Compatibility of Latvian non-conviction-based confiscation with Convention on Human Rights

MASTER'S THESIS

Author: Artjoms Lemberskis
LL.M 2020/2022 year student
student number M020018

SUPERVISOR: *Arina Melse, PhD*

DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) ……………………………………

RIGA, 2022

ABSTRACT

Traditional “repressive” criminal law is no longer sufficient to deal with the new threats posed by the global risk and information society. New forms of combatting international organised crime, drug trafficking and other serious crimes have emerged to target the most crucial aspect of incitive of the criminals – their money. Deprivation of property illegally obtained is an essential tool for crimes and money laundering. It led to the question of whether it is by human rights to confiscate the proceeds of crime, detected merely, e.g., in the form of suspects’ unexplained wealth, under a concept of unjust enrichment and re-establishment of the situation before a crime, and to do so without a conviction and by applying a set of less strict “civil”-law evidentiary rules. The primary focus will be to study the compatibility of the Latvian non-conviction-based confiscation with the European Convention on Human Rights and European Court of the Human Rights case law. The principles of the ECtHR will be examined to find out the court’s position regarding non-conviction-based confiscations and to define the adequate procedural safeguards that should be in place to comply with the European Convention on Human Rights. The thesis topic is if the Latvian legal acts of special confiscation of property can violate Article 6 and Article 1 of Protocol 1 of the European Convention on Human Rights and what procedural safeguards should be respected and taken into consideration to comply with the European Convention on Human Rights. Additionally, this paper will examine the experience of other countries, which have long-standing practices in implementing similar mechanisms in combating money laundering and organised criminal groups.

LIST OF ABBREVIATIONS

ARA - Assets Recovery Agency

Directive 2014/42/EU - Directive on the Freezing and Confiscation of the Instrumentalities and Proceeds of Crime

Decision 2005/212/JHA - Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property

ECHR - Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights

ECtHR - European Court of Human Rights

ECCD - Economic Crime Cooperation Division of the Council of Europe

ECJ - European Court of Justice

EU – European Union

FATF - The Financial Action Task Force

FinCEN - Financial Crimes Enforcement Network

OECD - Organisation for Economic Co-operation and Development

The Palermo Convention - United Nations Convention against Transnational Organized Crime

POCA - Proceeds of Crime Act 2002, United Kingdom

Strasbourg Convention - Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

SOCA - Serious Organised Crime Agency

UNODC - the United Nations Office on Drugs and Crime

UNCAC - the United Nations Convention against Corruption

Warsaw Convention – Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

TABLE OF CONTENTS

1. INTRODUCTION. 5
2. CONCEPT OF NON-CONVICTION-BASED CONFISCATION 8
3. PRACTICE IN THE EUROPEAN COURT OF HUMAN RIGHTS 12
3.1. Applicability of Article 6 of the Convention 12
3.1.1. Presumption of innocence 14
3.1.2. Shift of the burden of proof 16
3.1.3. Adversarial nature 17
3.1.4. Equality of arms 19
3.1.5. Public hearing 19
3.2. Applicability with Article 1 of Protocol 1 20
3.2.1. Lawfulness of the interference 21
3.2.2. Legitimate aim in the general interest 22
3.2.3. Proportionality of a confiscation measure 23
3.2.4. The general principles of international law 26
3.3. The concept of non-conviction-based in international law. 26
3.3.1. International Conventions 27
3.3.2. International and intergovernmental organisations 28
3.3.3. European Union Law 30
4. PRACTICE IN OTHER NATIONAL COURTS REGARDING NON-CONVICTION-BASED CONFISCATION 35
4.1. Practice in the UK 35
4.2. Practice in Italy 37
5. CHALLENGES OF CRIMINALLY ACQUIRED PROPERTY CONFISCATION IN LATVIA 40
5.1. Criminal Procedure Law in Latvia. 40
5.2. Opinion of legal scholars 45
5.3. Compatibility with Article 6 47
5.4. Compatibility with Article 1 Protocol 1 50
6. CONCLUSION 55

1. INTRODUCTION

Criminal activity generates illegal capital, which fuels further criminal activity, and illicit income generates significant benefits and incentives for the criminals. The World Bank and the UNODC estimate that the cross-border flow of the global proceeds from criminal activities, corruption and tax evasion is estimated at between USD 1 trillion and USD 1.6 trillion per year.[1] To conceal the illegal funds, the criminals use sophisticated schemes for laundering, making it very difficult to establish a direct link between specific proceeds and specific crimes. In that sense, the classical approach of enabling confiscation of funds and property based on the convicted crime and the direct link of the funds and the crime may be inconsistent with the real-time opportunities during criminal proceedings. The quick accumulation of enormous assets is the common objective of any crime globally (drug traffickers, corrupt persons, criminal organisations, traffickers in arms and human beings). In some cases, it is more appropriate to affect all those people accumulating illegal assets at the economic level rather than starting lengthy criminal proceedings[2]. The non-conviction-based confiscation method has emerged as a tool to overcome this issue. The UN, the FATF, the OECD, and other international organisations promoted such a tool as an effective mechanism for confiscation in situations where it is not possible to determine criminal liability.[3]

Compared with a traditional concept of confiscation, whereby the deprivation of property (crime instrumentalities and proceeds) follows a conviction for a specific crime, the new forms of confiscation provide for a loosened link between offences and confiscated proceeds. This paper aims to analyse the concept of non-conviction-based confiscation as one such form. Other notions will be touched on only if necessary to add to the legal analysis of the non-conviction-based confiscation. Non-conviction-based confiscation is generally seen as one of the most incisive measures against criminal organisations. It also allows them to deprive criminals of other assets presumably deriving from other illicit activities not proven at trial[4]. Non-conviction-based

---

[1] World Bank, *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*, p. 5. Available on: https://www.unodc.org/pdf/Star_Report.pdf. Accessed May 3, 2022.

[2] Francesco Testa, "International cooperation for the detection of corruption offences and for identification, freezing and confiscation of assets: the Italian system of non-conviction-based confiscation", 166th international training course visiting experts' lectures, resource material series no. 103, p. 10. Available on: https://www.unafei.or.jp/publications/pdf/RS_No103/No103_5_2_VE_Testa.pdf. Accessed May 3, 2022.

[3] Council of Europe, Economic Crime and Cooperation Division, Action against Crime Department, Directorate General Human Rights and Rule of Law, *The Use of Non-Conviction Based Seizure and Confiscation*, p. 16. Available on: https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3. Accessed May 3, 2022.

[4] Michele Simonato, "Extended confiscation of criminal assets: limits and pitfalls of minimum harmonisation in the EU". *E.L. Rev. 2016,* 41(5), pp. 727-740.

confiscation is intended to be a form of "proprietary remedy" focusing on the criminal origin of property rather than the attributes of a current property holder. It is important to note that such confiscation of ill-gotten property is not considered a punishment but rather a preventive and reparative measure to prevent illegally obtained funds from being held and used[5].

The structure of the paper will be the following. In the next chapter, the concept of non-conviction-based confiscation will be discussed. There are many definitions used to refer to non-conviction-based asset confiscation, such as "civil forfeiture", "*in rem* forfeiture," "objective forfeiture", or "civil recovery". However, all these definitions mean by nature the same and refer to the same legal concept. In chapter three, the principles of ECtHR and how non-conviction-based confiscation relates to human rights will be explained. Non-conviction-based form of confiscation touches upon some crucial issues related to the nature and purpose of deprivation of the person's possession. It raises some concerns about respecting the person's fundamental rights, like removing their property ownership, particularly the right to a fair trial (Article 6) and the right to peaceful enjoyment of the property (Article 1 of Protocol 1). After examining the case-law of ECtHR that are available regarding confiscation orders in the other Member States, the international binding Conventions will be discussed to find out what kind the property confiscation procedures were adopted at the international level and what kind of measures were commonly required to be implemented in the domestic legislation to prevent and combat transnational organised crime more effectively. Analysis of the FATF recommendations and the ECCD guidance paper will give insight into how recognised international institutions offer the implementation of confiscation orders. At the European Union, Directive 2014/42/EU was an effort to ensure that the Member States have in place a robust confiscation regime[6]. In chapter four, the UK and Italy's practices will be examined separately as examples of successful confiscation regime implementation that has been scrutinised by ECtHR and considered in compliance with the European Convention on Human Rights. Chapter five will provide an overview of the non-conviction-based confiscation in Latvia and explain further that the Latvian legislator has chosen a sophisticated and contemporary approach to confiscation, arguing that the property with which money laundering activity has been performed is criminally acquired unless the owner cannot prove the opposite. The law overview will be completed with the criticism of the local scholars and legal practitioners. Many Latvian

[5] Colin King, "Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture", *E&P*, Vathek Publishing, 2022, *E. & P. 2012*, 16(4), pp. 337-363.
[6] Jonathan Fisher QC and Justin Bong Kwan, "Confiscation: deprivatory and not punitive – back to the way we were", *Crim L.R*, pp. 192-201.

scholars argue that such legislation initiative does not correspond to other EU Member States' legislation norms and can be considered a brief interpretation of Directive 2014/42/EU, and does not correspond with the Warsaw Convention and other internationally binding Conventions for Latvia.[7] Eventually, based on the ECtHR case law, requirements of the international treaties, and practices of the UK and Italy, the compatibility of the Latvian non-conviction-based confiscation with human rights guarantees laid down in Article 6 and Article 1 Protocol 1 of the Convention of Human Rights will be analysed. In chapter six, the conclusion and the final thoughts will be given regarding how successful the applications to ECtHR might be regarding violations of human rights in non-conviction-based confiscation proceedings in Latvia.

[7] Gunārs Kūtris, "Noziedzīgi iegūtā konfiskācijas iespējas un pamats" (Possibilities and grounds for confiscation of crime proceeds.), Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās: Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums/redaktors Anita Rodiņa, *Rīga: LU Akadēmiskais apgāds*, 2020. 202.-208.lpp. Available on: https://doi.org/10.22364/juzk.78.22. Accessed 16 February 2022.

2. CONCEPT OF NON-CONVICTION-BASED CONFISCATION

There are similarities and crucial differences between criminal confiscation and non-conviction-based confiscation. They are similar in that they both entail the forfeiture of individual proprietary rights and the material seizure of the assets by state authorities. Criminal confiscation means the final deprivation of the owner's property rights related to assets representing the direct result of a crime they have been convicted of. Therefore, criminal confiscation requires – at least in the majority of cases – a conviction. The same is not valid for non-conviction-based confiscation, which is conceived as an alternative to the criminal justice process. Non-conviction-based confiscation is wholly independent of a criminal conviction, although, in practice, there is often a link between non-conviction-based confiscation and criminal proceedings. Non-conviction-based confiscation is usually imposed when criminal proceedings are underway or cannot be performed due to some reasons. A non-traditional criminal confiscation scheme can be defined as the confiscation of assets not linked to the crime for which there has been a conviction (extended confiscation) or the proceedings against "dirty" assets, independent from criminal proceedings or conviction (non-conviction-based confiscation).[8] Assets may also be confiscated even if they belong to persons other than the offender (third party confiscation).

Generally, types of confiscation can be defined in the following way:

- *Classical Criminal confiscation* allows for confiscating assets after the person is convicted, and the assets obtained through offence are confiscated[9].
- *Extended confiscation* allows for confiscating assets that are not linked to the crime for which the offender is being prosecuted. The order to confiscate is effectively 'extended' beyond the assets related to the prosecution to other assets owned by the defendant. That is the case when a criminal conviction is followed by confiscating the assets associated with the specific crime and additional assets that the court determines are the proceeds of other, unspecified crimes[10].

