Criminal Income and Judicial Confiscation in Albania

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Abstract

From 1945 to 1991, a communist government led Albania. In the early 1990s, the political system changed and the people could go abroad. As such, Albania faced a new situation, among others from a criminal point of view. Crime began to show new features and forms affected by the changing economic and social conditions. Money laundering began to emerge after the liberalization of the borders and the change of the political system, thereby influencing the forms in which organized crime appeared in other countries. However, in its beginnings, only some forms of cooperation between Albanian criminal groups can be seen with genuine criminal organizations, rather than Italian. Later, organizations of an entirely Albanian origin were established, creating a network that no longer preferred alliances with traditional criminal organizations abroad. Albanian criminal formations have a family-based structure and more or less are regulated by Albanian traditional laws, the *kanun*. Under such conditions, the Albanian criminal reality is described as the new mafia.

Keywords: Criminal Income, Judicial Confiscation, Albania.

Introduction

Albania became a ground for the development of criminal activities and the concealment or investment of their income. In a very short time, Albania became not only an exporting country, but also a transit country for illegal trafficking. The latter was the most varied in scope, ranging from trafficking of women to narcotic and psychotropic drugs. Large earnings were distributed across various sectors of the economy.

As much as an evaluating part of criminal offences, has as a final purpose to obtain income profits, it was necessary to implement legal provisions for combating this illicit income. Currently, the Albanian legal framework foresees that criminal income involves any economic advantage, derived from criminal offenses.

1. Legal provisions combating financial criminal proceeds

First, there are the provisions of the Criminal Code, article 36. Confiscation of criminal assets is foreseen as a non-principal or ancillary punishment. This provision stipulates that confiscation of criminal offence proceeds is mandatorily imposed by the court, including any kind of assets, as well as legal documents or instruments establishingdeeds or interests in the assets, obtained directly or indirectly from the commission of the criminal offence; the assets, the production, use, and/or possession of which consist a criminal offence, even if no conviction decision was pronounced.

If the criminal offence proceeds have been partly or fully converted into other assets,

the latter shall be subject to confiscation. If criminal offence proceeds are merged with assets gained legally, the latter shall be confiscated up to the value of the criminal offence proceeds.

In terms of Albania's criminal law, proceeds from crime are identified with its products and what is derived from these products. The term "offense product" is a relatively new term for our legislation. It was foreseen for the first time in 2003, the law which made some changes to the Criminal Code. According to its Article 4, Article 36 of the Code of Criminal Procedure" Confiscation of the means of committing a criminal offense" was expanded to "Confiscation of the means of committing the offense and its products".

It is worth remembering that the legal arrangements before the last changes identified the benefit of the offense with "objects, money and any other property derived from the offense or provided for its commission". Today, the lawmaker has tried to give the product of criminal offenses the meaning of "any economic advantage they have come from."

With products of the offense, I mean any kind of property that derives or is gained, directly or indirectly, from the commission of it. Also included are documents or legal instruments certifying titles or other interests in this property.[1]

This provision, provides for an additional penalty imposed by the court in a final decision. From the analysis of this article it turns out that seizure as a punishment includes what is foreseen in the law as a product of the criminal offense, as well as everything else that may flow from it in time. This means that, regardless of the various alienation that these products may have undergone and the new forms or nature they present, they cannot escape confiscation. It will also apply to the property that has replaced the proceeds of the offense, the value of which corresponds to them. It will also be directed to any other property of the same value.

In the last paragraph of Article 36 of the Criminal Code it is determined that confiscation will also be subject to:

- income and benefits from criminal offense products;
- income and benefits from assets in which the proceeds of the criminal offense have been transformed;
- proceeds and benefits from assets that have been mixed in these products, to the same extent and manner as the proceeds of the offense.

As can be seen, confiscation is not limited to products of the criminal offense. It includes any potential material gains from the commission of the offense, what they can add to or come from. Finally, we can say this provision expresses the intention to penalize in the broadest possible way any economic effect that criminal activity can produce in the benefit of their authors.

The article 287 of the Criminal Code, Laundering of the proceeds of a criminal offence or criminal activity, through exchange or transfer of property, for purposes of concealing or disguising its illicit origin, shall be punished by imprisonment of five to ten years. The provisions of this Article shall apply even where the criminal offence has been committed by a person who cannot be prosecuted as a defendant or who cannot be punished or no criminal prosecution has been initiated, or no punishment

[1] Art.36, Albanian Criminal Code.

has been imposed by a final criminal decision, in relation to the criminal offence, from which the proceeds have derived.

