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TECHNICAL PAPER

**COMPARATIVE ANALYSIS BETWEEN THE PROVISIONS ON
FORFEITURE IN THE ALBANIAN CRIMINAL CODE AND THE NEW
ALBANIAN ANTI-MAFIA LAW PROVISIONS ON CIVIL FORFEITURE,
AND THEIR APPLICABILITY WITH REGARD TO OFFENCES OF
MONEY LAUNDERING AND THE FINANCING OF TERRORISM**

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1 Methodology

1 The methodology was to prepare a technical paper comprising a comparative analysis of the provisions on forfeiture in the Albanian Criminal Code and the new Albanian Anti-Mafia Law on provisions on civil forfeiture and their applicability to with regard to the offences of money laundering and the financing of terrorism. The author has relied upon the English translations prepared and submitted by the Council of Europe, the Criminal Code of Albania, Law on Preventing and Striking at Organised Crime and Trafficking through Preventative Measures against Assets also known as the 'Anti-Mafia Law', the Law on the Prevention of Money Laundering and Financing of Terrorism also known as the 'AML Law' and a number of other relevant acts of the Albanian State.

2 Introduction

2 It has been possible under Albanian law to seize property as part of a criminal sanction for the offence which the property was used to commit or was somehow intrinsically connected to for some time now. What however is new to Albania, or at least appears to be new, is the sense of a strong desire to invoke new civil forfeiture legislation which aims to recover the proceeds of crime from individuals who cannot be prosecuted or convicted, for example as a result of witness intimidation or because they remain beyond the reach of the judicial system, but benefit, often very considerably, from its profits.

3 The recently introduced Anti-Mafia Law is a therefore a significant step forward in Albania's fight against organized crime which has come to plague the country and its international reputation for some time now.

4 The law contains a number of procedural provisions designed to align the civil recovery procedure as closely as possible with existing Albanian civil law and normal procedure. Although placing criminal prosecutors with their ability to generate evidence through compulsive measures in a civil procedure will represent challenges.

5 Any new legislation attempting to bring together a comprehensive package of provisions designed to strengthen and enhance the powers of the State must adhere to some basic principles if it is to be effective and if it is to comply with the new international norms that are quickly evolving. It is also imperative that the new provisions in the Anti-Mafia Law are placed into an order that takes note of the existing Penal Code provisions and also works effectively with other provision that may exist, for example, in the AML Law and others.

6 Finally all legislative provisions should attempt to be compatible with

any international obligations that exist for the State and also be compatible with international human rights provisions.

3 General Provisions of the Criminal Code

7 Article 1 of the Criminal Code defines criminal acts between crimes and contraventions. Criminal responsibility is applicable to persons above the age of 14 for crimes and 16 for contraventions (article 12 of the Criminal Code). Article 1a of the Criminal Code further informs that:

“The Criminal Code is based on the Constitution of the Republic of Albania, general principles of the international penal right, and international treaties ratified by the Albanian state.

“The Criminal legislation is composed of this Code and other laws that provide criminal acts.”

8 Despite some confusion, it seems Albania follows the monist theory in regard to international law. This is particularly important considering international treaties to which Albania is party to that touch upon the combating of money laundering and the financing of terrorism.

9 The criminal legislation of Albania must also observe, among other obligations, fundamental human rights and freedoms – as per article 1b of the Criminal Code. This important safeguard provided in the general part of the Criminal Code will permeate the analysis of the Albanian legislation throughout this technical paper.

10 Article 1c complements the preceding article, as it defines the principles of criminal law in Albania. Thus, equality under law, fairness in deciding guilt and punishment of the defendant must be thoroughly observed in the laws.

