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TECHNICAL PAPER

**FINDINGS FROM DISCUSSIONS WITH AASCA AND AN ABSTRACT
REVIEW OF THE LAW ON PREVENTING AND STRIKING AT
ORGANISED CRIME AND TRAFFICKING THROUGH PREVENTIVE
MEASURES AGAINST ASSETS**

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1 INTRODUCTION

At the invitation of PACA, I visited Tirana from 20 to 22 June 2010 and delivered a one day training session to the Agency of Administration of Sequestered and Confiscated Assets (AASCA) and its contracted assets' managers on the management of seized and confiscated assets. Prior to the visit, I familiarised myself with the Law nr. 10 192 dated 3.12.2009 "On Preventing and Striking at Organised Crime and Trafficking through Preventative Measures against Assets" (the Anti-Mafia Law). I was also provided with a report prepared by the U.S. Marshals Service following a visit in May 2008 to Albania; a briefing on AASCA (the Briefing) and a copy of the Penal Code. I then prepared a training module and PowerPoint presentations covering the following issues:

- Management of seized and confiscated assets duly distinguishing between cash, personal property, real property and ongoing businesses;
- Disposal of seized and confiscated assets; and
- Prevention of abuses in the management of seized and confiscated assets (auditing).

I delivered the training to the AASCA at the Tirana International Hotel on the 21 June 2010. All of the staff of AASCA was in attendance and in the afternoon, the Director of the AASCA hosted a team meeting with his staff during which there was discussion of ongoing cases and the issues facing the AASCA. I would like to thank the Director of the AASCA and his staff for their frank discussion.

A number of issues became apparent during my visit. These are discussed in Section 2 and a set of 12 recommendations are provided in Section 4.

2 FATF BEST PRACTICES ON CONFISCATION

In January 2010, the Financial Action Task Force (FATF) published a paper entitled "Best Practices: Confiscation (Recommendations 3 and 38)" (the FATF Paper). Part E of the FATF Paper deals with the management of frozen, seized and confiscated property. Paragraph 26 of the FATF Paper advises that it is a matter of best practice for jurisdictions to implement a program for efficiently managing frozen, seized and confiscated property. It sets out a number of issues that should be considered. I will address each of the issues below under the relevant headings.

2.1 Framework

The Albanian authorities are in the process of implementing a program to manage seized and confiscated property in respect of non-conviction based forfeiture and property frozen pursuant to the UN Resolutions. The Anti-Mafia Act was passed on

3 December 2009¹ and it repealed and replaced the previous Anti-Mafia Act of 2004. At the time of my visit, the Council of Ministers had not issued subordinate legal acts pursuant to articles 14, 15.2, 28.4, 33 and 34, which should have been in place within three months of the entry into force of the Anti-Mafia Law under article 39.

Article 1 sets out its objective as defining the procedures, competences and criteria for the implementation of preventative measures against the assets of person who are subject to this law as suspected of participation in organised crime and trafficking. Article 2 sets out the purpose of the law as preventing and striking at organised crime and trafficking through the confiscation of assets of persons who have an unjustified economic level as a result of suspected criminal activity.

The Anti-Mafia Law enables non-conviction based forfeiture proceedings to recover the proceeds of crimes (article 3). It provides for a reverse burden of proof and gives precedence to criminal confiscation. It also provides for preventative measures, which are defined in article 4 as any measure of a property nature that the court orders in a judicial proceeding through the sequestration of assets, the economic and professional activity of persons, as well as through their confiscation. The process is civil in nature and it relies upon the Civil Procedure Code (article 5), however, the proceedings are heard by the Court of First Instance for Serious Crimes (article 7).

Investigation and conduct of the litigation is the responsibility of the prosecutor with the assistance of the judicial police (article 9). There are three prosecutors with responsibility for this work and each has one or two judicial police assigned to work with him.

Article 34.1 establishes the AASCA. Articles 34.2 and 34.3 permit the Council of Ministers to make detailed rules about the organisation, competences and function of AASCA and about the criteria of evaluation, the manner and procedures of giving confiscated assets in use and of their alienation. At the time of my visit, these rules were not yet in place. The Briefing refers to Decision number 968 dated 2.7.2008 on the Organisation and Competences and Function of the Agency for the Administration of the Agency for the Administration of Seized and Confiscated Assets, however, I was not provided with a copy and it was probably repealed by Article 40 of the Anti-Mafia Act, as there is no reference to it in the transitional provisions set out in Article 38.

