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Money laundering in Kosovo: Emphasis on criminal activity



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Introduction

Money laundering represents a significant challenge in Kosovo, particularly given its implications for criminal activity and economic integrity. Despite the existence of a legislative framework, the implementation and enforcement of anti-money laundering (AML) measures remain insufficient. This concept note aims to examine the current state of money laundering in Kosovo, highlighting the challenges in defining criminal activity.

The focus is on identifying how money laundering is linked to criminal activities, emphasizing areas for legal and institutional reform to strengthen Kosovo's approach to combating these illicit practices.

1. Legal Framework and Issues in Practice

The EU Kosovo Report 2023 underlines the persistent gap between Kosovo's legal framework on money laundering and its practical implementation. A key issue is the reliance of prosecutors and judges on the need to establish a predicate offense to secure a money laundering conviction, despite the fact that Kosovo law does not require such proof. Article 56 of the Law No. 05/L-096 on the Prevention of Money Laundering and Combating Terrorist Financing (AML/CTF Law) provides that it is sufficient to demonstrate that the property in question represents proceeds from criminal activity, without the need for a conviction of the underlying crime. Article 56 further outlines that the prosecution may rely on indirect evidence and circumstantial proof to establish that the assets are of criminal origin. The provision clarifies that it is not necessary to trace the property directly to a specific crime, as long as there is reasonable cause to believe that the property was obtained through illegal means.

This aligns with the standards adopted by the Financial Action Task Force (FATF) and EU Directives, which emphasize the importance of flexibility in proving the illicit origin of assets to combat sophisticated money laundering operations effectively.

This discrepancy between the law and judicial practice has led to the dismissal of standalone money laundering cases, underscoring the need for judicial training and legislative amendments. It is critical for Kosovo's legal system to align with international standards, where demonstrating the illicit origin of assets is sufficient for conviction. Examples from developed countries such as the UK, Belgium, and the Netherlands show that successful money laundering prosecutions do not necessarily require specifying a predicate offense, which could serve as a model for Kosovo.

2. Criminal Activity vs. Predicate Offense

A key challenge in Kosovo's judiciary when dealing with money laundering cases is the confusion around the terms "criminal offense" and "criminal activity." While these terms may seem similar, they have different legal implications. A "criminal offense" refers to specific illegal acts defined under the criminal code that can lead to prosecution and conviction, such as fraud or drug trafficking. On the other hand, "criminal activity" is a broader concept that encompasses any conduct prohibited by law, regardless of whether it has resulted in an arrest or conviction.

This distinction becomes crucial in money laundering cases, where often the illicit origin of funds is tied to activities that are difficult to pin down to a specific offense. Kosovo's judiciary tends to apply a narrow interpretation of these terms, which limits the scope of prosecutions. In other countries, courts often take a more expansive view of "criminal activity" to include various forms of illegal conduct, even when there is no formal prosecution. A broader interpretation in Kosovo could allow for more effective prosecution of money laundering, particularly in cases where criminal behavior is evident, but direct evidence linking the funds to a specific offense is lacking.

Further complicating the issue is the way Kosovo's judiciary interprets terms like "illegal," "unlawful," and "criminal" activity. While these terms are often used interchangeably, they have distinct legal meanings. "Illegal" refers to something that is forbidden by law, "unlawful" can refer to both civil and criminal violations, and "criminal" specifically refers to acts punishable under criminal law.

This rigid interpretation of the terms often limits how cases are prosecuted.

A recent case involving terrorist financing illustrates this problem. Funds were funnelled through Money Service Providers, then transferred from Kosovo to Turkey, in what appeared to be a coordinated effort linked to ISIS recruitment. The transactions raised serious concerns about terrorist financing, yet the case was hindered by the lack of a direct link to a recognized terrorist group. The funds' movements and the surrounding context strongly suggested illicit intent, but without a direct connection to a known criminal offense, the case was weakened.

This reflects a larger issue: the rigid interpretation of "criminal offense" limits the prosecution's ability to address more complex financial crimes like terrorist financing.