11 Articles 6 through 8 of the Criminal Code prescribe the applicability of the Albanian criminal law. Albanian authorities have thus criminal jurisdiction over unlawful acts committed by:

- i. *Albanian citizens (or persons who have dual citizenship in which one is Albanian) and non-Albanians (including stateless persons), within the Albanian jurisdiction – territorial jurisdiction.*
 - a. *Territory of Albania includes*
- ii. *Albanian citizens outside the Albania jurisdiction, so long as there has not been a final judgment by the foreign court (ne bis in idem), and if the offence is also punishable under Albanian law – personal jurisdiction.*

- iii. *Non-Albanians who out of the Albanian jurisdiction commit, among others, the following crimes (extra-territorial jurisdiction):*
 - a. *With terrorist purposes;*
 - b. *Laundering the proceeds of crime;*
 - c. *Active and passive corruption, committed by persons exercising public functions, as well as in the private sector.*
- iv. *Non-Albanians who have committed the following crimes out of the Albanian jurisdiction, but which are in Albanian territory and have not been extradited (universal jurisdiction):*
 - a. *Crimes with terrorist purposes.*

Article 7a of the Criminal Code also provides for the applicability of the Albanian jurisdiction on foreign citizens who commits crimes out of the Albanian territory, which are punishable under international law and for which the Albanian law provides for its applicability.

4 Collaboration and Organised Crime

12 Chapter IV (Articles 25 through 28) of the General Part of the Criminal Code is dedicated to the collaboration of persons in committing criminal acts. The definition of collaboration is *“the agreement of two or more persons to commit a criminal act”*, be it a crime or a contravention.

13 Article 26 of the Criminal Code divides the persons as organizers (responsible for organising and managing the activities for the criminal act), the executors (responsible for carrying out direct actions to perform the criminal act), and the instigators (responsible for instigating others in committing the criminal act). Article 27 informs that all bear the same responsibility for the criminal act, but the court is to consider the level of participation and the role played by the persons whilst committing the criminal act.

14 It should be noted that the definition under article 25 of the Criminal Code does not fulfil the requirements of organized crime of the United Nations Convention against Transnational Organized Crime (UNTOC), as it does not define the temporal, financial and structural elements of the collaboration. It can be inferred that article 25 can be used for cases in which two or more persons collaborate for the action (or omission) of one or successive criminal acts only.

15 This is why article 28, while defining special forms of collaboration, defines, among others, criminal organisation (*“highest form of co-operation that is composed of three or more persons and that can be distinguished by the special degree of organisation structure, stability, duration, as well as by*

the purpose of committing one or more criminal acts to gain material or non material benefits”) and terrorist organisation (“a special form of the criminal organization, composed of two or more persons that have a stable collaboration extended in time, with the purpose of committing acts with terrorist purposes”).

However, article 28 also brings forth the definition of structured criminal group as being:

“...a special form of cooperation, composed of three or more persons, which have the purpose of committing one or more criminal acts, and which aim at achieving material and non-material benefits.

“The structured criminal group for the commission of a criminal act is not established spontaneously and it is not necessary to distinguish it for consistent membership, division of duties, elaborated structure and organization.”

16 Both the definitions of criminal organisation and structured criminal group fulfil the requirements of organised crime as defined by the UNTOC.

17 Moreover, article 28.7 provides for plea-bargaining for persons that are part of a criminal organisation, a terrorist organisation and a structured criminal group, when the contribution given is deemed decisive for receiving knowledge of their activity, of the other collaborators, on wealth owned directly or not by them, as well as on the investigative activities, conducted on the criminal organizations, on terrorist organizations, armed gangs and structured criminal groups. However, the Criminal Code does not provide for detailed provisions on the procedures for such plea-bargaining, who proposes it, and whether it can be rejected by the court.

5 Sanctions

18 Chapter V provides for criminal punishments. These are divided into principal and supplementary punishments. Principal punishments are subdivided into:

- i. Crimes
 - a. Life imprisonment
 - b. Imprisonment (ranging from 5 days to 25 years)
 - c. Fine (ranging from 100,000 to 1,000,000 Lek)
- ii. Contraventions
 - a. Imprisonment
 - b. Fine (ranging from 50,000 to 3,000,000 Lek)

19 In the event of a conviction the court may impose a custodial sentence of imprisonment or a fine, or both. However, crimes motivated by wealth or other material benefits, if the criminal provision only includes imprisonment, can have a fine imposed ranging from 100,000 to 5,000,000 Lek added to them.

5.1 Supplementary Punishments

20 Persons who have committed crimes and contraventions may also be subject to supplementary punishments (article 30, Criminal Code), which include, but are not limited to “the confiscation of criminal crime committal means and criminal crimes proceeds” (article 36, Criminal Code). This provision shall be subject to a separate section of this technical paper.