[8] Jon Petter Rui and Ulrich Sieber, *Non-Conviction-Based Confiscation in Europe*, Berlin:Duncker & Humblot, 2015, p.1; *see also* Michele Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery?", 2015, *New Journal of European Criminal Law,* 213.
[9] European Commission, *Analysis of non-conviction based confiscation measures in the European Union*, 12.4.2019, SWD(2019) 1050 final.
[10] Michele Panzavolta, "Confiscation and the concept of punishment: can there be a confiscation without a conviction?" In: Katalin Ligeti, Michele Simonato, *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU*, Hart Publishing, Oxford, 2017, p. 25.

- *Non-conviction-based confiscation* proceedings action against the assets, not the person (*in rem*), is initiated to confiscate assets presumably derived from illicit activities. It is a separate proceeding aimed at recovering illegal assets, removing the need for a criminal conviction. Confiscation may be based on circumstantial evidence, e.g., the balance between a person's assets and the lawful source of income[11].
- *Third-party confiscation* proceedings enable confiscating the proceeds of crime transferred to, or directly acquired by, a third party from a suspected or accused person. Third-party confiscation should at least be enabled in cases where the third party knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation[12].

The most critical and essential characteristic of non-traditional criminal confiscation compared to the classical criminal procedure is the transfer of the *onus probandi* (duty to prove) of the legality of the property to the person against which this procedure is being conducted. This is a so-called standard of "reverse proof of obligation." *Ratio legis* for introducing the "reverse" burden of proof is that proving the criminal origin of property is nearly impossible in practice. Criminals are using front companies, complex schemes using offshore schemes, and manage to layer[13] the funds around the globe to hide the initial origin of the funds. However, on the other hand, invert of the burden of proof (from the prosecutor to the accused) is questionable from the point of view of the protection of fundamental human rights because this raises the problem of interference with the property right and negates the general principles established by criminal law - threatens the fundamental right to defence, breaches the right to a fair trial, the presumption of innocence and right to peaceful enjoyment of the possession of the property[14].

Non-conviction-based confiscation is often used in stand-alone money laundering cases to combat money laundering. Stand-alone money laundering cases refer to (preliminary) investigations where the purpose is to find the truth about the money laundering activities when there is no (direct) evidence of the underlying criminal source of origin of the funds or the specific predicate offence—investigating a possible predicate offence as such is not the purpose of a stand-

[11] Simonato, *supra* note 4, p. 2.
[12] *Ibid*.
[13] The goal of layering is to make the process of tracking money through each layer more difficult to accomplish. Layering can include changing the nature of the assets, i.e. cash, gold, casino chips, real estate, etc. Complex layering schemes involve sending money around the globe using a series of transactions.
[14] Darian Rakitovan, "Extended Confiscation - Sui Generis Measure," *Journal of Eastern-European Criminal Law 2016, no. 2*, 2016, pp. 78-97.

alone money-laundering investigation[15]. Under this logic, a predicate offence is not necessary at all in order to trigger non-conviction-based confiscation, and it is unnecessary to link the targeted assets with a specific convicted or even suspected person. According to such a view, the aim of the investigation would be a determination of a property's criminal nature, not of a person's guilt. This also makes it a second chance for law enforcement in situations when the predicate offence went unnoticed or was done in a foreign country. For example, investigating a drug transaction or embezzlement in the 1990s will be doubtful and highly unlikely to be successful. But the law enforcement might be successful in confiscating the assets if the owner is unable to explain the origin of the funds.

To sum up, non-conviction-based confiscation is defined as deprivation of property without criminal conviction if it is more likely that the origin of funds is of illegal origin[16]. In non-conviction-based confiscation, a fully-fledged assessment of the prohibited conduct and the link with the assets is not a decisive factor in applying a confiscation measure in classical criminal confiscation. All forms of non-traditional criminal confiscation have the characteristic described above. This paper aims primarily to examine non-conviction-based confiscation as one of the most contradictive and novel approaches. Extended confiscation and third-party confiscation proceedings are more common in different countries and less controversial than non-conviction-based confiscation. It should be stressed that non-conviction-based confiscation differs from extended confiscation and third-party confiscation with one significant aspect—lack of suspected, accused or acquainted person in the parallel criminal proceeding. As defined above, in extended or third-party confiscation, some form of criminal charge should be given to a person related to the property during the investigation. In non-conviction-based-confiscation, as it is an action against the property and not the person, such a criminal charge is not needed. The lack of the link between confiscation and criminal offence raises several questions regarding the general objectives of criminal justice systems and the balance between effectiveness and human rights.[17] The ECtHR has not yet provided a firm answer to all questions about the compatibility of new forms of confiscation implemented in other countries with fundamentally strong protection of human rights. The ECtHR has dealt with some cases involving various forms of confiscation, but many aspects

[15] Michael Levi and Peter Reuter, "Money Laundering", *Crime and Justice: A Review of Research*, 34, 2006, pp. 289-376.
[16] *Ibid*.
[17] Michele Simonato. "Confiscation and fundamental rights across criminal and non-criminal domains", *ERA Forum 18*, 365–379, 2017. Available on: https://doi.org/10.1007/s12027-017-0485-0. Accessed May 3, 2022.

are still debated[18]. In particular, the ECtHR has a casuistic approach that makes it difficult to identify a solid framework to assess the legitimacy of confiscation regimes[19].

[18] Simonato, *supra* note 4, p. 7.

[19] Matthias J. Borgers, "Confiscation of the proceeds of crime: the European Union framework", i*n:* Colin King and Clive Walker, *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Ashgate Publishing, 2014, p. 27.

3. PRACTICE IN THE EUROPEAN COURT OF HUMAN RIGHTS

A wide margin of appreciation is usually allowed to the State under the Convention regarding general political, economic, or social strategy measures. A wide margin of appreciation is also left to the State regarding the implementation of crime prevention policies, including confiscation of property presumed to be of unlawful origin. The ECtHR generally respects the legislature's policy choice on how to fight crime unless it is "manifestly without reasonable foundation".[20] Due to this reason, there are not so many measures taken for the purposes of combating unlawful enrichment from the proceeds of crime that the ECtHR has examined. The Court has examined under Article 6 and Article 1 of Protocol No. 1 only a number of cases concerning the forfeiture of proceeds of crime on the basis of a variety of domestic forfeiture regimes based on a reversal of the burden of proof. In doing so, it has examined the purpose of the legislation and the applicable substantive and procedural guarantees. It has laid down in the process the basic principles to be applied in such cases[21]. The standard principles of the ECtHR can be identified in how the ECtHR treated confiscation orders where domestic authorities initiated proceedings against "dirty" assets, independent from criminal proceedings and regardless presence or absence of a previous criminal conviction.

3.1. Applicability of Article 6 of the Convention

To understand what are the principles and procedural safeguards that should be taken into account, it should be clear under which limb of Article 6 (1) of the convention (civil or criminal) the alleged encroachment has happened. To ascertain to what extent the nature of the confiscation can be considered criminal or non-criminal, the issue of the nature of the measure is a preliminary question. In various cases, the court contested that the forfeiture order is a preventive measure, which cannot be compared to a criminal sanction if it was designed to take out of circulation money that was presumed to be tied up with the international trade of illicit drugs[22]. In many cases, the attempts to characterise the non-conviction-based confiscation as criminal have failed in the ECtHR.[23] In many instances, the court determined that it is necessary to establish if the applicant

[20] *Azienda Agricola Silverfunghi S.a.s. and Others* v. *Italy*, nos. 48357/07, 52677/07, 52687/07 and 52701/07, para. 103, 24 June 2014.
[21] *Todorov and Others* v. *Bulgaria*, nos. 50705/11 and 6 others, para. 189, 13 July 2021.
[22] *Phillips* v. *UK*, no. 41087/98, para. 52, ECHR 2001-VII.
[23] *Walsh* v. *the United Kingdom* (striking out), no. 33744/96, 4 April 2000, *Saccoccia* v. *Austria*, 18 December 2008, no. 69917/01, *Gogitidze and Others* v. *Georgia*, no. 36862/05, 12 May 2015, *Butler* v. *UK* (dec.), 27 June 2002, no. 41661/98, ECHR 2002-VI., Zschüschen v Belgium, no. 23572/07, ECHR 178 (2017).

in the confiscation proceeding is charged with a criminal offence within the meaning of Article 6 (2). Otherwise, higher standards of criminal procedure are not applicable since the ECtHR clearly focuses on the purpose of the proceedings, which, under a non-conviction-based confiscation regime, do not have a deterrent or punitive character for the applicant[24]. In the person is not charged with a criminal offence, a non-conviction-based confiscation model is seen outside the criminal sphere, without the consequent obligation to respect the stricter rules provided by Articles 6 (2) and 6 (3). Primarily, it may concern the presumption of innocence that imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt. In confiscation procedures, ECtHR also pays attention that the Contracting States should not at their discretion classify an offence as disciplinary or, in case of confiscation, as civil proceedings instead of criminal, or to prosecute the author of a "mixed" offence on the civil or disciplinary rather than on the criminal plane. The operation of the fundamental clauses of Articles 6 and 7 should not be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The ECtHR, therefore, has jurisdiction under Article 6 to satisfy itself that the disciplinary does not improperly encroach upon the criminal sphere[25].

The starting point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in *Engel and Others* v. *the Netherlands*.[26] These specific and independent criteria have been developed in order to clarify the concept of 'charged with a criminal offence', namely (a) the national designation of the proceedings, (b) the essential nature of the proceedings, and (c) the nature and severity of the consequences to which the respondent is exposed.[27] Regarding the first of the above criteria, the court numerous times concluded that within the autonomous meaning of Article 6 (2), the confiscation order by itself does not amount to bringing a "criminal charge". Regarding the second criteria, the court expressed that no violation of Article 6 under its criminal heading has been made if the forfeiture proceeding is made independently of any finding of criminal activity or guilt of specific offences, does not involve any allegation of criminal conduct, and is not made ancillary to or dependent on any criminal prosecution or conviction. Regarding the last criteria, the ECtHR regarded the confiscation order as the recovery of assets that did not lawfully belong to the applicant. It is considered a non-

[24] King, *supra* note 5.
[25] *Gestur Jónsson and Ragnar Halldór Hall* v. *Iceland* [GC], nos. 68273/14 and 68271/14, para.76, 22 December 2020.
[26] *Engel and Others* v. *the Netherlands*, 8 June 1976, *paras.* 82-83, Series A no. 22.
[27] *Ibid*.

punitive penalty aimed at deterrence of engaging in organised crime and removing the value of the proceeds from possible future use[28].

In *Gogitidze and Others* v. *Georgia*, the ECtHR examined whether the procedure for forfeiture of a civil servant's alleged wrongfully acquired property as part of domestic anti-corruption measures was arbitrary. The ECtHR reiterated, in the light of its well-established case law, that the forfeiture of property ordered as a result of civil proceedings *in rem*, without involving the determination of a criminal charge, is not punitive but has a preventive and/or compensatory nature and thus cannot give rise to the application of the provision of Article 6 (2). A non-conviction-based confiscation model (without any former conviction of a person needed) seems to fall outside the criminal sphere of Art. 6 (1) and (2) since the ECtHR clearly focuses on the purpose of the proceedings, which, under the non-conviction-based confiscation model, do not have a deterrent or punitive character[29]. The court numerous times, given the nature of the proceedings in question, stated that it is appropriate to examine the facts of the case from the standpoint of the right to a fair hearing under the civil limb of the Article 6 (1) of the Convention.

Below will be discussed the main principles that should be present in civil proceedings to consider the trial is in non-violation of the non-conviction-based confiscation proceedings under the civil limb of the Convention on Human Rights.