2. *Preventive measures against criminal assets*

In 2009 Albania implemented the law on preventing and striking organized crime and corruption, through preventive measures against assets. This is called otherwise the law against the mafia and is amended several times, last time in 2017, in order to make it more practical and appropriate to the situation.
It defines the procedures, competences and criteria for the implementation of preventive measures, against the assets of persons who are subject to this law, as they are suspected of participation in organised crime, trafficking, corruption and in committing other crimes pursuant to the provisions of this law. The purpose is preventing and striking at organised crime, trafficking etc., through the confiscation of the assets of persons who have an unjustified economic level, as a result of suspected criminal activity.
The subjects of this law include:[2]

- Persons for whom there is a reasonable doubt based on indicia for the participation and committing of crimes by armed gangs, criminal organizations, and structured criminal group, provided for by Chapter XI of the Criminal Code, those offences related to terrorism, or other offences which make profit;
- Their relatives (husband, children, the antecedents, the descendants, brothers, sisters, cohabitant) for whom the false registration is presumed, unless proved otherwise;
- the heirs of the person who is the subject, but in any case no later than 5 years from the date of death;
- natural or legal persons, for whom there is sufficient data that their assets or activities are possessed, completely or partially, by the people mentioned above or their assets are used, have facilitated or have influenced in a certain form the realization of the illegal activity.

The presumption of the false registration of the assets and of the economic activities in the name of the relatives shall be applied, when there are useful data, obtained in a lawful way, which create the reasonable doubt on the illegality of the origin of the assets. Preventive measure is any measure of a property nature that the court orders in judicial proceedings through the sequestration of assets, the economic, commercial and professional activities of persons, as well as through their confiscation. The procedure of setting out and implementing preventive measures depends on the condition, level or conclusion of criminal proceedings being conducted against the persons who are subject to this law. The data received from the criminal process are used in the procedure provided for by this law. In cases when the assets sequestered or confiscated according to this law are also subject to sequestration or confiscation according to the Criminal Code and the Code of Criminal Procedure, the court orders the suspension of the consequences of the implementation of the measures. The

[2] Art 3, Law no.10192, December 03.2009, On Preventing and Striking Organized Crime Trafficking and Corruption through Preventive Measures againdst Assets.

suspension ends with the rendering of a criminal judicial decision, for the revocation or lapse of those measures. The prosecutor undertakes, even through the judicial police, the necessary investigations against the subjects of this law, on the financial means, assets, economic, trading and professional activities, the economic level and their income resources, as well as the questioning the people who have information on the facts which are the subject of this law and the conduct of the necessary expertise. When the international judicial assistance is necessary, the international agreements ratified and the relevant procedural provisions are being applied. The verifications are, in particular, done if these persons have permits, licenses, authorisations, concessions and other rights to conduct economic, commercial and professional activities.

In the decision of sequestration of assets, the court also nominates, from the list of experts of the Agency of Administration of Sequestered and Confiscated Assets, one or more administrators. The Agency puts at the disposition of the court, at least once a year, a list of administrators with persons employed or authorised by it, and indicates the criteria of nominating them. The administrator has the duty of preserving and administering the sequestered assets. In addition, he has the duty of increasing, if possible, the value of those assets. The administrator appointed by decision of the court for the execution of the measure and for the administration of the object, submits every necessary request to the prosecutor's office, or any other state institution. Even on its own initiative, the court may discharge the administrator from duty, at any time, for incompetence or for failure to fulfil his duty. The request is submitted at the court by the prosecutor on his own initiative or with a motivated proposal of the Agency. Except for cases when he receives prior authorisation from the court, the administrator is not permitted to take part in the adjudication, to take loans, to sign agreements of conciliation, arbitration, promise, pledge, of the sequestered assets or to perform other legal actions, beyond the actions of the ordinary administration. Through the Administration of Sequestered and Confiscated Assets, the administrator submits to the prosecutor the argued request when he considers that legal actions provided above shall be carried out. Upon the request of the prosecutor, the court authorizes the requested actions when it deems it necessary, for the preservation of the value of the asset. Within 15 days of his appointment, the administrator is obliged to submit to the court a detailed report on the basic elements of the existence and condition in which the sequestered assets are. Subsequently, according to the time periods set by the court, the administrator submits periodic reports to it about the administration, accompanied by the respective documents if requested. The administrator is obliged to send the reports at the same time to the prosecutor and the Agency. The subject of this law have the burden to prove that the activities and the sequestered assets, possessed completely or partially by them, have been gained in a legal way. They have the burden to prove that the assets for which confiscation is requested, are possessed with an ownership title only by them, have been benefited through legal resources and are not in indirect ownership of the people subject to this law. They have the burden to prove that the evidence collected during the assets proceeding, are insufficient to verify that their activities or assets are possessed completely or partially, indirectly, by the subject or have been used, have facilitated or have impacted in a certain way, in the realization of the illegal activities.