6 Money Laundering and Terrorist Financing under the Criminal Code

21 Chapter VII (article 230 through 234b) of the Special Part of the Criminal Code provides for criminal acts with terrorist purposes. Article 230 of the Criminal Code states:

Committing the following acts, with the purpose of instilling panic in the public or with the purpose of forcing state institutions, Albanian or foreign, to perform specific actions or omissions or with the purpose of destroying or seriously perturbing essential political, constitutional, economic or social structures of Albanian state, another country or an international organization or institution, are punishable by no less than fifteen years of imprisonment or life imprisonment.

Acts with terrorist purposes include, but are not limited to:

- a) Acts against persons that can cause death or serious injury;*
- b) Taking hostage or kidnapping persons;*
- c) Serious destruction of public property, public infrastructure, transportation system, information system, fixed continental platforms, private property in large size, endangering life of the others;*
- ç) Hijacking planes, ships or other transportation means;*
- d) Producing, keeping, purchasing, transporting or trading of explosive substances, military weapons, biologic, chemical, nuclear weapons, as well as scientific research for producing weapons for mass destruction, mentioned above;*

dh) Distribution in the environment of hazardous substances, as well as setting fires, floods, explosions, with the purpose of endangering the life of persons or causing large financial damages;

e) Causing interruption of water supply, power or any other important source.

22 A terrorist act must thus fulfil the requirement of the first paragraph of article 230, which must be married with one of the actions listed in the second paragraph.

23 However, article 2 of the Criminal Code states that no one may be punished for an act that was not already explicitly provided for by law as a crime or contravention. Thus, although article 230 seeks to provide for a prescriptive list in its second paragraph, only the 7 types in the list can be conjugated with the first paragraph. Any other interpretation of this article would necessarily contradict with article 2 of the Criminal Code and bring forth substantial human rights infringements.

24 Article 230a provides for the crime of financing of terrorism or its support. The applicability of this article is questioned, as no definition for financing of terrorism, or its support, is given. Again, article 2 of the Criminal Code would have to be applied for this circumstance. Furthermore, article 230 provides for a definition of acts with terrorist purposes, but not of terrorism *per se*. The applicability of article 230b (hiding/concealing of funds and other wealth/goods that finance terrorism) is also questioned for the same reasons, as there is no definition of financing of terrorism in the Criminal Code.

25 Terrorist organisations as defined by article 28 are punishable under article 234a.

26 The crime of money laundering is found in Chapter VIII (Crimes against the State Authority) and Section III (Criminal Acts against the Public Order and Security). Article 287 of the Criminal Code defines money laundering as:

1. Laundering of proceeds of crime committed through:

a) Exchange or transfer of an asset that is known to be a proceed of crime, for hiding or concealing the origin of the asset or for providing help to evade the legal consequences related with the committal of the crime;

b) Concealment or disguise of the nature, source, location, position, shift of ownership or other rights related to the asset that is proceed of crime;

c) Performance of financial activities and fragmented/structured transactions to avoid reporting according to the money laundering law;

ç) Abrogated

d) Counselling, incitement or public call to commit any of the offences specified

dh) Use and investment in economic or financial activities of the money or objects that are proceeds of crimes is punishable by three to ten years of imprisonment and by 500 000 to five million Lek fine.

2. When this offence is committed during the exercise of a professional activity, in collaboration or more than once, it is punishable by five to fifteen years of imprisonment and by 800 000 to eight million Lek of fine, while when the offence caused grave consequences, it is punishable by not less than fifteen years of imprisonment and by three to ten million Leke of fine.

3. Provisions of this article shall also apply in the cases when the person that has committed the offence from which the crime proceeds derive, cannot be taken as defendant, cannot be punished, there exists a cause which obliterates the criminal offence or one of the conditions for criminally prosecuting such a criminal offence is missing.

27 It can be noted that the crime of money laundering does not contain a list of predicate offences; rather it appears that any criminal act may be subject to the crime of money laundering. Thus, the rules for connection of crimes and unification of sentences under articles 55 and 56 are applicable as between money laundering and its predicate offence.

28 However, the money laundering offence mentions only the proceeds of crime, and fails to mention its instrumentalities, the profits gained from the predicate criminal activity, and the transformation of the profits of crime. This is particularly important, as not all elements of the confiscation of assets under article 36 of the Criminal Code are applicable to the crime of money laundering.