What this case shows is the need for a more flexible interpretation of "criminal activity" within Kosovo's legal framework. If the judiciary could consider a broader spectrum of illicit conduct, even when direct links to specific criminal offenses are missing, it would better equip prosecutors to secure convictions in cases involving suspicious financial transactions. Many international legal systems adopt this approach, allowing prosecutors to work with indirect evidence or strong circumstantial evidence when pursuing money laundering or terrorist financing cases.

However, to complicate matters further, in another similar case to the one involving terrorist financing, a defendant was accused of money laundering for moving large sums of money from Serbia into Kosovo. The defence claimed that the money was intended for his currency exchange shop, located in the southern part of Kosovo, which operated under the Serbian system. Because the shop was functioning within this system, the defendant argued that he could not declare the money legitimately. The defendant's operation involved using a foreign legal system to justify the movement of funds, which, while questionable, does not necessarily fit the strict definition of money laundering. A more accurate charge, in this case, would have been illegal trade due to the use of unregulated cross-border financial channels without compliance with Kosovo's financial laws.

This case highlights the importance of carefully analysing financial activities and ensuring that the correct legal framework is applied to the prosecution. Misclassifying cases as money laundering when they may be better prosecuted as illegal trade or another financial offense can weaken the prosecution's case and make it harder to secure convictions.

To address these issues, Kosovo could benefit from several key legal adjustments.

- First, it's important to clearly define "criminal activity" in legislation to include actions that, while not leading to an arrest or conviction, are strongly indicative of illegal conduct. This could be modelled on international practices, where a broader interpretation is common.
- Secondly, Kosovo's burden of proof requirement could be revisited, allowing prosecutors to rely on patterns of suspicious financial behaviour rather than waiting for conclusive proof linking funds to a recognized criminal offense.
- Third, training for judges and prosecutors would help clarify the distinction between these terms and their implications, enabling a more nuanced approach to money laundering cases.
- These changes would not only help resolve current challenges but also align Kosovo's judicial practices with international standards, making the prosecution of money laundering and related crimes more efficient, particularly in complex cases involving cross-border financial flows or terrorism financing.

3. Principle of Legality and Prosecution Standards

The principle of legality *nullum crimen, nulla poena sine lege* is essential in preventing retrospective justice. Article 7 of the European Convention on Human Rights (ECHR) guarantees that no one should be held guilty of an offense if their actions were not criminal under national or international law at the time they were committed. This principle is designed to uphold legal certainty and ensures that individuals are aware of the consequences of their actions.

There have been several cases in the European Court of Human Rights (ECHR) where the principle of legality was discussed in relation to criminal activities and money laundering. In the case of *Kokkinakis v. Greece* (1993), the court emphasized the importance of clear legal provisions that define what constitutes criminal behaviour to avoid arbitrary prosecution. Similarly, in *C.R. v. United Kingdom* (1995), the court highlighted that the law must be accessible and foreseeable to comply with the principle of legality. These rulings underscore that individuals must be able to foresee the legal consequences of their actions based on existing law.

In money laundering cases, the principle of legality was also scrutinized in *Dassa Foundation v. Liechtenstein* (2019), where the court ruled that a retrospective application of new money laundering laws violated Article 7 of the ECHR. The case demonstrated that while combating money laundering is essential, it should not come at the expense of fundamental legal principles, such as non-retrospective application of criminal laws. The ECHR's consistent stance on ensuring that laws are foreseeable and accessible is critical for upholding justice, even in complex financial crime cases like money laundering.

Kosovo's legal framework incorporates the principle of legality through multiple legislative instruments:

- I. The Kosovo Constitution upholds the principle of legality in criminal law under Article 33, which ensures that no one can be punished for an action that was not a criminal offense at the time it was committed. This provision reflects the broader requirements of Article 7 of the ECHR and seeks to provide legal certainty, guaranteeing that citizens are aware of what constitutes a crime at any given time. In the context of financial crimes such as money laundering, the principle ensures that individuals cannot be prosecuted under retroactive laws, thereby upholding fairness and predictability in the criminal justice system.
- II. The Kosovo Criminal Procedure Code also reinforces the principle of legality by outlining procedures that are consistent with existing laws, ensuring that no retrospective changes can be made to criminal provisions. The code provides that criminal procedures must be conducted according to the applicable law at the time of the offense. This requirement emphasizes that both procedural fairness and substantive legality must be respected during prosecutions. However, in financial crime cases, where the nature of criminal activities might evolve rapidly, strict adherence to the original procedural provisions may present challenges, especially when dealing with sophisticated money laundering schemes that exploit existing loopholes.