In practice, the AASCA is responsible for administering assets seized under the Anti-Mafia Law and Law number 9258 on the Measures against Financing Terrorism and for realising assets confiscated pursuant to the Anti-Mafia Law. Although it was apparently intended that AASCA should also be responsible for assets seized or confiscated under the criminal procedures, this has not been implemented.

The Anti-Mafia Act does not provide a freezing power. The Albanian authorities may wish to consider the benefits of such a power, which permits a defendant to

¹ References to articles within this paper are to articles of the Anti-Mafia Act of 2009 unless otherwise stated.

continue to hold property subject to appropriate restrictions on use and sale. This approach can provide better value for money in respect of assets such as low value motor vehicles, which may cost disproportionate amounts to seize, store and maintain pending the outcome of the legal proceedings.

2.2 Resources

AASCA consists of 15 staff, including the Director, a lawyer, administrators and support staff. Administrators are recruited based upon their educational background and experience. They are given a two-week training course and are then given a test. Weekly case meetings are held with all staff to discuss live cases and any issues that have arisen.

I was told that there are approximately 25 live cases of which five or six were currently pending before court and that in about 10 cases, the court had ordered that assets should be returned. There are approximately 10 further cases waiting to be started.

Income from the management and sale of assets currently exceeds AASCA's costs in the ratio of 4:1, however, I was told that this is expected to change this year.

2.3 Planning

The Paper emphasises the need for appropriate planning to take place prior to taking freezing or seizing actions. Planning was raised by AASCA as an issue during my visit. It is imperative that AASCA is involved at an early stage in the planning of proposed seizures so that it can make any necessary preparations. It is also necessary that the judicial bailiffs are properly briefed and prepared.

An example was given of a judicial bailiff proposing to give possession of land and the fifth storey of a five-storey building without giving possession of the other levels. A further example was given of a case in which it was unclear which piece of land was to be seized and that this was only resolved by identifying a building on the land.

These are issues that should be resolved between the relevant agencies prior to seizure according to agreed Memoranda of Understanding (MOUs). Work is apparently underway on this and it is of particular importance given the multi-agency approach required by the legislation and the very tight time limits it imposes. The MOUs should set out what action should be taken in the event of disagreement and when matters should be referred to the court for clarification and for action against the judicial bailiff or administrator, if appropriate.

2.4 Measures to properly care for and preserve property

Although detailed secondary legislation is not yet in place, Article 16 of the Anti-Mafia Law imposes a duty upon the court appointed administrator to preserve and

to administer sequestered assets and to increase their value, if possible. Article 17 requires the administrator to make an application to the Court for authority to make loans, to sign agreements of conciliation, arbitration, promise, pledge, mortgage or alienate the sequestered assets or to perform other legal actions of administration.

It was apparent during the visit that seized immovable property is often rented out. If the property is seized under the Anti-Mafia Act, then this should require an application to the Court for authorisation, however, in the case of seized terrorist assets, there is no court supervision.

2.5 Measures to deal with the individual's and third party rights

An application for sequestration of assets is made by the prosecutor to the Court under article 11. The application must be examined by the court with the prosecutor within five days from the date of submission (article 12.1) and it does not appear that the defendant or third parties have a right to be heard at that stage. The initial order for sequestration is for a period of six months. Thereafter, the court at the request of the prosecutor, may extend the time in three month periods up to a maximum period of one year and article 12.3 allows for an appeal to be made to a higher court against the order for extension. Once the application has been made for confiscation, the sequestration continues until the confiscation application has been heard (article 12.5).

In the event that sequestration is revoked, article 20.4 permits the owner of the assets to ask for the proceeds of the assets realised during the administration and may ask for compensation in the amount of the reduction of the value of the assets or the damage that has been caused to the assets. Other third parties do not appear to have a remedy under the legislation.

I am unclear what action may be taken locally by owners and third parties in respect of assets seized pursuant to the UN Resolutions.

The Albanian authorities should consider the introduction of procedures to enable third parties to assert their rights in respect of seized and confiscated property.