7 Confiscation under the Criminal Code

29 Article 36 of the Criminal Code provides for the criminal rules of confiscation of proceeds and instrumentalities of crime, as well as intermingled and transformed assets. It also provides for value-based confiscation.

1. Confiscation is given necessarily by the court and has to do with reception and transfer in the state's favour:

a) Of the objects that have served or are specified as means for committing the criminal act;

- b) Of criminal act proceeds, where it is included any kind of asset, as well as legal documents or instruments verifying other titles or interests in the asset waiting upon or gained directly or indirectly from the criminal act committal;*
 - c) Of the promised or given remuneration for committing the criminal act;*
 - ç) Of any other asset, whose value corresponds to the criminal act proceeds;*
 - d) Of objects, whose production, use, holding or their alienation make a criminal act crime, and when the sentence decision is not given;*
- 2. If the criminal act's proceeds are transformed or partly or fully converted into other assets, the latter is subject to confiscation;*
 - 3. If criminal act's proceeds are merged with assets gained legally, the latter are confiscated up to the value of the criminal act proceeds;*
 - 4. Subject to confiscation are also other incomes or profits from the criminal act proceeds, from assets that are transformed or altered to criminal act proceeds, or from assets with which these proceeds are involved, in the same amount and manner as the criminal act proceeds.*

30 The confiscation provided for in the Criminal Code can be used in criminal proceedings, and is subject to the rules provided for in the Criminal Procedure Code of Albania (Criminal Procedure Code). Property can only be confiscated under the rules of the Criminal Code and the Criminal Procedure Code if there is a final judgement of conviction against the defendant, and the Court imposes the supplemental punishments under article 30 or the Criminal Code. It is not clear from the legal text if the court may issue the supplemental punishments autonomously or at the request of the prosecution.

31 Chapter VI of the Criminal Procedure Code provides for the rules on preventative sequestration (or an initial freeze with a view to future possible confiscation). Article 274 states as follows:

- 1. When there is a danger that free possession of an item connected to the criminal offence may aggravate or prolong its consequences or facilitate the commission of other criminal offences, the competent court, on the application of the prosecutor, orders its sequestration by reasoned decision.*
- 2. Sequestration may also be ordered against items, proceeds of the criminal offence and against any other kind of property that is permitted to be confiscated in conformity with Article 36 of the Criminal Code.*
- 3. When the application conditions alter, the court, on the application of the prosecutor or interested person, cancels the sequestration.*

32 A Court, upon the application of the prosecutor, must issue the freezing of assets. The Criminal Procedure Code is not clear in defining at what stage during the criminal investigation or prosecution such an order may be applied for.

33 Article 275.2 of the Criminal Procedure Code informs that the effects of the seizure continue if the confiscation of the seized assets has been ordered. It is, however, not clear if the prosecution must apply for the confiscation, or if it is given *ex officio* by the Court upon rendering its decision.

8 Confiscation under the Anti-Mafia Law

34 Law No. 10.192 dated 3.12.2009 (the commonly known 'Anti-Mafia Law') provides for the seizure and confiscation of assets of persons where there is a reasonable suspicion of having committed, among others, the crimes of money laundering and terrorism financing. The Anti-Mafia Law relies on, and is supplemented by, the rules contained in the Albanian Code of Civil Procedure.

35 The Anti-Mafia Law states that its provisions are applicable to assets from both the natural persons and their close relatives (up to the 4th generation), and natural and legal persons – although no specific is given for the term “ancestors” and “descendants”, contained in article 3.2.a. The applicability of the Anti-Mafia Law to legal persons is made possible thanks to the Law on Criminal Liability of Juridical .

36 Article 5 clarifies that the procedures set forth in the Anti-Mafia Law are autonomous to the “condition, level or conclusion” of the criminal proceedings against the persons who are subject to it. However, although the Law states that its proceedings are autonomous in relation to the criminal proceedings, article 5.3 states that the criminal proceedings and its effects take precedence over the civil proceedings under the Anti-Mafia Law. Moreover, article 24.2 of the Anti-Mafia Law clearly states that the procedures contained therein may be used in the event that the criminal proceedings are dismissed, or the person is found “criminally innocent.” Therefore, there is some confusion as to what exactly is meant by the ‘autonomous nature of the proceedings’.