3.1.1. Presumption of innocence

The confiscation measure should not be based on a judicial finding that the applicants had derived any advantage from offences of which they had been acquitted, but solely on the basis that, according to domestic law and in the spirit of international standards in the battle against money laundering, those funds should not remain in circulation since they had been found to be illicit and their use - after such provenance had been established - would have been constitutive of an offence. In the circumstances where a confiscation order is being preventive and not punitive, the presumption of innocence cannot be breached by the mere imposition of a confiscation order over the illicit assets[30].

In the case of *Balsamo* v. *San Marino* concerning proceeds from money laundering, the ECtHR also found it legitimate for the relevant domestic authorities to issue confiscation orders

[28] Todorov and Others, *supra* note 21, paras. 288-293.
[29] Gogitidze and Others, *supra* note 23, para. 126.
[30] *Balsamo* v. *San Marino*, nos. 20319/17 and 21414/17, para. 73, 8 October 2019.

based on a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offences, the ECtHR did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1[31].

In the context of the presumption of innocence, it is important to examine the judgment in *Zschüschen* v. *Belgium*. The substance of the case: The Dutch national, Mr C., opened an account at the Belgian bank and paid EUR 75 000 in five instalments. Following a report from the bank, criminal proceedings on money laundering were initiated. Initially, C.'s money was explained by undeclared work without indicating the employer, but then exercised the right to remain silent. C. believed that his right to be regarded as innocent had been infringed, the right to remain silent and the right of defence. The ECHR did not find any infringement of the Convention, as the court concluded that the conviction was certainly not based solely or essentially on the person's silence. The local courts had obtained a convincing set of evidence on the origin of the money (the Netherlands recorded a number of drug-related offences, the absence of other legal sources of income), so C's refusal to explain the origin of the money only confirmed this evidence. However, the court also reiterated that the concept of a fair criminal court would not be compatible with the requirement that the person is obliged to provide an explanation. Silence or lying can also be used as proof or, rather, confirmation of the credibility of other evidence as an auxiliary confirmation. As the confiscation proceedings are not a criminal matter, the applicant does not enjoy the rights under the criminal proceedings that have a higher threshold, such as remaining silent and refusing to justify the origin of the money. The "most likely" acquisition of money from criminal activity should be sufficient to demonstrate in order to shift the burden of proof from the prosecution to the defence. The domestic courts convincingly established a body of circumstantial evidence, and the refusal to provide the requisite explanations about the origin of the money merely corroborated the collected evidence. It is only dictated by common sense and should be regarded as fair and reasonable to give a convincing explanation about the origin of the money[32].

---

[31] *Ibid.*, para. 91.

[32] Zschüschen, *supra* note 23.

3.1.2. Shift of the burden of proof

The principle of presumption of innocence implies that the burden of proof is on the prosecution[33]. In non-conviction-based confiscation, the burden of proof can be shifted from the prosecution to the property owner. The purpose of the shift of the burden of proof should be permissible if it concerns "exceptional" circumstances[34].

In the case, *Telbis and Viziteu* v. *Romania*, the official at issue had committed 291 acts of bribe-taking over an extended period and had caused damage to the State social security budget. The ECtHR took into account the importance of "prevention and eradication of corruption in the public service" in accepting the justification of extended confiscation in the case of an official convicted for taking bribes. The ECtHR noted that the considerable estate acquired by the applicants' families in a rather short period of time was clearly disproportionate to their lawful income, and it had been "reasonable" to expect the applicants – who were presumed to have benefited unduly from the proceeds of his crimes – to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets[35].

Such a conclusion was reiterated in *Grayson and Barnham* v. *the UK*. The ECtHR underlined that although the court was required by law to assume the assets derived from drug trafficking, this assumption could have been rebutted if the applicant had shown that he had acquired the property through legitimate means.[36] In *Butler* v. *the UK*, the ECtHR also pointed out that the Customs authorities who had sought the forfeiture of the applicant's assets had to make out their case before the courts, relying on forensic and circumstantial evidence. The domestic courts should refrain from any automatic reliance on presumptions created in domestic law[37].

More recently, in *Gogitidze and Others*, concerning a confiscation applied in civil proceedings, the ECtHR also found that the civil proceedings *in rem* through which the applicants - one of whom had been directly accused of corruption in a separate set of criminal proceedings, and two other applicants, were presumed, as the accused's family members, to have benefited unduly from the proceeds of his crime - had suffered confiscations of their property, could not be considered to have been arbitrary or to have upset the proportionality test under Article 1 of

[33] *Barberà, Messegué and Jabardo* v. *Spain*, 6 December 1988, para. 77, Series A no. 146, *Telfner* v. *Austria*, no. 33501/96, para. 15, 20 March 2001.
[34] *Silickienė* v. *Lithuania*, no. 20496/02, paras. 67-69, 10 April 2012.
[35] *Telbis and Viziteu* v. *Romania*, no. 47911/15, paras. 77‑80, 26 June 2018.
[36] *Grayson and Barnham* v. *the United Kingdom*, nos. 19955/05 and 15085/06, para. 49, 23 September 2008.
[37] Butler, *supra* note 23.

Protocol No. 1. The ECtHR found that it was reasonable for all three applicants to be required to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets[38].

The ECtHR has specified in his conclusion in *Phillips* v. *the UK* that it was not incompatible with the notion of a fair hearing after it had been found that the applicants had been involved in extensive and lucrative drug dealing, to place the onus on them to give a credible account of their current financial situation[39]. Further on, the ECtHR argued that even though confiscation measures do not have punitive characteristics, the applicant still should have safeguards, which should be taken into account. Lower standards of evidence and the absence of a trial for "criminal conduct" might conflict with the presumption of innocence if not counterbalanced by adequate limitations and procedural safeguards.[40]

Like any other procedures, these judicial procedures should include a public hearing, advance disclosure of the prosecution case, and the opportunity for the applicant to adduce documentary and oral evidence. The domestic law provisions should not confine the rights of the defence within reasonable limits, given the importance of what is at stake[41]. Overwise, the shift of the burden of proof is considered as not incompatible with the requirements of a fair hearing[42].

3.1.3. Adversarial nature

The right to adversarial proceedings means, in principle, the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision[43]. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon.[44] A property owner should have a reasonable opportunity to put his or her case to the responsible authorities to

---

[38] Gogitidze and Others, *supra* note 23, para. 111.
[39] Phillips, *supra* note 22, para. 40.
[40] Testa, *supra* note 2.
[41] Phillips, *supra* note 22, para. 43.
[42] Todorov and Others, *supra* note 21, para. 191, *see also* Butler, supra note 23.
[43] Council of Europe/European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (civil limb),* 2013. Available on: https://rm.coe.int/1680700aaf#:~:text=%E2%80%9C1.,impartial%20tribunal%20established%20by%20law. Accessed May 3, 2022.
[44] *Brandstetter* v. *Austria*, 28 August 1991, para. 67, Series A no. 211.

effectively challenge the measures interfering with the property rights guaranteed. When assessing the proportionality test under Article 1 Protocol 1 in confiscation proceedings, the ECtHR attached importance to the adversarial nature of proceedings, the advance disclosure of the prosecution case, the opportunity for the party to adduce documentary and oral evidence, whether the party can rebut the assumption of the criminal character of the assets and whether an individual assessment of which pieces of property should be confiscated in the light of the facts of the case has been carried.

An individual's procedural rights, such as access to prosecution cases in the investigation proceedings, might be restricted only in exceptional circumstances, and such disadvantage should be adequately counterbalanced[45]. A property owner's opportunity to adduce documentary evidence should not be limited. The desire to save time and expedite the proceedings does not justify disregarding such a fundamental principle as the right to adversarial proceedings[46]. Otherwise, the State might put itself in the position of breaching the procedural rights of the property owner. All in all, the ECtHR assesses whether the applicant was afforded a reasonable opportunity to put his arguments before the domestic courts, regard being had a comprehensive view of the proceedings concerned[47]. Therefore, the confiscation procedure cannot be tainted with manifest arbitrariness and adversarial nature if the applicant has a reasonable opportunity to put forward his case and submit the arguments before the domestic court[48].

On the contrary, in *Rummi* v. *Estonia*, the ECtHR was "unable to see how the property could be confiscated as obtained through crime". The ECtHR considered the confiscation "an arbitrary measure", resulting from the "somewhat incidental seizure of evidence". The ECtHR pointed out that no individual assessment of which pieces of property to confiscate appeared to have been carried out. Moreover, the applicant had no possibility to challenge the opposite side meaningfully and put forward the case[49]. Therefore, the judicial proceedings had been deficient and lead to a violation of Article 6 (1) of the Convention[50].

---

[45] *Adorisio and Others* v. *the Netherlands* (dec.) - 47315/13, 48490/13 and 49016/13, para.73, 9 April 2015.
[46] *Nideröst-Huber* v. *Switzerland*, 18 February 1997, para. 30, Reports of Judgments and Decisions 1997-I.
[47] Council of Europe/European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*, updated on 31 December 2021. Available on: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf. Accessed May 5, 2022.
[48] Gogitidze and others, *supra* note 23, paras. 109–113.
[49] *Rummi* v. *Estonia*, no. 63362/09, para. 83, 15 January 2015.
[50] *Ibid*., paras. 105-109.

3.1.4. Equality of arms

The requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to civil as well as to criminal cases[51]. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party. If one of the parties is placed at a clear disadvantage, it can be considered a breach of this principle. This implies the opportunity for the parties to have knowledge of and comment on all evidence or observations adduced against them[52]. Thus, as a rule, Article 6 (1) ECHR requires that the prosecution authorities disclose to the other party all material evidence in their possession for or against them. Restrictions to that principle are permissible under Article 6 (1) only when strictly necessary in order to safeguard another individual or important public interest[53].

The principle of "equality of arms" is inherent in the broader concept of a fair trial and is closely linked to the adversarial principle discussed above[54]. As it was discussed previously, the burden of proof is reversed in non-conviction-based confiscation. The person who contends that the property has no illicit origin has the duty to indicate evidence regarding the non-conformity. Therefore, in non-conviction-based confiscation proceedings, the opportunity to call witnesses and give evidence of the origin of the funds is vital for the defence. The principle of "equality of arms" is crucial that both parties have equal opportunities to provide an explanation of the origin of the property so that the court can decide regarding the confiscation of the property in question.

3.1.5. Public hearing

The right to a public hearing is an indispensable part of the principle of a fair hearing. As the ECtHR reiterated in the case *Kilin* v. *Russia*, the (non-)violation of the defendant's right to a public hearing vis-à-vis the exclusion of the public and the press does not necessarily correlate with the existence of any actual damage. Thus, even where an applicant would be afforded otherwise an adequate opportunity to put forward a defence with due regard to his right to an oral hearing and the principles of equality of arms and adversarial procedure, the authorities must show that the decision to hold a non-public hearing is strictly required in the circumstances of the case[55].

[51] *Feldbrugge* v. *the Netherlands*, 29 May 1986, para. 44, Series A no. 99.
[52] Brandstetter, *supra* note 44, para. 67, *Matyjek* v. *Poland*, no. 38184/03, para. 65, 24 April 2007.
[53] *Rowe and Davis* v. *the United Kingdom* [GC], no. 28901/95, para. 60, ECHR 2000-II.
[54] *Regner* v. *the Czech Republic* [GC], no. 35289/11, para. 146, 19 September 2017.
[55] *Kilin* v. *Russia*, no. 10271/12, para. 112, 11 May 2021.