2.6 Dispose of confiscated property

Ownership of property passes to the State on the making of the confiscation order (article 29.3). The administrator appointed to manage the sequestered assets may continue to act in the name and for the account of AASCA, unless replaced by another person (article 31). The administrator is under a duty to liquidate moveable property (article 32), but the Council of Ministers is responsible for deciding what should happen to immovable and movable property that may be used for economic, commercial and professional activities acting upon a request from the Minister of Finance (article 33). Article 37 establishes a special fund for the prevention of criminality with 50% of the income generated in 2009-2010, however, no income has been placed into the fund.

2.7 Keep appropriate records

Article 14.3 requires the judicial bailiff to make an inventory of the sequestered objects in the presence of the administrator of the assets and of the person possessing the assets, if he so requests. The inventory is then signed by all present. Within 15 days of his appointment, the administrator is required by article 18.1 to report to provide to the court a detailed report on the basic elements of the existence and condition of the sequestered assets. Thereafter, the court may request regular reports. The administrator is required to provide copies of the reports to the AASCA and to the prosecutor.

The AASCA has an asset register, although I was told that low value items would not be included on the register and I am, therefore, unclear whether all objects recorded on the inventory are included on the asset register.

2.8 Take responsibility for damages

Article 20.4 permits the owner of assets in respect of which sequestration has been revoked to ask for the proceeds of the assets realised during the administration and may ask for compensation in the amount of the reduction of the value of the assets or the damage that has been caused to the assets.

Article 29.3 provides that the owner of confiscated assets has the right to seek fair indemnification, if it is subsequently proven that the confiscation was illegal or not grounded.

There does not appear to be a mechanism for third parties, who are not owners, to claim damages.

2.9 Able to provide immediate support to law enforcement on all issues relating to seizure

This is an issue that should be addressed in MOU's between the prosecutors, the judicial police and the AASCA.

2.10 Those managing property have sufficient expertise to manage any property

The FATF Paper suggests that the best method of managing, depending upon the nature of the property or the particular circumstances of the case might be through any one of (or a combination of) the following: the competent authorities; contractors; a court-appointed manager; or by the person who holds the property subject to appropriate restrictions on use and sale.

Under the Anti-Mafia Law, management of assets is entrusted to administrators appointed by the court from a list given to the court by the AASCA once a year. In practice, the AASCA generally uses in-house administrators and this must raise

questions as to whether it will be able to deal with every eventuality. The legislation potentially allows for the use of contractors, if they are included on the list provided to the Court by AASCA. The AASCA should consider this possibility with the prosecutors and judicial police taking into account the types of property that future cases might present.

2.11 Statutory authority to sell, including perishable goods

Article 17 prohibits the sale of assets subject to sequestration except with the prior authorisation of the Court. Article 19 permits the sale and transfer of damaged or perishable items to non-related third parties. Article 34.3 requires detailed rules about the criteria of evaluation, the manners and procedures of giving confiscated assets in use and of their alienation to be set by the Council of Ministers. These detailed rules are not in place.

2.12 Mechanism to sell with the consent of the owner

There is no express power to sell sequestered property with the consent of the owner, however, an application could no doubt be made to the court under articles 17 and/or 19.

2.13 Power to destroy property that is not suitable for public sale

Article 32 permits the transfer of ownership without payment or the destruction of confiscated assets, if the procedures of sale would not be economic. It is unclear whether this article would also apply to property that is not suitable for public sale, due to its illegal nature.

2.14 Title may be passed in respect of confiscated property

The court has power to transfer title of damaged or perishable property subject to sequestration under article 19, but it is unclear if the title of sequestered property may be transferred in other circumstances. Property passes to the State on the making of the final confiscation order under article 29.3 and the State may then pass good title.

2.15 Mechanisms to ensure transparency, assess effectiveness of system and trace property and the value realised on sale

There are a number of issues to address in this regard: secondary legislation is not yet in place; there is no effective case management system; and it is unclear whether the asset register is complete and contains all relevant information. There is a need for more complete statistics and for public reporting on the work of AASCA and its partner agencies.