37 Article 6.1 of the Anti-Mafia Law states that “[v]erifications are performed against the persons (...) about the financial means, assets, economic, commercial and professional activities, economic level and sources of their income.” Article 6.2 further provides that “verifications are done, in particular, if these persons have permits, licenses, authorisations, concessions and other rights to conduct economic,

commercial and professional activity, as well as to verify whether they enjoy contributions, financing or credit of any kind given by or gained from the state, public legal persons or entities, international institutions or bodies as well as to verify whether the assets, activities or property rights are justified.”

38 Although these verifications seem to be administrative in nature, it is not clear if they in fact are administrative, civil or criminal matters. Moreover, the legal text is broad and leaves a wide margin of interpretation, to the extent that there may not be any plausible or objective reason to conduct the verification of one of the persons under article 3. This in turn may cause, or may be interpreted, as abuse of power of those who conduct these investigations. There should be a much more explicit criteria within the Law as to when such provisions apply. Such loosely worded yet powerful provisions may fall foul of human rights criteria which invariably seek clarity in the law, particularly where the provisions are criminal in nature.

39 Article 7 defines jurisdiction and the competent court for receiving and deciding upon the requests for preventive measures under the Anti-Mafia Law, as being those responsible for trying serious crimes and their appeals. It can be concluded from the wording of the law that a criminal court (responsible for serious crime offences) is responsible for carrying out the proceedings initiated under the Anti-Mafia Law.

40 The question arises whether the rules of connection of proceedings are applicable between the Anti-Mafia Law proceedings and the criminal proceedings, and whether the criminal or civil rules should be applicable. More importantly, since the Civil Code of Procedures complements the rules of the Anti-Mafia Law, these proceedings must observe article 10 of the Code of Civil Procedures (*“The court bases its decision only on the facts, which have been presented during the legal proceedings.”*). Therefore, if a criminal proceeding has been initiated, and there in fact is a connection of the proceedings to the same court, the impartiality and capability of the court to analyse the Anti-Mafia Law proceedings is tarnished. Not only this, but it also reinforces the idea that the proceedings under the Anti-Mafia Law are not autonomous to criminal proceedings. They are at the most procedurally independent.

41 Preliminary investigations to be carried out by the prosecutor and the judicial police are prescribed in article 8 of the Anti-Mafia law. Both the prosecutor and the judicial police may initiate investigations for preliminary verifications through a notification made by third parties (regardless of the fact that they may be bona fide third parties), or under their own initiative. Although not mentioned in the text of the Anti-Mafia Law, one concludes that the initiation of the preliminary verifications may only happen when there are grounds to believe that the assets are of an illicit nature (but does not specify

whether they are proceeds or instrumentalities of crime), and all prerequisites under article 3 of the Anti-Mafia Law have been met.

42 Furthermore, under article 8.3, the preliminary verification is limited to investigating the *“financial means, assets, economic, commercial and professional activities, manner of living, as well as the sources of income of the persons who are subjects of the implementation of this law.”* However, it is not clear how this investigation is to be undertaken, or whether the evidence may be taken from an existing criminal investigation or prosecution, or whether the evidence produced under the rules of the Anti-Mafia Law (and the Civil Code of Procedures, when applicable) can be utilised in criminal proceedings or subsequently in civil proceedings.

43 Although the Code of Civil Procedures complements the Anti-Mafia Law, article 9 mentions that the search and seizure of documents are governed by the rules established in the Criminal Code of Procedures. This is perhaps because the Civil Code of Procedures does not establish rules for the search and seizure of documents. Nonetheless, the evidentiary threshold for the production of this evidence under the Code of Criminal Procedures is higher than the others produced under the auspices of the Civil Code of Procedures.

44 Article 10 provides for the performance of special actions. It is unclear from the translated text of the Anti-Mafia Law whether this is in fact special investigative techniques. It should be noted, notwithstanding, that special investigative techniques are to be used in criminal investigations, governed by the Criminal Procedure Code. Moreover, due to the highly invasive nature of the techniques, these should be subject to a specific law, laying out the techniques allowed and the objective criteria and objectives which allow for its use. Thus is not evident from a reading of Article 10.