Publicity is a guarantee that should, in principle, apply to all judicial litigations, including non-conviction-based confiscations. Even though confiscation proceedings deal with a civil matter, namely the legality of the funds, a sufficient justification to depart from the principle of publicity should be found. By rendering the administration of justice visible, a public hearing contributes to the achievement of the aim of Article 6 (1), namely a fair trial[56]. It is especially important taking into account that the State or State agency is one of the parties to the proceedings, and confiscation leads to material gain for the State. Therefore, only limited exceptions for public hearings can be tolerated. Otherwise, the property owners' rights are not protected against the arbitrariness and administration of justice in secret with no public scrutiny, which might lead to infringement of the right to a fair trial.[57]

3.2. Applicability with Article 1 of Protocol 1

The permanent deprivation of property without compensation affects such rights as the right to own the property, and it is forbidden to deprive property without due process of law. Therefore, the confiscation affects some fundamental rights protected by the Convention, namely Article 1 of Protocol 1 and the safeguards provided for by the Convention and its protocols should be respected.

Article 1 of Protocol No. 1 to the Convention, which guarantees the right to property in substance, comprises three distinct rules. The first one, which is expressed in the first sentence of the first paragraph, lays down the principle of peaceful enjoyment of property in general. In the second sentence of the same paragraph, the second rule covers the deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule[58].

The Convention permits to deprive people of their possessions when it is "in the public interest and subject to the conditions provided for by law and by the general principles of international law." Paragraph two furthermore states that the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control

[56] *Malhous* v. *the Czech Republic* [GC], no. 33071/96, paras. 55-56, 12 July 2001.
[57] *Fazliyski* v. *Bulgaria*, no. 40908/05, para. 69, 16 April 2013.
[58] *Immobiliare Saffi* v. *Italy* [GC], no. 22774/93, para. 44, ECHR 1999-V.

the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties[59]. Hence, the states can impose measures that restrict private property as long as they can justify them on the grounds of public interest and do so by providing a clear legal basis and in accordance with international law.

The ECtHR consistent approach has been that confiscation, even though it does involve deprivation of possessions, nevertheless constitutes control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1[60]. Therefore, it might be concluded that the principles governing the question of justification of confiscation order are substantially the same, involving that the interference needed to be lawful and in the public interest and strike a fair balance between the demands of the general interest and the applicants' rights[61].

3.2.1. Lawfulness of the interference

The principle of lawfulness is the first and most important requirement of Article 1 of Protocol No[62]. 1. The second sentence of the first paragraph authorises a deprivation of "possessions" "subject to the conditions provided for by law", and the second paragraph recognises that States have the right to control the use of the property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention[63]. The existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal basis must have a certain quality, namely, it must be compatible with the rule of law and must provide freedom from or guarantees against arbitrariness[64]. The Court's jurisdiction to verify that domestic law has been correctly interpreted and applied is limited, and it is not its function to take the place of the national courts. Rather, its role is to ensure that the decisions of those courts are not arbitrary or otherwise manifestly unreasonable[65].

---

[59] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms. Available on: https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 9, 2022.

[60] *Air Canada* v. *the United Kingdom*, 5 May 1995, para. 34, Series A no. 316‑A; *Riela and Others* v. *Italy* (dec.), no. 52439/99, 4 September 2001; *Veits* v. *Estonia*, no. 12951/11, para. 70, 15 January 2015; and Sun v. Russia, no. 31004/02, para. 25, 5 February 2009.

[61] see, *mutatis mutandis*, *Denisova and Moiseyeva v. Russia*, no. 16903/03, para. 55, 1 April 2010, *Ünsped Paket Servisi SaN. Ve TiC. A.Ş.* v. *Bulgaria*, no. 3503/08, paras. 39-40, 13 October 2015.

[62] *Vistiņš and Perepjolkins* v. *Latvia* [GC], para. 95; *Béláné Nagy* v. *Hungary* [GC], para. 112.

[63] Guide on Article 1 of Protocol No. 1, *supra* note 47, p. 25.

[64] *East West Alliance Limited* v. *Ukraine*, no. 19336/04, para. 167, 23 January 2014; Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria, *supra* note 61, para. 37; Vistiņš and Perepjolkins, *supra* note 62, para. 96; *Yel and Others* v. *Turkey*, no. 28241/18, para. 89, 13 July 2021.

[65] *Anheuser-Busch Inc*. v. *Portugal* [GC], no. 73049/01, para. 83, ECHR 2007-I.

One of the requirements flowing from the expression "provided for by law" is foreseeability. The ECtHR may find that the requirement of foreseeability is not met if the application or interpretation of legislation has been unexpected, overly broad, or bordering on the arbitrary. For instance, in the case *Gogitidze and Others*, the applicant argued that it was arbitrary to extend retrospectively the scope of the confiscation mechanism to the property that they had acquired prior to the entry into force of the amendment of the Code of Criminal Procedure and the Act on Conflict of Interests and Corruption in the Public Service that allowed the confiscation of the property. The ECtHR reiterated that the "lawfulness" requirement contained in Article of Protocol No. 1 cannot normally be construed as preventing the legislature from controlling the use of property or otherwise interfering with pecuniary rights via new retrospective provisions regulating continuing factual situations or legal relations anew[66].

In conclusion, the principle of lawfulness contains two requirements, there should be a legal basis in domestic law for non-conviction-based confiscation proceedings and applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application[67].

3.2.2. Legitimate aim in the general interest

Any interference by a public authority with the peaceful enjoyment of "possessions" can only be justified if it also serves a legitimate aim in the general interest. For, example, in the case *Gogitidze and Others*, the confiscation measures formed an essential part of a larger legislative package aimed at intensifying the fight against corruption in the public service. The confiscation measure was a twofold aim, compensatory and preventive. The compensatory aspect consisted of the obligation to restore the injured party in civil proceedings to the status that existed prior to the unjust enrichment of the public official in question by returning wrongfully acquired property either to its previous lawful owner or, in the absence of such, to the State. A preventive aim is defined as ensuring the use of the property did not procure an advantage for the applicants to the detriment of the community.[68] It is considered to satisfy the "public interest" test if the confiscation

---

[66] Azienda Agricola Silverfunghi S.a.s. and Others*, supra* note 20*,* para. *104, Arras and Others* v. *Italy*, no. 17972/07, para. 81, 14 February 2012; *Huitson* v. *the United Kingdom* (dec.), no. 50131/12, paras. 31-35, 13 January 2015.

[67] *Lekić* v. *Slovenia* [GC], no. 36480/07, para. 95, 11 December 2018; *Beyeler* v. *Italy* [GC], no. 33202/96, para. 109, ECHR 2000-I; Hentrich v. France, 22 September 1994, para. 42, Series A no. 296-A; *Lithgow and Others* v. *the United Kingdom*, 8 July 1986, para. 110, Series A no. 102; *Ališić and Others* v. *Bosnia and Herzegovina*, *Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC], no. 60642/08, para. 103, ECHR 2014; *Centro Europa 7 S.R.L. and di Stefano* v. *Italy* [GC], no. 38433/09, para. 187, ECHR 2012; *Hutten-Czapska* v. *Poland* [GC], no. 35014/97, para. 163, ECHR 2006-VIII; Vistiņš and Perepjolkins, *supra* note 62, paras. 96-97; *Imeri* v. *Croatia*, no. 77668/14, para. 69, 24 June 2021.

[68] Gogitidze and Others, *supra* note 23, para. 103.

aims to prevent "the illicit use, in a way dangerous to society, of possessions whose lawful origin has not been established".[69] The ECtHR has found a similar observation in *Phillips*, where the confiscation order deterred from engaging in drug trafficking and deprived a person of profits received from drug trafficking.[70] In *Raimondo* v. *Italy*, the ECtHR reiterated that a fair balance should be struck between the means employed for forfeiture of the applicants' assets and the general interest in combatting corruption in the public service[71]. In the latest case, *Todorov and Others* v. *Bulgaria*, regarding the confiscation order, the ECtHR has underlined that the forfeiture of money or assets obtained through illegal activities or paid for with the proceeds of crime is a necessary effective means of combating criminal activities[72]. It can be concluded that ECtHR case law declares that a confiscation order for criminally acquired property operates in the general interest to deter those considering engaging in criminal activities and guarantees that crime does not pay.

3.2.3. Proportionality of a confiscation measure

Article 1 of Protocol No. 1 also requires that any interference be reasonably proportionate to the aim sought to be realised. Even though Article 1 of Protocol No. 1 contains no explicit procedural requirements, judicial proceedings concerning the right to the peaceful enjoyment of one's possessions must also afford the individual a reasonable opportunity of putting their case to the competent authorities to effectively challenge the measures interfering with the rights guaranteed by this provision.[73] The ECtHR in the case law demands a fair balance to be struck between the demands of the general interest and a person's interest in the protection of his right to peaceful enjoyment of his possessions.

In the case *Gogitidze and Others*, the ECtHR recalled previous cases in which it was required to examine, from the standpoint of the proportionality test of Article 1 of Protocol No. 1. The States in these cases contained similar procedures for the forfeiture of property linked to the alleged commission of various serious offences entailing unjust enrichment. In regard to the property presumed to have been acquired either in whole or in part with the proceeds of drug-trafficking crimes or other illicit activities of mafia-type or criminal organisations, the ECtHR did

[69] Sofia Milone, "On the Borders of Criminal Law. A Tentative Assessment of Italian Non-Conviction Based Extended Confiscation", *NJECL 8, no. 2*, 2017, pp. 150-170.
[70] Phillips, *supra* note 22, para. 52.
[71] *Raimondo* v. *Italy*, 22 February 1994, para. 27, Series A no. 281-A.
[72] Todorov and Others, *supra* note 21, para. 186.
[73] *Ibid*, para. 188.

not see any problem in finding the confiscation measures to be proportionate even in the absence of a conviction establishing the guilt of the accused persons. In the examined case law, the ECtHR weighed the benefit obtained through the restriction and the harm caused to the applicants' rights. On the one hand, the ECtHR acknowledged that the confiscation order makes an essential contribution to the fight against organised crime. On the other hand, the ECtHR considered the restriction on the right to property from the procedural angle. In this regard, the judges pointed out that the presumptive mechanism underpinning the application of the confiscation should be based on the evaluation of circumstantial evidence. Looking at both sides of the scale, the ECtHR acknowledged that the restriction imposed should not be an excessive burden and is performed according to the law. The respondent should be able to rebut the presumption of the unlawfulness of the assets before the judicial authorities.[74]

In the case *Raimondo*, the ECtHR emphasised that it is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, particularly drug trafficking and its international connections, this "organisation" has an enormous turnover that is subsequently invested, among other things, in the real property sector. The ECtHR concluded that confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against these organised crime groups, such as the Mafia. The ECtHR considered the measure to be proportionate to the aim pursued[75]. The ECtHR came to similar conclusions in several cases against the United Kingdom, where the proportionality requirement under Article 1 of Protocol No. 1 has not been breached in the forfeiture of proceeds of drug trafficking. The practice of confiscation of property in the UK will be discussed further in the separate Chapter.