3. Judicial procedure of confiscation

During the adjudication of a request for confiscation, the provisions of the Code of Criminal Procedure are applied to the extent possible. Upon request of the prosecutor, the court may also proceed in cases when the person does not have a known residence within the country, has left the country or, despite all the searches made, is not found. In this case, the court orders the failure of finding the person, designating a defence lawyer for him. He may be designated bythe court or be selected by the relatives of the person. When during the judicial examination it comes out that the sequestered assets belong to third persons, the court, even on its own initiative, by a reasoned decision, calls them to be part in the proceedings.Within 3 months from the date of the confiscation request being submitted by the prosecutor or from the initiation of the special hearing, the court shall decide on the confiscation. In complex cases, the court may, decide at a later date, however, in any case within one year.

4. The Decision of the Confiscation of the assets

The court decides on the confiscation of assets when there are reasonable doubts based on indicia for the participation of the person in the criminal activities and it results that the assets are in full or partial possession, directly or indirectly, of the persons referred above. In this case, the subject has not proven that the assets have a legal origin or the persons, do not manage to justify the possession of the assets or of the incomes, which are disproportionate with the level of incomes or of the profits, gained through legal resources declared by them. The court decides for the confiscation of the assets even when the charge or the criminal proceeding against the person is dismissed or he is found innocent, except for the cases when the following is declared in the decision for dismissal or innocence, because:[3]

- the fact does not exist;
- the fact is not provided for by law as a criminal offence;
- it results that the defendant has not committed the criminal.

A decision of the confiscation of assets shall be enforced immediately after the announcement. The decision and orders for carrying out special actions shall be transmitted to the proceeding prosecutor, who supervises the enforcement actions. The judicial police shall keep minutes on the enforcement actions, which shall be sent to the court through the prosecutor.

5. The Management of the Confiscated Assets

Assets confiscated by court decision shall be assigned to the ownership of the state. The decision is sent immediately to the Agency. The Minister of Finance decides on the way of using the assets confiscated, based on the recommendations of the Committee of Experts for the Measures against Organised Crime. The Agency submits a report of technical financial evaluation to the Minister of Finance for every

[3] Art 24, Law no. 10192, Decemeber 03.2009, On Preventing and Striking Organized Crime and Corruption through Preventive measures Against Assets.

asset confiscated. The Minister of Finance determines the manner and conditions of use of the immovable assets confiscated and issues instructions of use.

The Agency of Administration of Sequestered and Confiscated Assets is the institution responsible for the administration of sequestered and confiscated assets. While for the supervision of the administration of confiscated assets by the Agency, as well as for giving recommendations for the destination of confiscated assets, the Inter Institutional Expert Advisory Committee for Measures against Organised Crime has been set up and is functioning. The Committee consists of eight members proposed, respectively, by the Minister of Finance, Prosecutor General, etc., and the member proposed by the Minister of Finance, is the chairman of the committee. Representatives of public institutions or other organisations, active in fields of interest, may also be invited to take part in the activities of the committee. The Agency reports to the committee about its activity at least once every three months.

6. Money Laundering Prevention

Among the most important legal instruments that help identify and prosecute illegal income is the law "On Money Laundering Prevention". It sanctions a special regime regarding the identification of clients and the reporting the transactions they perform under certain conditions. Subjects of the law are a certain category of economic operators. Its subjects are natural or legal persons, who carry out the activities defined by law. The first obligation, is the identification of clients. They identify clients who seek to establish a legal relationship in two cases.

The first case is when people carry out financial transactions with a value above the amount set in the law. Identification of the client is accomplished through the registration of the data, the nature of which depends on the fact whether we are dealing with a non-commercial individual, a natural person, a legal person or if the action is performed by the legal representative of the client.

The second case relates to those financial actions, the amount of which, despite being below the legal limits set, are suspected based on concrete facts and circumstances relating to money laundering. This because the best known practice to cover financial transactions that are related to illegal activities, is their fragmentation. "Given the nature and mode of operations, we can conclude that some of them, each with a value below forecast, despite being realized at different moments and times, build part of a unique operation."

At the same time, each time a value transaction is realized, each customer has the obligation to declare the final beneficiary, the source of this amount. So, if the beneficiary or the source of income is not identified, the employees of these institutions are obliged not to perform financial operations. The identification regime provided for by this law requires the provision of data at the time of the establishment of the report and their storage for a certain period (five years) upon its completion. Subjects should take measures to prevent their use for money laundering. Failure to establish appropriate structures constitutes administrative offense. This mechanism operates under the guidance of a Responsible Authority which in the sense of this law, is

the General Directorate for the Prevention of Money Laundering, subordinated to the Minister of Finance. As a specialized financial unit, it is the Albanian Financial Intelligence Unit, which is a link in the entire process of tracking proceeds that are related to crime and deriving from it. It is a National Central Agency, which has the responsibility to analyse and distribute financial information related to income that is suspected of having criminal origin." In cases when the subjects of the aforementioned law noticed elements that may lead to suspicions of money laundering, then the obligation to report to the Responsible Authority arises. The latter, investigates and evaluates the facts. In case the information collected on the suspected operation is sufficient, proceeds with a criminal report to the prosecution body. In the criminal police, the Directorate of the Fight against Organized Crime, in the Ministry of Interior, referred to the cases that were needed for police investigation before passing them to the prosecution for criminal pros