45 The current text of the Anti-Mafia Law, however, allows for completely subjective criteria of the judge to decide, whether by request of the prosecution (despite the fact that the text of the law mentions the parties, any knowledge of these techniques by the defendant would defeat the purpose of the techniques) or by the initiative of the judge itself.

46 More worryingly, is the fact that there apparently is no specific law governing special investigative techniques, and the Anti-Mafia Law chose the formula *“other special actions that are not regulated expressly by law”*. This not only infringes basic human rights principles, by the legality of the measures themselves, which can be deemed both illegal and unconstitutional. Moreover, the production of the evidence under this article may well be declared inadmissible in subsequent proceedings, as there is no previous law that determines and allows for a special investigative technique which are by their nature invasive and thus in need of tight legal regulation.

47 Chapter II (articles 11 through 14) of the Anti-Mafia Law lays the ground the criteria, rules and procedures on the seizure of assets. The prosecutor may apply to a court (whose jurisdiction is defined under article 7) for the application of a preventive measure (as defined in article 4) against any of the persons mentioned in article 3.2, if any of the criminal actions under article 3.1, sub-paragraphs a) through d), meet the evidentiary threshold defined under article 3.1. Furthermore, the application of preventive measures by the prosecutor must base the application (article 11.2) in the additional conditions set out in article 11.1

(...) show that the person may be included in criminal activity and has assets or income that do not respond obviously to the level of income, profits or lawful activities declared, nor are they justified by them and when:

a) A real danger exists of the loss, taking or alienation of the funds, assets or other rights over which the putting into implementation of the measure of confiscation according to the provisions of this law is provided; or

b) There are reasonable suspicions that show that the possession of the assets and the exercise of the particular economic, commercial and professional activities are in a state of danger or influence by a criminal organisation or that may facilitate criminal activities.

48 The court must examine the application of the preventive measure within five days of the day of submission of the request (article 12.1) by the prosecutor. However, no time limit for the court to reach its decision is given. If the application of the preventive measure is successful, it may be executed immediately and has a six-month validity from the moment it is implemented. An extension on the validity can be further applied for periods of three months, up to one year from the date that the first time limit expired (article 12.2). Thus, the preventive measure under the Anti-Mafia Law can last for up to 18 months, and the prosecutor must apply for up to 4 time extensions to the measure.

49 It should be noted that the Anti-Mafia Law does not require the prosecutor to bring forth new evidence or facts that would justify a time extension under article 12.2. The only requisite for the application of time extension is that the case be deemed complex. As there is no objective criteria to define what a complex case is, the court gives this definition subjectively. Nevertheless, article 12.2 also ensures for the appeal of these time extensions.

50 Notwithstanding, should the prosecutor wish not to immediately execute the order under article 12.1, it may do so at his convenience, as there is no time limit for the execution of a valid preventive measure that has not been implemented. This creates an obvious insecurity in the procedure for the defence, and also infringes human rights and due process.

51 Regardless of whether there is an application for time extension of the preventive measure, the prosecutor may apply for confiscation of the seized assets up to five days prior to the end of the time period of the preventive measure (article 12.5). The Anti-Mafia Law envisages two scenarios at this moment (article 12.6):

- i. *The prosecutor applies for the confiscation measures, at which point the preventive measure imposed on the assets will remain valid until the adjudication of the confiscation – regardless of the time period this would take;*
or
- ii. *The prosecutor does not apply for a time extension or confiscation measures, which causes for the extinguishment of the preventive measure.*

52 Item (ii) above allows the prosecutor to pursue the confiscation at a later date, but remains silent as to whether it would be possible for a new application for preventive measures under the Anti-Mafia Law.

53 Article 13 brings forth the consequences when the preventive measures are revoked. As the Anti-Mafia Law does not specify whether the revocation of the measure was caused by lack of action of the prosecutor (as stated in article 12.6) or because the persons under article 3 were acquitted. Due to this, it must be assumed that any of these scenarios is applicable when article 13 mentions revocation of the preventive measures. The immediate consequence is that the court may;

(...) [I]mpose the obligation on the owner of the assets or the person who has the assets, or part of them, in his use or administration to notify the Tax Police for a period of no less than five years of acts of ownership, purchase or payments made, payments received, professional duties of administration or guardianship, as well as other contracts or acts, according to the type and value designated by the court depending on the assets and the income of the person, but not for a value smaller than two million lek.