In *Balsamo*, the ECtHR also found it legitimate for the relevant domestic authorities to issue confiscation orders based on a preponderance of the evidence that suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order resulted from proceedings *in rem* related to the proceeds of crime derived from severe severance, the ECtHR did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary,

[74] Milone, *supra* note 66.
[75] Raimondo, *supra* note 71, para. 30.

was found to suffice for the proportionality test under Article 1 of Protocol No. 1.[76] In the case of Silickienė, the ECtHR considered in its proportionality analysis that the domestic courts ordering the confiscation had been debarred from relying on mere suspicions and had satisfied themselves that each item to be confiscated from the applicant had been acquired through proceeds of crime. In the same way, in *Veits* v. *Estonia*, in finding the confiscation proportionate, the ECtHR took into account the fact that the national courts rejected with sufficient reasoning the arguments by the applicant's mother and grandmother that the property to be forfeited had not been obtained through crime.[77]

Not always, the ECtHR has found that domestic authorities' judgments regarding confiscation orders have been proportionate. In the case of *Rummi* v. *Estonia*, the ECtHR considered that confiscation order to be disproportionate, as no link has been established between the confiscated property and any criminal activity.[78] In the most recent case from ECtHR, *Todorov and others*, the ECtHR gave a depth analysis for non-conviction-based confiscation, contesting that a link between forfeited assets and alleged crime has to be found; otherwise, the required balance will not be found, and the person concerned had to bear an excessive burden. In the examined case, the connection between the first applicant's criminal conduct and the forfeited assets was in no way evident. The domestic courts did not seek to establish it and had merely referred to the presumption that the assets are assumed to be the proceeds of crime, as no legal source had been established. The courts equally failed to indicate whether the value of the assets to be forfeited equalled the established discrepancy between the income and expenditure of the applicants.[79] The ECtHR refers to its finding that, in the particular circumstances, it would require the national authorities to provide at least some particulars as to the alleged unlawful conduct that has resulted in the acquisition of the assets to be forfeited and to establish some link between those assets and the unlawful conduct.[80]

Unjust enrichment is unjust, and therefore, in principle, the question of proportionality between offence on the one hand and confiscation on the other does not arise. The question is what kind of suspicion is sufficient to consider that unjust enrichment has occurred and, therefore, the confiscation of the property is proportionate. It is important to bear in mind that in the cases decided

[76] Balsamo, *supra* note 30, para. 91.
[77] Veits, *supra* note 60, para. 74.
[78] Rummi, *supra* note 49, paras. 105-109.
[79] Todorov and Others, *supra* note 21, para. 230.
[80] *Ibid*, para. 231.

by the ECtHR, confiscation had always been preceded by criminal proceedings against the owner of the asset (*Saccoccia*: money laundering, the conviction in the US; *Raimondo*: preventive seizure of assets; suspicion of belonging to a mafia-type organisation; *Gogitidze and others*: public authority and suspicious of embezzlement of public money, *Todorov and others*: alleged tax avoidance. *Zschüschen*: a previous conviction in drug trafficking many years prior, *Rummi*: smuggling, *Silickienė*: fraud, *Balsamo*: money laundering, *Veits*: fraud). A question not yet decided by the ECtHR is what the conditions for a non-conviction-based confiscation are to be considered proportional, i.e., without parallel or preceding criminal proceedings[81].

3.2.4. The general principles of international law

To comply with Article 1 Protocol 1, the law should be in compliance with the general principles of international law. In the case *Gogitidze and Others*, the ECtHR observed that common European and even universal legal standards exist regarding the confiscation of property linked to serious criminal offences such as corruption, money laundering, and drug offences, without the prior existence of a criminal conviction.[82] At the same time, the ECtHR observed that non-conviction-based confiscation remains relatively exceptional in international law.[83] Due to a wide range of heterogeneity in the confiscation procedures, International Organizations, such as the FATF, the World Bank, and others, have produced practice guides and recommendations to tackle cross-border crimes, organised group crimes, and money laundering. The EU has harmonised the extended powers of confiscation provisions by laying down a common minimum rule by Directive 2014/42. In the next chapter of this paper, the international conventions and instruments regarding the confiscation of proceeds of crime by the international bodies will be examined.

3.3. The concept of non-conviction-based in international law.

For a long time, organised criminals used their power and intelligence to remove themselves from the crimes they were masterminding, and they were able to mask the criminal origin of their assets. At the international level, the United Nations, the Council of Europe, and the institutions of the European Union have adopted a significant number of instruments to enhance the fight against crime, including organised crime, and to minimise the negative consequences produced by

[81] Robert Esser, "A Civil Asset Recovery Model. The German Perspective and European Human Rights" in *Non-Conviction-Based Confiscation in Europe,* ed. Jon Petter Rui and Ulrich Sieber (Berlin:Duncker & Humblot, 2015), p. 100.
[82] Gogitidze and Others, *supra* note 23, para. 105.
[83] *G.I.E.M. S.R.L. and Others* v. *Italy* ([GC], nos. 1828/06 and 2 others, para. 141, 28 June 2018.

(organised) crime for national economies and society.[84] The global society's answer to the development of organised crime was the revitalisation of rules, making it possible to confiscate the proceeds of crime. Because of the difficulty of proving a link between organised criminals and crime, confiscation rules were "paired" with establishing a new criminal offence, namely money laundering. Instead of proving a link between organised criminals and predicate offences, e.g., drug trafficking, the subject matter of money laundering cases is whether the organised criminals can be linked to the money stemming from such crimes.[85]

3.3.1. International Conventions

Strasbourg Convention proclaimed that one of the "modern and effective methods" in the "fight against serious crime ... consists in depriving criminals of the proceeds from crime"[86]. The Convention called upon the Signatory Parties to adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds[87]. At the same time, the term "confiscation" was defined as:

> a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.[88]

Adopted in 2000, The Palermo Convention, in Article 12, paragraph one, requires the States to adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of proceeds of crime derived from criminal offences or property the value of which corresponds to that of such proceeds. Paragraph eight allows the reverse of the burden of proof requiring the offender to demonstrate the lawful origin of the alleged proceeds of crime or other property liable to confiscation[89]. Similarly, Article 31, paragraph eight of the UNCAC states:

> States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to

[84] Ladislav Hamran, „Confiscation of Proceeds from Crime: a Challenge from Criminal Justice". In: ed. Flora A.N.J. Goudappel, Ernst M.H. Hirsch Ballin, *Democracy and Rule of Law in the European Union*, Hague: T.M.C. Asser Press, 2016, p. 167.
[85] Jon Petter Rui and Ulrich Sieber, *supra* note 8.
[86] Council of Europe, Preamble to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), Strasbourg, 8.XI.1990.
[87] *Ibid*, Article 2.
[88] *Ibid*, Article 1.
[89] UN General Assembly, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 8 January 2001, A/RES/55/25. Available on: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html. Accessed May 5, 2022.

> the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.[90]

Additionally, The Convention states in Article 54 that each State Party may allow confiscation of such property without a criminal conviction in cases where the offender cannot be prosecuted because of death, flight or absence or other appropriate circumstances[91], expressly declaring non-conviction-based confiscation as an appropriate measure to enable confiscation of unlawfully obtained assets.

The Warsaw Convention updated the 1990 Strasbourg Convention and entered into force in 2008. It requires in Article 3 (1) that each Party adopted such legislative and other measures as necessary to enable it to confiscate instrumentalities and proceeds or property, the value of which corresponds to such proceeds and laundered property[92]. The Implementation of the Warsaw Convention is considered a key to successful preventive and repressive measures and to stopping organised crime groups.

International Conventions provisions set out mandatory requirements for states to enact measures within their legal systems to enable the confiscation of unlawfully obtained assets. These Conventions aim to meet the need for a coordinated global response in fighting organised crime and ensure the proper criminalisation of acts of participation in organised crime groups. None of the analysed Conventions foresees confiscation without conviction of the related person and proving that the criminal offence occurred.

3.3.2. International and intergovernmental organisations

A number of international and intergovernmental organisations have recommended non-conviction-based confiscation in their guidebooks and working groups. These guidebooks are not legally binding, but these bodies set the standards and promote effective implementation of legal, regulatory and operational measures for different issues, including combating money laundering.

FATF is perhaps the most influential international organisation in the field of combating money laundering and terrorist financing. FATF is an international policy-making body and sets out a comprehensive and consistent framework of measures that countries should implement to

---

[90] UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422. Available at: https://www.unodc.org/unodc/en/treaties/CAC. Accessed 22 April 2022.

[91] *Ibid*.

[92] Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No. 198, Warsaw, 16.V.2005. Available on: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=198. Accessed May 5, 2022.

combat money laundering and terrorist financing[93]. The UN Security Council strongly urges all Member States to implement the comprehensive, global standards embodied in the FATF 40 Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing.[94] FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse. Recommendation four of the FATF Recommendations further clearly follows the trend implemented in the Conventions. It steers towards the implementation of a non-conviction-based confiscation regime, recommending the countries consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction-based confiscation) or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.[95]

Besides FATF, World Bank issued a handbook with 36 key concepts with guidance's how to fight organised criminal groups; among many other key concepts, the World Bank highlighted that non-conviction-based confiscation could be activated if criminal prosecution becomes unavailable or is unsuccessful, and such a principle should be affirmatively stated in the law. Unavailability can be due to the fact that the violator is dead, has fled the jurisdiction, or enjoys immunity from prosecution. Other factors reasons for unsuccessful criminal prosecution can be that a defendant has been acquitted,[96] or the defendant cannot be prosecuted because there is insufficient evidence to secure a criminal conviction beyond a reasonable doubt or by an intimate conviction.[97] However, the World bank underlines that non-conviction-based confiscation should never be a substitute for criminal prosecution. It will still be necessary to prove that the assets are either the proceeds of crime or the instrumentalities used to commit the crime.[98]

---

[93] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. *The FATF Recommendations*, February 2012, updated March 2022. Available on: https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html. Accessed May 5, 2022.

[94] The UN Security Council in Resolution 1617, Threats to international peace and security caused by terrorist acts. Available on: http://unscr.com/en/resolutions/1617. Accessed May 3, 2022.

[95] FATF, *supra* note 91, p. 12.

[96] Acquittals can occur for any number of reasons: evidence gathered in an unlawful search may be declared inadmissible; a witness may recant; a trial judge may misdirect the jury; a juror may be intimidated into voting not guilty. The lack of sufficient evidence can occur for similar reasons and is often the unfortunate reality of cases involving corruption and organized crime.

[97] Theodore S Greenberg, et al, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, World Bank Publications, 2009, Concept 3. Available on: ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/lulv/detail.action?docID=459488. Accessed May 9, 2022.

[98] *Ibid*., Concept 1.

Economic Crime and Cooperation Division of the Council of Europe issued their own handbook on the use of non-conviction-based seizure and confiscation. From the perspective of compatibility with the Human Rights Convention, the authors concluded that the alignment of the system should be case-specific. However, the handbook particularly stresses the importance of judicial oversight for the non-conviction-based confiscation regime to be effective and fair. [99]

By ECtHR discretion, these legal sources constitute a supranational set of common European and even universal legal standards that can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction. Secondly, the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings *in rem*. Thirdly, confiscation measures may be applied not only to the direct proceeds of crime but also to property, including any incomes and other indirect benefits obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets. Finally, confiscation measures may be applied to persons directly suspected of criminal offences and to any third parties that hold ownership rights without the requisite *bona fide* with a view to disguising their wrongful role in amassing the wealth in question.[100]

International conventions and organisations give broad authority to adopt measures to fight organised criminal groups, confiscate the proceeds, and enable confiscation of unlawfully obtained assets. All organisations equally stress the importance of confiscation in fighting organised crime with an aim to deter criminal activity. However, none of the above documents provides detailed information on what form of non-conviction-based confiscation procedure is appropriate, and it is up to the domestic authorities to implement such policies.

3.3.3. European Union Law

The development of a confiscation regime in the Member States of the EU has been encouraged through existing cooperation mechanisms and new legal instruments. The objectives of the EU are

[99] Council of Europe, Economic Crime and Cooperation Division, Action against Crime Department, Directorate General Human Rights and Rule of Law, *The Use of Non-conviction-based Seizure and Confiscation.* Available on: https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3. Accessed April 22, 2022.

[100] Gogitidze and Others, *supra* note 23, para. 105.

not necessarily different from those pursued by other international organisations, such as the United Nations or the Council of Europe. The EU, however, due to the type of binding instruments that it can adopt, has the potential to take a step further compared to a traditional international setting; for this reason, it has adopted several legal instruments, in some cases re-stating the obligations provided by international treaties, in other cases going beyond them[101].