III. Article 56 of the Law against Terrorist Financing and Money Laundering (AML/CTF) Law in Kosovo states that it is sufficient to demonstrate that the property in question represents the proceeds of "criminal activity," without requiring a conviction of a specific underlying crime. This provision allows for flexibility in dealing with cases where direct evidence of a predicate offense may be lacking, which is essential for effectively combating sophisticated financial crimes.

From the perspective of the principle of legality, this broad definition may raise concerns. It allows for convictions based on indirect evidence and circumstantial proof without necessarily linking the assets to a defined criminal act. While this approach aligns with international best practices (such as those seen in EU jurisdictions), it could be argued that the lack of specificity might create ambiguity, potentially conflicting with the requirement of legal certainty. In jurisdictions where the principle of legality is strictly enforced, the need to clearly establish which conduct is prohibited is fundamental. Without such clarity, defendants might argue that they could not reasonably foresee that their actions would result in criminal liability.

The challenge is to strike a balance between providing enough legal flexibility to prosecute money laundering effectively and ensuring that laws are sufficiently clear to meet the standards required by the principle of legality. Internationally, cases such as *Dassa Foundation v. Liechtenstein* highlight the risks of violating Article 7 of the ECHR when applying anti-money laundering laws retrospectively or without proper specificity.



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In the context of prosecuting money laundering, this principle plays a critical role. Financial crimes often evolve with new legislation and international norms, and the prosecution must ensure that the laws being applied were in effect at the time the offense occurred.

4. Supreme Court Judgment

The Supreme Court of Kosovo's decision in Case no. 2021.049825 emphasized adherence to this principle by annulling the lower courts' decisions due to failure to comply with the law as it stood at the time of the offense. The court highlighted that the reasoning provided by the lower courts failed to adequately justify the decisive facts, particularly concerning whether the confiscated funds were definitively linked to criminal activities. The Supreme Court also emphasized that the lower courts did not sufficiently establish the subjective element of the crime, specifically the intent, knowledge, and purpose of the accused in committing the crime of money laundering.

The issue with the confiscation of assets was that it was done without irrefutable evidence that the funds originated from a criminal activity. The court also pointed out inconsistencies in the lower courts' judgments, where there was no clear logical link between the established facts and the relevant legal provisions, which is a requirement under Kosovo's criminal procedural law. However, this strict interpretation diverges from international best practices, which take a more flexible approach to evidence and proof in financial crime cases. EU jurisdictions, for example, emphasize the autonomous nature of money laundering, allowing inferences regarding the illicit origin of assets without necessarily proving a specific predicate offense.

This approach taken by the Supreme Court of Kosovo also appears to be in breach of international precedents and best practices observed in other EU and international jurisdictions. In cases such as *R v Anwoir* (2008) in the UK, the courts have established that it is not necessary to prove the exact predicate offense if it can be inferred that the property is of criminal origin. Similarly, in the Dutch case *ECLI:NL:GHAMS:2013* (2013), the court concluded that circumstantial evidence could be sufficient to determine the illicit origin of assets when no legitimate source could be verified.

These approaches are also reflected in the Belgian case of *Steve Zschüschen v. Belgium* (2018), which adopted a flexible method for proving the criminal origin of funds, focusing on the context and pattern of transactions rather than demanding direct proof of a predicate offense.

A contrasting decision by the Supreme Court of Kosovo, Case no. 2020.111321 (2022), illustrates a different approach in evaluating the necessity of proving a predicate offense or specific criminal activity. In this case, the Supreme Court rejected the defense's arguments that the lower courts had failed to establish that the funds were linked to any specific criminal activity.