The Anti-Mafia law contains many time limits, which are strictly applied and can lead to the failure of civil confiscation proceedings. This was described as a major

source of leakage. There are obvious risks, if parties can delay and so defeat the purpose of the legislation. This issue should be addressed by ensuring that there is an effective case management system in place to track time limits and that the prosecutor and judicial police have sufficient resources and that there is sufficient court time to ensure that the necessary steps are taken in good time. It is also recommended that the Albanian authorities consider amending the legislation to allow for applications to further extend time limits in appropriate circumstances. This was also raised as a potential issue for appeals in the MONEYVAL Third Round Report.

Ideally, the asset register should be electronic and available to all of the relevant agencies to view and update. At a minimum, it should be able to link to the case and uniquely identify each asset recording the date seized and from whom; a description; the condition of the asset; its location; the original and current values; the amount realised on sale; and the method of disposal. If low value assets are not being entered individually on the register, they should be grouped together and appear on the register as a group.

The Anti-Mafia Law requires a number of reports to be made at various stages of the proceedings for the use of the court and also for the Council of Ministers, however, there is also a need for statistics to be kept and to be made available to the public on an annual basis. It is recommended that this requirement be set out in the secondary legislation.

2.16 Other issues

In addition to the issues that fall under FATF guidelines, during the course of discussions in Tirana it was revealed that the AASCA is unable to seize paintings, on the basis that they represent intellectual property. This is an issue, as paintings may have substantial value. It is recommended that this issue is examined and a resolution determined.

3 CONCLUSIONS

The Anti-Mafia Law provides a good framework for the management of seized and confiscated property under the non-conviction based system of confiscation, however, it will not be fully effective without the implementation of detailed secondary legislation, which should also ensure that the system is transparent and is providing value for money.

The Anti-Mafia Law does not appear to enable third parties, who are not owners, to make application to the court for compensation or to otherwise secure their rights in respect of property seized or confiscated.

Cases are being lost due to the operation of the time limits set out in the Anti-Mafia Law and those applying on appeal. This should be addressed through better multi-agency planning; an effective case management system; and a detailed asset register.

The AASCA is also responsible for administering terrorist assets, but it currently has no responsibility for assets seized or confiscated in criminal proceedings.

4 RECOMMENDATIONS

I have set out 12 recommendations to address the issues highlighted during my visit.

- Secondary legislation should be implemented as soon as possible. In addition to detailed guidance on the work of the AASCA, it should also list the information to be recorded on the asset register and the annual publication of detailed statistics on the value of sequestered and confiscated assets, the income generated and expenses, so as to ensure transparency and to demonstrate efficiency, effectiveness and value for money.
- An effective case management system is required to ensure that cases are progressed efficiently, time limits are not missed and to provide management reports to monitor progress.
- The Albanian authorities should consider introducing primary legislation to permit time limits to be extended in appropriate circumstances.
- The Albanian authorities should ensure that the asset register is accurate and comprehensive and that it is regularly updated by the relevant agencies and is able to provide management information for regular performance reports.
- In order for the system to work efficiently, it is necessary that all agencies understand their part in the process. The development and adoption of detailed MOUs should assist and it is recommended that they stress the need for all relevant agencies to be involved in planning, so that there is certainty as to the assets to be seized and the resources that are required to administer them.
- The Inter- institutional Expert Advisory Committee for Measures against Organised Crime has an important coordinating role, but ultimately it is the Court that has the power to appoint or discharge administrators and judicial bailiffs and the AASCA should ensure that it makes any necessary applications to the Court for authority to deal with assets and any issues arising from the conduct of partner agencies.
- The Albanian authorities should consider the introduction of procedures to enable third parties to assert their rights and to claim damages in respect of seized and confiscated property.

- The Albanian authorities should consider how funding can best be made available for the Special Fund for the Prevention of Criminality.
- The Albanian authorities should consider whether the AASCA should be given responsibility for assets subject to criminal confiscation and whether more Court oversight is required in respect of the management of terrorist assets.
- The AASCA should consider the possible role of the private sector in administering assets that require specialist knowledge or skills to administer and the method by which such assistance could be procured.
- The Albanian authorities should consider whether there is a role for restraint of assets without seizure in appropriate cases.
- The Albanian authorities should consider how best to resolve any legal or practical issues preventing the seizure of intellectual property.