One of the first such instruments was Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. In the preamble, it suggests that an examination should be made of the possible need for an instrument that, taking into account best practices in the Member States and with due respect for fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime[102]. It is crucial to underline that the Decision 2005/212/JHA primarily have put an obligation on the Member States to confiscate the convicted person's assets[103]. Later, the legal text of the Framework Decision 2005/212/JHA, which was the base of national provisions on extended confiscation, was replaced, in the European order, by the Directive 2014/42/EU. The Directive has laid down minimum rules for the Directive's objective to facilitate confiscation of property in criminal matters. The Directive 2014/42 preamble 21 states that confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct[104]. The Directive 2014/42 introduces the norm that it is sufficient for the court to consider the balance of probabilities or reasonably presume that it is substantially more probable that the property in question has been obtained from criminal conduct than from other activities. However, the Directive does not clarify to what extent a reversal of the burden of proof is allowed, what offences can be taken into consideration to determine the amount of confiscated property, or what criteria can be used to prove the link of certain assets with previous criminal conduct[105]. The scope of application of such confiscation has been limited in the Directive 2014/42

---

[101] Borgers, *supra* note 19.
[102] Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, OJ L 68, 15.3.2005, p. 49–51.Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005F0212. Accessed May 9, 2022.
[103] Flaviu Ciopec, "Extended Confiscation. Repression and beyond", *Journal of Eastern-European Criminal Law 2016*, no. 2, 2016, pp. 98-104.
[104] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, recital 15. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0042. Accessed 17 February 2022
[105] Simonato, *supra* note 4.

to the cases in which a final conviction could not be obtained as a result, *inter alia*, of illness or flight of the suspected or accused person[106]. Nevertheless, the Directive does not prevent the Member States from providing more extensive powers in their national law to law enforcement or judicial authorities in order to fight organised criminal crimes[107].

It is worth mentioning that the Directive introduces a minimum level of procedural safeguards that must be implemented at the national level, too. These procedural safeguards basically consist of the obligation to communicate the order with its underlying reasons as well as the possibility of a judicial review[108].

It should be noted that the Special Committee on Organized Crime, Corruption and Money Laundering of the European Parliament, in its comprehensive report of 10 June 2013, called on the Member States, on the basis of the most advanced national legislation, to introduce models of non-conviction based confiscation, in those cases where, based on the available evidence and subject to the decision of a court, it can be established that the assets in question result from criminal activities or are used to carry out criminal activities.[109] Eventually, the initial scope of the draft directive was reduced, and the final Directive 2014/42 provisions mirror the provisions of the UNCAC that were previously discussed. Such limitations were considered to be necessary in order to meet the requirement of proportionality; the proposal has not introduced harmonisation of non-conviction-based confiscation in all Member States. [110]

It is important to note that the ECJ has scrutinised the Directive 2014/42. The ECJ concluded that non-conviction-based confiscation does not fall within the scope of EU regulations as these proceedings are not 'in relation to a criminal offence, and their issue does not depend upon a criminal conviction.[111] The ECJ has also come to a negative answer regarding does Directive 2014/42 precludes the possibility for Member State to implement a confiscation regime, where confiscation does not depend on a final criminal conviction.[112] In that sense allowing for the

[106] Directive 2014/42/EU, *supra* note 104, article 4.
[107] Simonato, *supra* note 17.
[108] Directive 2014/42/EU, *supra* note 104, article 8.
[109] European Parliament, Special Committee on Organized Crime, *Corruption and Money Laundering: Draft report on organized crime, corruption and money laundering: recommendations on action initiatives to be taken 2009–2014*, 2013/2107 (INI), 10 June 2013.
[110] European Commission, *Proposal for a directive of the European parliament and of the council on the freezing and confiscation of proceeds of crime in the European Union*, 12.3.2012, COM (2012) 85 final. Available on: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:EN:PDF. Accessed April 22. 2022.
[111] Judgment of the Court (Third Chamber) of 19 March 2020, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v BP and Others*, C-234/18, ECLI:EU: C:2019:920, para. 54.
[112] *Ibid*, para. 59.

Member states to implement such non-conviction-based confiscation regimes as it considers appropriate. The ECJ noted, first, that, to determine whether a criminal offence is liable to give rise to economic benefit, Member States may take into account *the modus operandi*, for example, whether the offence was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. Secondly, the national court must be satisfied based on the circumstances of the case, including the specific facts and available evidence that the property is derived from criminal conduct. To that end, that court may take account of the fact that the value of the property in question is disproportionate to the lawful income of the convicted person.[113] Again, the ECJ confirmed that Directive 2014/42/EU in Article 5 (1) states three cumulative conditions that should be met to allow for the purpose of the confiscation of property. First, the person to whom the property belongs must be convicted of a 'criminal offence'. Secondly, the criminal offence of which the person has been convicted must be liable to give rise, directly or indirectly, to economic benefit. Thirdly, the court must, in any event, be satisfied, on the basis of the circumstances of the case, including the specific facts and available evidence, that the property in question is derived from criminal conduct.[114]

Most Member States' non-conviction-based confiscation regimes go beyond the minimum harmonisation requirements set out in the Directive 2014/42/EU but vary considerably in their scope. Analysis by the European Commission of implementing this Directive noted that most EU Member States have more far-reaching systems[115]. The model of non-conviction-based confiscation in national criminal proceedings has been implemented by a few members of the Convention on Human Rights: Bulgaria, Italy, Ireland, the UK and, since 2019, Latvia.[116] In other countries, non-conviction-based confiscation raised severe concerns about the necessity and shared understanding of justice[117].

It might be concluded that at the international or European level, the instruments contain provisions that imply certain limits to confiscation measures and set a minimum level of safeguards for convicted persons, defendants, or property owners. International institutions and EU legislators

---

[113] Court of Justice of the European Union, a judgment of the Court (Third Chamber) of 21 October 2021, *Bulgaria v DR*, C-845/19, and TS, C-863/19, ECLI:EU: C:2021:864.
[114] *Ibid.,* paras. 59 - 67.
[115] European Commission, *Report from the Commission to the European Parliament and the Council*, 2.6.2020 COM (2020) 217 final. Available on ec.europa.eu/home-affairs/system/files/2020-06/20200602_com-2020-217-commission-report_en.pdf. Accessed April 19, 2022.
[116] Council of Europe, *supra* note 99.
[117] Simonato, *supra* note 17.

give a wide margin of appreciation to the national level authorities in fostering the effectiveness of measures in fighting organised crime[118].

[118] *Ibid*.

4. PRACTICE IN OTHER NATIONAL COURTS REGARDING NON-CONVICTION-BASED CONFISCATION

This chapter aims to discuss how the regime of non-conviction-based confiscation works in the UK and Italy. These two countries have an extensive experience of property confiscation without the person's conviction. Both these countries went beyond the guidelines of intergovernmental bodies, and the laws are country-specific, well beyond the international Conventions and minimum requirements of EU Law. Also, cases regarding confiscation orders from these two countries have been extensively scrutinised through ECtHR. It is essential to look at how other countries binding by the same Conventions and high standards of protection of Human Rights managed to implement non-conviction-based confiscation, notwithstanding the complicity in implementation and increased risk of human rights violation as discussed previously.

4.1. Practice in the UK

The UK has a long-standing legislation case-law of civil recovery or non-conviction-based confiscation as defined in this paper, which has been gone through extended court review.[119] Non-conviction-based confiscation legislation came into force in the United Kingdom through the Proceeds of Crime Act 2002. It has been said that the non-conviction-based part of POCA was the most innovative but, at the same time, the most controversial.[120] POCA contain an alternative approach that uses civil processes to target criminal assets. This follow-the-money approach allows for assets to be seized in the absence of criminal conviction and using the civil standard of proof. Civil recovery is designed to enable the state to remove from circulation the proceeds of crime where criminal prosecution is not possible or has failed rather than to determine or punish for any particular offence. Proceedings under Part 5 of POCA attach to property that has been tainted by association with or derived from prior criminal conduct[121]. UK's Supreme Court in *SOCA* v. *Gale* endorsed that these proceedings are considered to be seen as civil and criminal procedural protections are not applied. Civil recovery enables the state to remove the proceeds of crime from

[119] Home office, Serious Crime Bill. Fact sheet: Overview of the Proceeds of Crime Act 2002. Available on: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/317904/Fact_Sheet_-_Overview_of_POCA__2_.pdf#page46. Accessed February 3, 2022.

[120] Alan Bacarese and Gavin Sellar, "Civil Asset Forfeiture in Practice" in *Non-Conviction-Based Confiscation in Europe,* ed. Jon Petter Rui and Ulrich Sieber (Berlin:Duncker & Humblot, 2015), p. 213.

[121] *Gale* v. *SOCA,* 2011, [2011] UKSC 49, para. 123. Available on: Westlaw UK database.

circulation where criminal prosecution is impossible or failed rather than determining or punishing any particular offence.[122]

Law enforcement agencies[123] can sue for the recovery of "recoverable property", defined as "property obtained through unlawful conduct."[124] The law enforcement claimant doesn't need to show that the unlawful conduct was of a particular kind if it is shown that the property was obtained through the conduct of one of many kinds, each of which would have been unlawful conduct.[125] This was the concern in *Director of the Assets Recovery Agency* v. *Green*. In *Green*, the ARA sought recovery of property, inviting the court to infer that it was the proceeds of crime on the grounds that the defendant could point to no readily identifiable income[126]. The judge, Mr Justice Sullivan, disagreed. He held, in paragraph 25, that:

> The Act deliberately steered a careful middle course between, at the one extreme, requiring the Director to prove (on the balance of probabilities) the commission of a specific criminal offence or offences by a particular individual or individuals and, at the other, being able to make a wholly unparticularised allegation of "unlawful conduct" and in effect require a respondent to justify his lifestyle[127].

Green confirmed that, although the Part Five claimant need not specifically plead and justify allegations of specific criminal conduct, no inference could be drawn solely from the defendant being unable to demonstrate the provenance of the property held or used to fund his lifestyle.

In some cases, the court in the UK draws inferences from the primary facts of the issue so that a case may be determined based on an "irresistible inference" that the property in question could only have been derived from the crime or, to put it another way, no other inference can be drawn relatively from the primary facts. It is the object and purpose of the law enforcement agency to show that property could not have another origin except criminally obtained. Only when such predominance of probability has been received, the burden of proof should be transferred to the

---

[122] *Ibid*.

[123] Initially only Assets Recovery Agency, subsequently widened to a number of agencies, the most well-known being the National Crime Agency (NCA).

[124] UK, Proceeds of Crime Act 2002, section 304 (1). Available on: https://www.legislation.gov.uk/ukpga/2002/29/section/304#:~:text=304%20Property%20obtained%20through%20unlawful%20conduct&text=(1)Property%20obtained%20through%20unlawful,hands%20it%20may%20be%20followed. Accessed May 3, 2022.

[125] UK, Proceeds of Crime Act 2002, section 242 (2) (b). Available on: https://www.legislation.gov.uk/ukpga/2002/29/section/242#:~:text=242%E2%80%9CProperty%20obtained%20through%20unlawful%20conduct%E2%80%9D&text=(1)A%20person%20obtains%20property,in%20return%20for%20the%20conduct. Accessed May 3, 2022.

[126] *Director of the Assets Recovery Agency* v. *Green*, [2005] EWHC 3168 (Admin), para. 1.Available on: Westlaw UK database.