The Court upheld the lower courts' judgments, which had found the defendants' guilty based on evidence of suspicious financial transactions and the absence of any legitimate explanation for the large sums involved. The Court emphasized that the defendants had knowledge of the transactions and had actively participated in transferring funds without any credible documentation of legal business activity. This judgment supports a more flexible interpretation where the intent and awareness of the accused regarding the suspicious nature of the transactions were sufficient to establish criminal liability for money laundering, even without direct proof of a predicate offense.

The Supreme Court's insistence on direct evidence linking confiscated assets to a specific criminal activity in one case contrasts sharply with its more flexible approach in Case no. 2020.111321. In the latter case, the Supreme Court found that it was sufficient for the lower courts to base their judgment on evidence indicating that the defendants had knowledge of the transactions and participated actively in transferring funds without credible documentation of legal business activity.

The Court determined that even in the absence of direct evidence of a predicate offense, the circumstances and the behavior of the defendants' demonstrated sufficient intent and awareness of the suspicious nature of the transactions to establish criminal liability for money laundering. Specifically, the court highlighted that the defendants were aware of large-scale transactions routed through their bank account in a short time frame, with no accompanying legitimate business activities, indicating a high likelihood that the funds originated from illegal activities. This recognition of circumstantial evidence and indirect proof methods reflects a more flexible approach that is consistent with international best practices.

Such discrepancies in judicial practice create uncertainty in the legal framework for combating money laundering in Kosovo. By requiring irrefutable evidence of a specific predicate offense in some instances while allowing for broader interpretations in others, Kosovo's courts may inadvertently weaken the consistency and predictability needed for effective anti-money laundering efforts.



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5. Standards of Evidence and Proof in Money Laundering Prosecutions

International best practices for prosecuting money laundering emphasize the use of indirect methods and circumstantial evidence. The UK case of *R v Anwoir* (2008) established that it is not necessary to prove a specific predicate offense if it can be inferred that the property is of criminal origin. This inference-based approach has been widely accepted across EU jurisdictions, allowing for more flexibility in prosecuting complex financial crimes.

In the United States, the case of *United States v. All Assets Held in Account Number 80020796*, an approximately \$26 Million were seized which highlighted the use of circumstantial evidence to establish the illicit nature of assets. In this case, the government was able to prove the criminal origin of the funds through a pattern of transactions and the absence of any legitimate source of income for the defendant. The U.S. courts often rely on financial profiling and discrepancies in income and expenditures to demonstrate money laundering, especially when direct evidence is lacking.

The Dutch case *ECLI:NL:GHAMS:2013* (2013) further reinforces the use of indirect proof methods. In this case, the suspect was unable to provide a credible explanation for the origin of large sums of money, which were used to purchase luxury items. The court concluded that the funds were of criminal origin based on the absence of a legitimate source and the suspicious nature of the financial transactions.

Another notable case is *Steve Zschüschen v. Belgium* (2018), which supports an approach that focuses on proving the illicit nature of funds without establishing a direct link to a specific crime. This case demonstrates how the flexibility of evidence standards in Belgium aligns with broader EU best practices, thereby facilitating successful prosecutions in complex money laundering cases.

Similarly, the Dutch courts have used indirect methods of proof to convict individuals of money laundering based on circumstantial evidence, such as unexplained wealth or financial transactions inconsistent with legal income. These practices align with the Council of Europe's Warsaw Convention, which focuses on proving that assets are of illegal origin without needing a direct link to a predicate offense.

Kosovo's current strict interpretation requiring direct proof of a predicate offense hinders effective prosecution of money laundering. Aligning standards of evidence with international best practices would support more successful prosecutions, particularly in cases involving sophisticated laundering schemes where direct evidence is challenging to obtain.

6. Summary of Dutch Case ECLI:NL:GHAMS:2013 (2013)

The Dutch case ECLI:NL:GHAMS:2013 (2013) serves as a significant example of the application of indirect proof methods in money laundering cases. This case involved a suspect who failed to provide a plausible explanation for the origin of substantial amounts of money, which were subsequently used to acquire luxury goods. The court's findings were primarily based on the absence of a legitimate explanation for the funds, combined with the suspicious circumstances surrounding the transactions.