54 Therefore, even if the persons subject to preventive measures under the Anti-Mafia Law are deemed innocent by the Court, it may still impose, at its discretion and with no objective criteria, an administrative sanction that these persons must prove of the lawfulness of their assets to their court, when an investigation failed to do so. This is potentially in breach of basic human rights principles and due process.

55 Chapter III (article 15-20) brings forth rules and procedures pertaining to the administration of assets subject to preventive measures. The court that ordered the preventive measure does not administer the assets subject to preventive measures; rather, the Albanian Agency of Administration of Sequestered and Confiscated Assets (“Agency”) is tasked to administer them upon the decision issued by the court (article 15.1).

56 The Agency may further authorise assistance from specialists in order to administer the assets (article 15.2). Although the Anti-Mafia Law does not provide for specific rules, one is led to expect that the Agency has its own sets of laws, rules and regulations which would be applicable whenever the Anti-Mafia Law is silent in that regard.

57 The administrator must report, within 15 days from his appointment, on the existence and condition on which the asset is to the court, the prosecutor and the Agency (articles 18.1 and 18.3). The administrator must also notify the court, the prosecutor and the Agency of other assets that may be subject to preventive measures, which he/she is made aware of during his/her administration (articles 18.2 and 18.3).

58 The administrator may not (article 17), unless otherwise authorised by the court, take part in the “the adjudication, to take loans, to sign agreements of conciliation, arbitration, promise, pledge, mortgaging or alienation of the sequestered assets or to perform other legal actions of administration that are not ordinary.” It should be noted, however, that the status of specialists called to assist the Agency in administering the assets is not clearly defined by the Anti-Mafia. As they are not the administrators, one is led to the conclusion that the limitations imposed to the administrators under article 17 are not applicable to the specialists. This, in turn, could bring several problems relating to either the active or passive bribery of said specialists.

59 In the event that the seized assets are damaged or whose value is highly volatile (i.e. movable property), these may be transferred to bona fide third parties (not including the persons under article 3.2) to administer the assets (article 19). This article thus allows for the use of seized assets by persons or entities that include, but are not limited to, the Albanian Government.

60 This is a highly controversial topic, as the use of the seized assets may raise several issues that range from corruption of public officials (should the assets be temporarily be transferred to a government agency), to a faster depreciation of an asset whose final owner is still the person under investigation. Although several jurisdictions utilise such measures, its efficiency is highly questionable.

61 In any event, the management of assets itself is resource intensive – which may be the reason why the Law provides for rules on the expenses had during the administration of the assets (article 20), and may become burdensome for the State, as the investigated person may request for the civil fruits derived from the property and also for the payment of damages by the State due to mismanagement, reduction of value and damages caused to the seized property.

62 Chapter IV (articles 21 through 25) of the Anti-Mafia Law provides for the confiscation of assets subject to preventive measures. The request for confiscation must be made to the court at the request of the prosecutor, with reasons as to why the property is to be confiscated (article 21.1). The Code of Civil Procedure supplements the rules of confiscation under Chapter IV of the Anti-Mafia Law (article 22.1), so long as it is possible. The question then becomes which rules will be applicable if neither the Anti-Mafia Law nor the Civil Code of Procedures can be utilised.

63 The lawfulness of the property under confiscation procedures under the rules of the Anti-Mafia Law lies on the defence (reversal of the burden of proof – article 21.3). The reversal of the burden of proof can be found in several jurisdictions; however, the prosecution must prove to the court that it was not able to prove the legal source of the property, and the court must issue a decision by which the burden of proof is reversed. This is to ensure due process and to assume innocence of the defendant.

64 The Anti-Mafia Law in turn prescribes that the burden of proof is reversed to the defence, and is not clear as to whether the prosecutor must exhaustively prove that it did not find a legitimate source for the property or simply place this assertion before the court. This again potentially infringes human rights, due process, and other general principles of law, such as the presumption of innocence of the defendant. There is a detailed critique of this position in technical paper two.