[127] *Ibid*., para 25.

respondent, who should provide evidence of the legal origin of the property. Additionally, the UK non-conviction-based confiscation does not impose that the law enforcement must show that the unlawful conduct was of a particular kind if it is shown that the property was obtained through the conduct of one of many types, each of which would have been unlawful. It is not sufficient for the law enforcement agency to show that a respondent had no identifiable lawful income to warrant his holding of the property in question. An untruthful explanation or a failure to explain may add strength to the case for civil recovery. However, it cannot be the basis to consider the property illegally obtained.[128] In the UK, it should be concluded that if the acquisition of assets cannot be linked to identifiable criminal conduct, whether the subject of a criminal charge or not, it should be ignored to determine a defendant's benefit. Otherwise, the benefit will continue to be determined on a vague and unsubstantiated basis, with the link between the acquisition of assets and criminal conduct broken.[129]

4.2. Practice in Italy

Italy is of particular interest due to the notoriety of the Italian mafia worldwide. Mainly because of the mafia problem, Italian non-conviction-based confiscation laws predate the adoption of similar legislation by other European countries by two or more decades.[130] Italy stands out for a peculiar form of "confiscation" called "preventive confiscation"[131]. It is a type of confiscation that shares some similarities with the civil forfeiture of common law and retains features of its own, which makes it a unique instrument within the European legal landscape.[132] This paper will briefly describe the Italian "preventive non-criminal confiscation" system within the more extensive array of confiscation measures.

With a view to tightening the fight against the mafia, the Italian government introduced a bill in 1982[133] to impose restrictive measures on individuals who were suspected of being part of a mafia association. In Italy, it became evident that tackling the criminals' assets is more effective

[128] *Director of Assets Recovery Agency* v. *Szepietowski,* [2007] EWCA Civ 766. para. 26. Available on: Westlaw UK database. *See also Director of Assets Recovery Agency* v. *Olupitan*, [2008] EWCA Civ 104, para. 16. Available on: Westlaw UK database.
[129] Kwan and Fisher, *supra* note 6.
[130] Paul Kenneth and Mwirigi Kinyua, "Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction", *New Journal of European Criminal Law 7*, no. 3 (2016): 381-[ii].
[131] Panzavolta, *supra* note 10.
[132]Testa, *supra* note 2.
[133]*Ibid*.

than temporarily affecting their liberty. Shifting the focus from the criminals to their assets was necessary for an effective fight with the Italian Mafia. In 2011, a consolidation of the existing provisions was made, and a new act received the name "Anti-mafia code" (A.M.C.). This led to the introduction of non-conviction-based confiscation in the Italian legal system, which allows confiscation of a significant amount of highly valuable assets every year. Under such a bill, besides confiscation of the property, Mafia suspects could be placed under surveillance, forced not to enter certain areas of the country or even live in a confined part of the country, thus being restricted in their personal liberty and/or freedom of movement. These were "preventive" measures in that they were issued to prevent the commission of crimes (*praeter delictum* or *ante delictum*) without going through criminal proceedings. The constitutionality of such measures had always been in question, but, despite general criticism, the measures survived several challenges before the Constitutional Court and ECtHR[134].

In the Italian "preventive" proceedings, one of the two conditions should be met to initiate the confiscation procedure. The asset owner should have a status of suspected, which implies a considerable probability of guilt. The judge must ascertain the existence of sufficient clues in one of the crimes. The status of "suspected" implies (first condition) the considerable probability of guilt. In the Italian "preventive" proceedings, criminal offences must be established on a balance of probabilities standard of proof, as the judge must ascertain the existence of "sufficient clues" of one of the crimes. Criminal lifestyle and criminal relationships, previous convictions, the information provided by cooperative defendants, interceptions and documents from criminal proceedings and trials may all constitute a reasonable ground for the application of the preventive measures. The second condition is that the indicted person has been acquitted because he was not found guilty "beyond any reasonable doubt," or the proceedings have been terminated because the defendant has died, or the statute of limitations has been applied[135].

It is crucial to mention that it is not just the link of the property with the crime that matters in the anti-Mafia Act in Italy; there must also be a link of the property with a suspect or dangerous person. In other words, even if clear evidence were available that a crime had been committed and that certain property was derived from it, it would still be necessary to identify a suspect at least roughly. Besides establishing a direct link between the assets and the alleged crime, it is also

[134] Michele Panzavolta and Roberto Flor, "A Necessary Evil. The Italian "Non-Criminal System*"* in *Non-Conviction-Based Confiscation in Europe,* ed. Jon Petter Rui and Ulrich Sieber (Berlin:Duncker & Humblot, 2015, p. 119.
[135] *Ibid*., p. 138.

possible to forfeit property that is disproportionate to the individual's income and whose provenance the individual cannot justify. The defendant's burden arises only when the prosecution has proven that the property is disproportionate to the individual's lifestyle or has an illicit origin. Therefore, again it is only when the prosecution can successfully demonstrate the disproportionality of the individual's income or illicit origin of the funds that the targeted individual is required to offer evidence to the contrary[136].

The Italian system of financial preventive measures has been challenged before the ECtHR on the grounds of a violation of Article 6 and Article 1 Protocol 1[137]. ECtHR has been tolerant with regard to the Italian system of "non-criminal" confiscation. In assessing whether financial preventive measures are in compliance with fundamental rights, the ECtHR has primarily answered in the affirmative.[138] In particular, the reversal of the burden of proof (and the possible violation of the presumption of innocence) and the interference with property rights have been repeatedly considered consistent with the article 6 of the European Convention on Human Rights (right to a fair trial) and to the Article 1 of the First Protocol of the same Convention (protection of property).[139] The ECtHR specifically underlined in a series of cases against Italy that the forfeiture of assets was proportionate and justified the impugned measures[140]. The ECtHR has agreed that it is sufficient to issue a confiscation order if, in examining the evidence, the national courts showed that the applicants are associated with the Mafia and that there had been a considerable discrepancy between their financial resources and their income. Therefore the Italian non-conviction-based system has been declared consistent with the presumption of innocence and fundamental property rights by the ECtHR.

[136]Ciopec, *supra* note 103.
[137] Panzavolta and Flor, *supra* note 131, p. 142.
[138] Simonato, *supra* note 17.
[139] Testa, *supra* note 2.
[140]*Arcuri and Others* v. *Italy* (dec.), no. 52024/99, ECHR 2001-VII; *Riela and Others* v. *Italy* (dec.), no. 52439/99, 4 September 2001; *Perre and Others* v. *Italy* (dec.), no. 1905/05, 12 April 2007, *see also* Todorov and Others, *supra* note 68, para. 190.

5. Challenges of criminally acquired property confiscation in Latvia

The framework of non-conviction-based confiscation in Latvia will be discussed in four subchapters. First, A brief description of non-conviction-based confiscation in Latvia will be provided. It will include the conditions under which the confiscation might be made and several significant procedural requirements that are important to stress in discussing compatibility with the case law ECtHR. The second part will consist of the national practitioners' and scholars' opinions who question the compatibility of non-conviction-based confiscation with ECHR. The third part will consist of analysing the confiscation procedure in Latvia and its compatibility with article 6 of the European Convention on Human Rights. The last part will give an overview of the compatibility of Article 1 Protocol 1 with the non-conviction-based confiscation implemented in Latvia. Overall, it will provide insight into how current legislation in Latvia regarding the non-conviction-based confiscation correspond with principles enshrined in European Convention on Human Rights.

5.1. Criminal Procedure Law in Latvia.

The non-conviction-based Confiscation of Property in Latvia, or "special confiscation or property" (mantas īpašās konfiskācija), was introduced in the current version on August 1, 2017, with amendments to the Criminal Law. Further amendments to the Criminal Procedure Law were made in 2019 to implement additional procedural conditions. The Republic of Latvia introduced the process of confiscation in Criminal law Sections $70.^{10}$ – $70.^{14}$ and Criminal Procedure law Section 124, paragraph six (predominance of evidence), Section 125, paragraph three (money laundering activity as a legal laundering presumption), Section 126, paragraph 3^{1} (transfer of the burden of proof), Sections 626-631 under Chapter 59 (proceedings regarding criminally acquired property). These amendments in the Criminal Law and Criminal procedure Act of Latvia have been made with the purpose of combating the flow of illegal funds through the Latvian banking system by non-resident clients[141]. In 2018-2019, the "capital repair" of the banking sector in Latvia intensified the fight against money laundering and the seizure of more than a billion euros in financial resources[142]. Most criminal property confiscation cases are dealt with in accordance with Chapter

---

[141] Antonio Greco (Transparency International Latvia), "Money Laundering in Latvia and the Baltics Recent Developments, Ongoing Risks, and Future Challenges". Available on: https://delna.lv/en/2021/08/03/transparency-international-latvia-publishes-a-new-report-on-money-laundering-in-latvia-and-the-baltics. Accessed May 3, 2022.

[142] Cabinet of Ministers. The overhaul of Latvia's financial sector supervision has been a resounding success – we have re-established the reputation of our country and created a strong and robust anti-money laundering system.

59 of the Criminal Procedure Law, which allows not to call a person for prosecution and initiate the proceedings against the criminally acquired property.

Amendments in Sections $70.^{10}$ – $70.^{14}$ of the Criminal law added the concept of a special confiscation of property, which corresponds to the need to comply with the Conventions signed by Latvia and the Directive 2014/42 discussed previously. Consequently, Latvia introduced confiscation of a criminally acquired property or object of a criminal offence, or the property connected to a criminal offence to the State ownership without compensation, not based on the person's conviction or as a punishment, but by the link with the criminal offence[143].

According to these amendments, confiscation of a criminally acquired property might happen under one of four conditions:

a) property that has come into the ownership or possession of a person as a direct or indirect result of a criminal offence[144].

b) the value of the property is not commensurate with the lawful income of the person. The person does not prove that the property has been acquired lawfully, property belonging to a person who: 1) has committed a crime which by its nature is directed towards the obtaining of material or other benefits 2) is a member of an organised group or supports it 3) is related to terrorism[145].

c) A property that is at the disposal of such person who maintains permanent family, economic or other kinds of property relationships with the person before[146].

d) proceeds of crime which the person has obtained from the disposal of criminally acquired property[147].

The author considers that these amendments correspond to the Directive's requirements and conform to the case law of ECtHR. Similar provisions for the confiscation have been declared to comply with Article 6 and Article 1 Protocol 1 by ECtHR in cases against the other Contracting

---

Available on: https://www.mk.gov.lv/en/article/karins-overhaul-latvias-financial-sector-supervision-has-been-resounding-success-we-have-re-established-reputation-our-country-and-created-strong-and-robust-anti-money-laundering-system. Accessed May 3, 2022.

[143] Latvijas Republikas Kriminallikums (The Criminal Law of the Republic of Latvia) (17 June 1998), section $70.^{10}$. Available on: https://likumi.lv/ta/id/88966-kriminallikums. Accessed February 3, 2022.

[144] *Ibid*, section $70.^{11}$, para. 1.

[145] *Ibid*, section $70.^{11}$, para. 2.

[146] *Ibid*, section $70.^{11}$, para. 3.

[147] *Ibid*, section $70.^{11}$, para. 4.

States[148]. All conditions mentioned above require a criminal offence to be established to deprive the property.

Further Latvian legislators implemented the amendments on November 21, 2019, in Criminal Procedure law, which implement preconditions to consider the property criminally acquired without establishing the predicate offence. Section 124, paragraph six states that in criminal proceedings and proceedings regarding criminally acquired property, the conditions included in an object of evidence in relation to the criminal origin of the property shall be considered proven if there are grounds to recognise during the course of proving that a property is, most likely, of criminal rather than lawful origin[149]. The Law provides for the possibility of confiscating criminally acquired property based on Section 125, paragraph three of the Criminal procedure law, which states that it shall be considered proof that the property with which laundering activities have been performed is criminally acquired if a person involved in criminal proceedings is not able to believably explain the legality of the origin of the relevant property and the totality of evidence provides grounds for the person directing the proceedings to assume that a property is, most likely, of criminal origin[150].