In the case at hand, the court's ruling emphasized the critical role of circumstantial evidence as a foundation for conviction. It concluded that the suspect's inability to account for the lawful origin of the substantial funds pointed to their criminal nature. This aligns with the principle that when a credible explanation is lacking, one can reasonably infer that the money was acquired through illicit means. The ruling illustrates the Dutch courts' readiness to rely on indirect methods of proof, particularly in instances where direct evidence of criminal activity is hard to establish.

Moreover, the burden of proof effectively shifted to the suspect, requiring them to provide a credible and lawful explanation for the large sums involved. The suspect's failure to do so was pivotal in the court's determination that the assets were criminal in origin. This approach enables authorities to tackle money laundering more effectively, especially in cases where the typical documentation used to verify the origin of funds may be obscured or intentionally concealed.

The court also scrutinized the suspect's financial patterns and transactions, noting the involvement of unusually large amounts without any clear, legitimate business or personal justification. The suspicious nature of the luxury goods purchases, coupled with the lack of transparency

regarding the funds, significantly influenced the final judgment. This ruling underscored the necessity of transparency in financial dealings and highlighted the legal repercussions of failing to provide such transparency.

Additionally, the decision reinforced the idea that the absence of a legitimate source of income could serve as proof of criminal activity, even without a specific predicate offense being identified. This is particularly relevant in dealing with sophisticated financial crimes, where direct links to predicate offenses are often obscured by the complexities of financial transactions.

Finally, the court applied the principle of reasonable inference, concluding that given the circumstances—the suspect's failure to justify the funds, the lavish spending, and the lack of legitimate income—it was reasonable to infer that the money originated from criminal activities. This approach aligns with international practices observed in other EU jurisdictions, which focus on the inability to establish a legal origin for suspicious assets.

The Dutch case ECLI:NL:GHAMS:2013 demonstrates the effective use of indirect evidence and reasonable inference in the prosecution of money laundering cases. By emphasizing the suspect's inability to provide a legitimate source for the funds and highlighting the suspicious nature of the financial transactions, the court established a precedent that circumstantial evidence can be sufficient to determine criminal origin. This case underscores the importance of transparency in financial activities and illustrates how the Dutch judiciary combats money laundering, particularly when direct evidence is unavailable. It serves as a valuable reference for jurisdictions like Kosovo, which are working to strengthen their anti-money laundering frameworks through similar principles and practices.

7. Comparison with Kosovo Supreme Court Cases

The Dutch case ECLI:NL:GHAMS:2013 (2013) can be contrasted with the approach taken by the Supreme Court of Kosovo in two significant cases: Case no. 2021.049825 and Case no. 2020.111321. The analysis of these cases highlights differences in the application of proof standards in money laundering cases and the interpretation of the necessity for a predicate offense.

Supreme Court of Kosovo Case no. 2021.049825

The Supreme Court of Kosovo's decision in Case no. 2021.049825 emphasized adherence to the principle of legality by annulling the lower courts' decisions due to failure to comply with the law as it stood at the time of the offense. The court highlighted that the reasoning provided by the lower courts failed to adequately justify the decisive facts, particularly concerning whether the confiscated funds were definitively linked to criminal activities. Additionally, the Supreme Court criticized the lower courts for not sufficiently establishing the subjective elements of the crime, such as the intent, knowledge, and purpose of the accused in committing money laundering.

The court's strict insistence on direct evidence linking confiscated assets to a specific criminal activity contrasts sharply with the Dutch court's approach in ECLI:NL:GHAMS:2013, where circumstantial evidence and the lack of a credible explanation for the funds were deemed sufficient to conclude the criminal origin of assets.

The Kosovo Supreme Court's rigid interpretation diverges from international best practices, which favor a more flexible approach that allows for reasonable inferences regarding the illicit origin of funds.