As well as the resulting investigations made by this agency provide an important basis in the identification and prosecution of criminal assets. Often, its work may be an initial stage, which precedes further procedural actions. In order to strengthen its role in this regard, the law has given this institution the right to implement precautionary measures of a preventive and discovery nature. This authorityhas the right to decide on the blocking and temporary freezing of transactions when there are grounds based on facts and concrete circumstances for money laundering. This act is sent to the prosecutor's office. The right of access to data administered by state bodies and any public register is among the key attributes of the Responsible Authority, in view of investigating cases of money laundering. As explained above, it has the right to a special investigation to arrive at the relevant conclusions, which then refer to the proceeding bodies.

By collecting and analysing information from financial institutions and state agencies, D.P.P.P. has a special position in identifying transactions and participants in them. It may request additional information, distribute data and reports to other relevant authorities for the investigation and prosecution of individuals in cases where they are suspected of money laundering.The entities implementing this law cooperate with the justice authorities to the extent permitted by the relevant law regarding the confidentiality of the client's financial operations. Institutional interaction is the key to achieving satisfactory results. This way, D.P.P.P. consults with the Office of the Prosecutor General regarding the verification and investigation of complex money laundering cases. Customs, tax and licensing bodies are foreseen as special subjects of the Law "On Money Laundering Prevention". This is due to the fact that these state bodies play an important role in the economic system of a state. The information and its analysis can lead to important data on the illegality of a property. One of the criminal phenomena faced by customs authorities today is money smuggling. Also, money launderers use import-export businesses for this purpose. At the same time, they report any suspicious activity within the scope of their activity. Elements of suspicious activities are: the transfer of large amounts of money to or from foreign countries, transactions that are inconsistent with business activity or business size, insurance is extremely large for the value of import etc.

In this context, individuals, resident or non-resident, when entering or leaving the

territory of the Republic of Albania make the declarations required by law and relate to a certain value. They are required to declare the amounts in cash, any kind of bank check, metals or precious stones, valuable items or antique objects ranging from a fixed amount in Lek. Failure to comply with such obligation constitutes criminal offense and is punishable. Within a certain timeframe, the customs authority shall be obliged to report to the Responsible Authority on any suspicious activity where it believes that money laundering has been or is being carried out. This information is provided on the initiative of the body whenever it deems necessary, even on the basis of a request from the competent authorities. Employees of the Customs Administration maintain the confidentiality of the information transmitted. Any unauthorized disclosure of it makes the person subject to criminal or / and administrative liability as the case may be.

The most vulnerable sectors are those of enterprises in public works, but should not neglect any economic activity that allows substantial amounts of money to be diverted and realized. For this reason, the application of this law has extended to those economic activities, the exercise of which necessarily requires other licenses or authorizations. This implies respecting the procedures for identifying, recording and signalling suspicious operations to the Responsible Authority. The obligation falls on those bodies that license the legal and physical persons that so request. They identify persons who seek to be licensed before granting a license for action on a certain amount in the law. Also, these bodies are identifying and then reporting even when financial actions are below legal value but there are baseline data and doubts.

Conclusions

The law attributes to the General Directorate of Money Laundering Prevention the right to order the blocking or freezing of a transaction or financial transaction. Such an act is a temporary measure taken in those cases where based on facts and concrete circumstances, for money laundering. Also, the law "On measures against terrorism financing" has envisaged measures that deal with assets that may serve to fund this criminal activity. The competent body responsible is the Minister of Finance. Their subjects are persons proclaimed on the basis of a decision of the Council of Ministers. They are settled for all the funds and assets where the person exercises ownership, control or other rights and interests. Currently, since the adoption of the law, about 8 (eight) orders have been issued for the seizure of the property of persons declared as terrorist financiers by the UN. These measures also have a temporary character. They are independent of the criminal proceeding and apply when the competent body has data on the commission of criminal offenses, such as a terrorist act or the financing of such an activity. After receiving these measures, the Minister of Finance sends the necessary information to the suspect, his funds and assets to the General Prosecutor's Office in order to initiate criminal proceedings.

As a conclusion, we can say that the imposition of such measures generally precedes the prosecution. They aim at eliminating the possibilities for these funds to be involved in the commission of crimes and apply regardless of the measures to be taken later on the basis of criminal procedural provisions.

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