65 This rule is particularly worrisome if the prosecutor does not file for confiscation of the property subject to the preventive measures and the court applies the rules under articles 12.6 and 13.1. If the documentation provided by the defence then is deemed insufficient by the court to ascertain the lawfulness of the property, the prosecutor may file for confiscation under articles 12.5 and 21.1. Thus, the prosecutor will not have investigated the defendant (or certainly not been able to produce enough evidence under the criminal standard), and yet may still be able to confiscate his property. This may well infringe the laws of Albania, basic legal principles such as the due process, and human rights principles.

66 Article 22.2 states that the confiscation proceedings are to continue regardless of whether the person is physically present in the territory of Albania. The court, or relatives of the defendant, may grant power of attorney to a lawyer to represent the defendant during the proceedings.

67 The confiscation proceedings are to last 3 months (article 23.1), but the proceedings may be extended for up to one year, subject to its complexity (article 23.2).

68 Article 24 provides for the objective criteria under which the court may order the confiscation of property under the Law, namely;

1. *The court decides the confiscation of assets when all the following conditions are met:*

a) *When there are reasonable suspicions based on indicia of the participation of the person in the criminal activities provided in article 3 of this law;*

b) *When it is not proven that the assets have a lawful provenance or the person does not justify the possession of the assets or income that do not respond obviously to the level of income, profits or lawful activities declared, nor are they justified by them; and*

c) *When it turns out that the assets are directly or indirectly in the full or partial ownership of the person.*

2. *The court may also decide the acceptance of the request for the confiscation of assets when:*

a) *A criminal proceeding started against the person is dismissed by the proceeding organ because:*

i) *Of the insufficiency of the evidence;*

ii) *Of the death of the person;*

iii) *The person cannot be taken as a defendant and cannot be convicted;*

b) *The person is declared criminally innocent because:*

i) *Of the insufficiency of the evidence;*

ii) *The criminal offence was committed by a person who cannot be accused or convicted;*

c) *The person was proceeded against for a criminal offence that is included in the field of application of this law, but during the criminal proceeding the legal qualification of the offence is changed and the new offense is outside the field of application of this law.*

69 In conclusion then it appears that both the Anti-Mafia Law and the Criminal Code provisions on forfeiture can be utilised with the criminal offences of money laundering and terrorist financing. This is possible because article 36 of the Criminal Code is a general rule that can be applied to any action established as criminal by the Laws of Albania. The Anti-Mafia Law is also applicable, as the pertinent criminal offences are listed in its article.

70 The approach to confiscation, however, is quite different in nature. Article 36 of the Criminal Code depends upon a final criminal judgement that is non-appealable. Moreover, the confiscation under the Criminal Code depends on a higher threshold of evidence to attain the confiscation, as well as a higher threshold to reach the conviction of the defendant.

71 The Anti-Mafia Law, however, relies upon the Code of Civil Procedures for much of its basis in how it freezes and confiscates assets. It purports to allow for the civil forfeiture of assets but also seems to use the civil process in a more conventional manner to take the property. However, throughout the Anti-Mafia Law there is an uneasy switching between the criminal and the civil processes, which may be the manner in which the Law has been translated but it may not be. Nevertheless, the legal threshold for obtaining evidence (with the exception of search and seizure of documents) does appear to be lower than that of Criminal Code, as is the decision to confiscate the assets.

72 Article 36 of the Criminal Code provides for the confiscation of proceeds of crime, its instrumentalities, intermingled (criminal and legal) property, transformed property, as well as value-based confiscation. The Anti-Mafia Law, on the other hand, is not clear as to which property is to be subject to its preliminary investigation, seizure and confiscation. Although article 24 of the Anti-Mafia Law states that the simulation of transfer of proceeds is subject to confiscation, it does not specify whether these include instrumentalities, profits and transformed proceeds, as well as intermingled assets.

73 Confiscation under article 36 of the Criminal Code does not appear to permit a reversal of the burden of proof, which is assumed possible in the Anti-Mafia Law. Also, the criminal confiscation under the Criminal Code may take longer, as it requires the conviction of the defendant. The civil confiscation of the Anti-Mafia Law, on the other hand, is procedurally independent (but not autonomous) to the Criminal Code, which will allow for quicker proceedings.

74 In essence, the Criminal Code and the Anti-Mafia Law both seek to address the same object, but adopting different strategies to reach the desired end.