Supreme Court of Kosovo Case no. 2020.111321

In a contrasting decision, the Supreme Court of Kosovo, in Case no. 2020.111321 (2022), upheld the lower courts' judgments, which had found the defendants guilty based on evidence of suspicious financial transactions and the absence of a legitimate explanation for the large sums involved. Unlike in Case no. 2021.049825, the Supreme Court here adopted a more flexible approach, ruling that the intent and awareness of the accused regarding the suspicious nature of the transactions were sufficient to establish criminal liability for money laundering, even without direct proof of a predicate offense.

The Court emphasized that the defendants had knowledge of the transactions and actively participated in transferring funds without credible documentation of legal business activity.

The circumstances, including 90 large-scale transactions routed through their bank account in a short time frame without any legitimate business activities, were sufficient to indicate a high likelihood that the funds originated from illegal activities.

8. Analysis of Diverging Judicial Practices

The two contrasting decisions by the Supreme Court of Kosovo reveal inconsistencies in the judicial practice regarding the necessity for a predicate offense in money laundering cases. In Case no. 2021.049825, the Supreme Court required irrefutable evidence directly linking assets to a criminal offense, which creates challenges for the prosecution of sophisticated financial crimes where direct evidence may not always be available. On the other hand, the decision in Case no. 2020.111321 reflects a more pragmatic approach that aligns with international practices, similar to those seen in the Dutch case ECLI:NL:GHAMS:2013 and the UK case of *R v Anwoir* (2008).

In the Dutch case and in *R v Anwoir*, the courts have established that it is not necessary to prove the exact predicate offense if it can be inferred that the property is of criminal origin. This flexible approach is crucial for effectively tackling financial crimes where direct evidence may be lacking due to the complexity of transactions and the use of international financial networks to obscure the illicit origins of funds. Such discrepancies in judicial practices within Kosovo create uncertainty and may undermine the effectiveness of the country's anti-money laundering framework.

The Dutch case ECLI:NL:GHAMS:2013 highlights the importance of indirect evidence and reasonable inference in money laundering prosecutions. By contrasting this with the differing approaches taken by the Kosovo Supreme Court in Cases no. 2021.049825 and 2020.111321, it becomes evident that consistent application of standards is crucial for maintaining legal certainty and effectiveness in combating financial crimes.

The adoption of a more flexible approach, as seen in the Dutch case and Case no. 2020.111321, aligns better with international best practices and provides a more effective framework for addressing money laundering. Kosovo's judicial system may benefit from further training and alignment with international practices to ensure consistency and predictability in money laundering cases.

Recommendations

Lëvizja FOL recommends several legislative and practical changes to enhance Kosovo's approach to combating money laundering.

- 1.** Legislative Amendment - One key recommendation is to amend the Anti-Money Laundering/Countering the Financing of Terrorism (AML/CTF) Law to ensure clarity, particularly by addressing inconsistencies between the Albanian and English versions. Furthermore, clarifying the definition of "criminal activity" and aligning with EU Directives and FATF standards would streamline cases by reducing the emphasis on proving a predicate offense, which can be a significant barrier to successful prosecution.
- 2.** Supreme Court Opinion on Criminal Activity - To further support legal clarity, the Supreme Court should consider issuing an opinion on what constitutes "criminal activity" in the context of money laundering. This opinion would provide clear guidelines for prosecutors and judges, minimizing ambiguities that can lead to inconsistent case handling.
- 3.** Capacity Building for the Judiciary - Targeted training for prosecutors and judges is critical, especially with the recent Law on Special Prosecution delegating cases under €500,000 in suspected money laundering to the Basic Prosecution Office. Training can ensure that these professionals view money laundering as a standalone crime and approach cases with a more nuanced understanding, potentially leading to stronger prosecutorial outcomes.
- 4.** Evidence Standards Alignment - Kosovo could benefit from aligning its evidentiary standards with international best practices, particularly by recognizing indirect and circumstantial evidence as valid for establishing the criminal origin of assets. This approach, similar to those adopted in the UK and the Netherlands, enables prosecutors to build cases on broader types of evidence, which can be crucial in proving money laundering activities when direct evidence is limited.