Laundering activities are not defined in the Criminal Law or Criminal Procedure Law. The definition of money laundering can be found in Section 5 of the Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing:

1) the conversion of proceeds of crime into other valuables, change of their location or ownership while being aware that these funds are the proceeds of crime, and if such actions have been carried out for the purpose of concealing or disguising the illicit origin of funds or assisting another person who is involved in committing a criminal offence in the evasion of legal liability.
2) the concealment or disguise of the true nature, origin, location, disposition, movement, and ownership of the proceeds of crime while being aware that these funds are the proceeds of crime.

[148]*For example* Raimondo, *supra* note 71, para. 30.
[149] Latvijas Republikas Kriminālprocesa likums (The Criminal Procedure Law of the Republic of Latvia) (21 April 2005), section 124., para. 6. Available on: https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law. Accessed February 3, 2022.
[150] *Ibid*., section 123, para. 3.

3) the acquisition, possession, use, or disposal of the proceeds of crime of another person while being aware that these funds are the proceeds of crime;[151]

Additionally, Section 126, paragraph three has been added that if a person involved in criminal proceedings claims that the property is not considered criminally obtained, the obligation to prove the legality of the property in question shall lie with that person[152].

By implementing these amendments in the Criminal Procedure Law, the legislator allowed the new form confiscation of property, not as a direct or indirect result of a criminal offence or whether the property has been gained as a result of a crime, but merely on the conduct of suspicious activity and assumption that a property is, most likely, of criminal origin. With these amendments to the Criminal Law and Criminal Procedure Law, the legislator has also lowered the standard of proof from “beyond reasonable doubt” to “most likely” criminal origin or the predominance of the evidence for the confiscation procedure.

According to Section 356, property may be recognised as criminally acquired by a court decision in accordance with the judicial procedure laid down in Chapter 59 (Sections 626 - 631) of the Criminal procedure Law[153]. Accordingly, criminal proceedings of Chapter 59 are separate rules concerning criminal property, to which the general procedures for the examination of cases are not applicable and do not provide for the possibility to rule on the guilt of a person, thus excluding the possibility of applying a presumption of innocence the application of which presupposes that the person has committed the crime.

According to Section 626, it is sufficient to initiate legal proceedings that the totality of evidence provides grounds to believe that the property that has been removed or seized is criminally acquired or related to a criminal offence. The second condition, due to objective reasons, the transferal of the criminal case to court is not possible in the near future (in a reasonable term), or such transferal may cause substantial unjustified expenses.[154]

It is important to point out several crucial aspects of the court proceedings under Chapter 59 of the Criminal Procedure Law. According to Section 627, paragraph four, the case materials in

---

[151] Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma un proliferācijas finansēšanas novēršanas likums (Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing) (17 July 2008), section 5. Available on: https://likumi.lv/ta/en/en/id/178987. Accessed April 22, 2022.

[152] Latvijas Republikas Kriminālprocesa likums (The Criminal Procedure Law of the Republic of Latvia), *supra* note 149, section 126, para. 3.

[153]*Ibid*., section 356.

[154] *Ibid*, section 626.

proceedings regarding criminally acquired property shall be an investigative secret. The person directing the proceedings, a prosecutor and a court examining the case may only get acquainted with the case[155]. Section 628 states that only the persons mentioned above (defined in Section 627 of the Criminal Procedure) become acquainted with the case materials with the permission of the person directing the proceedings and, in the amount specified thereby[156]. And finally, according to Section 629, the person directing the proceedings, a prosecutor, other summoned and arrived persons, their representatives or defence counsels shall be heard in a closed court hearing[157]. It should be stressed that the procedure does not give the possibility to call witnesses; the court shall decide after hearing the participants' explanations in the case only. The law imposes a duty for a person involved in proceedings who contends that the property is criminally acquired and has the duty to indicate evidence regarding the non-conformity with the reality of such fact[158].

The Ministry of Justice's “Manual for Action with Property in Criminal Procedure” summarised and laid down a six-step principle for proving the criminal origin of property:

1) Property has been identified, but there must be no known or proven criminal offence from which the proceeds of the crime have occurred.
2) There is a suspicion of money laundering on the basis of money laundering activities that are included in internationally recognised money laundering typologies.
3) The suspect's explanations regarding the origin of the property are heard. If the origin of the property is legitimate, it should not be difficult for the owner to prove it.
4) The explanations must be clear and credible, and verifiable.
5) The person directing the proceedings must check the explanations.
6) The Court must, in the light of all the evidence and the above steps, establish that the property is most likely to be criminally obtained, as there is no other reliable explanation of the origin of the property. [159]

[155] *Ibid*, section 627, para. 4.
[156] *Ibid*, section 628.
[157] *Ibid*, section 629.
[158] *Ibid*, section 126, para. 3.
[159] Ministry of Justice, Manual for Action with Property in Criminal Procedure. Available on: https://www.tm.gov.lv/lv/jaunums/izstradata-rokasgramata-ricibai-ar-mantu-kriminalprocesa-0?utm_source=https%3A%2F%2Fwww.google.com%2F. Accessed May 5, 2022.

Therefore, Latvian non-conviction-based confiscation puts forward suspicion of money laundering based on the typologies as the evidence that the property is criminally obtained. Otherwise, the property may be recognised as criminally acquired by a court ruling[160] and confiscate to the State ownership without compensation.[161]

5.2. Opinion of legal scholars

Many Latvian scholars argued that such legislation initiative does not correspond to other EU Member States' legislation norms and can be considered a brief interpretation of Directive 2014/42/EU and Warsaw Convention. Legal practitioners also question compatibility with the Convention on Human Rights.

Egon's Rusanovs, in his thorough analysis of cases from the ECtHR, made an in-depth review of court principles that should be in place for non-conviction-based confiscation.[162] His opinion is that when deciding on the property's criminal origin and the property's deprivation, a lower measure of proof, such as the predominance of probabilities, might be applied, provided that all parties in the process had adequate procedural guarantees. He also argued that Latvia is inconsistent in the choice of the model for confiscation of criminally obtained property. He concluded that current legislation gives vast powers to confiscate the property and replenish the government budget with seized funds.[163]

Gunārs Kūtris, in his article "Possibilities and grounds for confiscation of crime proceeds," argued that more discussion is needed regarding the implementation of reverse burden of proof and that the link between the property and criminal conduct still should be established.[164] He further argued that it is not possible that a total of evidence may provide grounds to assume that a property is of criminal origin if the predicate offence is unknown. Without knowledge of the offence and

[160] Latvijas Republikas Kriminālprocesa likums (The Criminal Procedure Law of the Republic of Latvia), *supra* note 149, section 356.
[161] Latvijas Republikas Kriminallikums (The Criminal Law of the Republic of Latvia), *supra* note 143, section 70.[10].
[162] Egons Rusanovs, *ECT atziņas: mantisko jautājumu risināšana kriminālprocesā. IV.Aizsardzība pret patvaļu mantas konfiskācijas procesā (ECtHR disputes: Tackling human issues in criminal proceedings. IV. Protection against arbitrariness in seizure of property*), Jurista Vārds, Domnīca/Eseja, 3. September. Available on: https://juristavards.lv/eseja/279439-ect-atzinas-mantisko-jautajumu-risinasana-kriminalprocesa-iv-aizsardziba-pret-patvalu-mantas-konfisk/. Accessed May 4, 2022.
[163] Egons Rusanovs, *Procesa par noziedzīgi iegūtu mantu regulējums Kriminālprocesalikumā (Regulation of the criminal property process in Criminal proceedings)*, Jurista Vārds/nr. 1 (904), 5 January 2016. Available on: https://juristavards.lv/doc/267842-procesa-par-noziedzigi-iegutu-mantu-regulejums-kriminalprocesa-likuma/. Accessed May 5, 2022.
[164] Gunārs Kūtris, *supra* note 7.

applying the shift of the burden of proof, a person involved in criminal proceedings cannot contest the investigator's evidence and believably explain the legality of the origin of the relevant property[165]. In his opinion, the current approach contradicts the legal doctrine and current practice in criminal cases, which say that it is impossible to perform the legalisation activity without identification of the potential criminal origin of the property. He further argued that a judgment cannot be considered logical and just by which a person would be found guilty of money laundering without identifying the crime or criminal misconduct[166]. K. Strada-Rozenberga agrees that the assumptions which give the person an obligation to prove the legitimate nature of the property origin are not justified because, according to the definition of the related property contained in the Criminal Law, it does not require criminal origin; it is not sufficient that the origin of property is unknown. She believes that this should be avoided by defining a specific level of assurance of the property's criminal origin, which would create the State's right to impose an obligation on the person to prove the lawful origin of the property.[167]

The General Prosecutor of Latvia, Juris Stukāns, expresses the opposite opinion. In his doctoral thesis in 2019, he contested that the regulation of criminally acquired property confiscation in Latvian is progressive and that Chapter 59 of the Criminal Procedure law framework is effective in the fight against organised crime. He further argued that the amendments previously discussed are consistent with the principles enshrined in international instruments and are legitimate and consistent with the European Convention on Human Rights[168]. He argues that the person can easily demonstrate the legitimate origin of the property if it is not illicit[169].

The aim of the last part of the paper is dedicated to the compatibility of the Latvian legislation regarding a criminally acquired property with the Latvian international obligations,

---

[165] Gunārs Kūtris, "Mantas konfiskācija un nevainīguma Prezumpcija" (Confiscation and Presumption of Innocence). Legal Science: Functions, Significance and Future in Legal Systems I: The 7th International Scientific Conference of the Faculty of Law of the University of Latvia, 16-18 October 2019, Riga: Collected conference papers / red. Kalvis Torgāns, Anita Rodiņa, Carlo Amatucci, Frank L. Schäfer ... [et al.] *Rīga: Latvijas Universitāte*, 2019 353.-365.lpp. https://doi.org/10.22364/iscflul.7.31. Accessed April 22, 2022.

[166] *Ibid*.

[167] Kristīne Strada-Rozenberga, "Vispārīgs ieskats jautājumos, ko rada 21.11.2019. Grozījumi kriminālprocesa likumā" (General insight into issues arising from 21.11.2019. Amendments to criminal procedure law), Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās : Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums / redaktors Anita Rodiņa, Rīga: *LU Akadēmiskais apgāds*, 2020. 189.-201.lpp. https://doi.org/10.22364/juzk.78.21. Accessed April 22, 2022.

[168] Juris Stukāns, "Mantas atzīšanas par noziedzīgi iegūtu tiesiskais regulējums un tā piemērošanas problemātikā" (Legal framework for the recognition of property and its application), Promocijas darba kopsavilkums: apakšnozare – krimināltiesības, Darba Zinātniskais Vadītājs Dr.iur. Andrejs Vilk, *Rīgas Stradiņa universitāte,* 2019. Available on: https://doi.org/10.25143/prom-rsu_2019-03_pdk. Accessed February 4, 2022.

[169] *Ibid*.

person rights to property enshrined in the Human Rights Convention and practices in other countries.

5.3. Compatibility with Article 6

First of all, it should be determined whether the asset holder is "charged with a criminal offence" within the meaning of Article 6 (2) in the course of the criminal proceedings in Latvia. As it was discussed previously, ECtHR uses the Engel criteria for this purpose, namely the classification of the proceedings under the Latvian law, essential nature and the type and severity of the penalty. The proceedings under Chapter 59 do not involve a finding of guilt but are instead designed to take out the criminally acquired property. It can also be pointed out that the nature of the proceedings does not involve an offence of national criminal law to the property holder. Confiscation of acquired property under Chapter 59 is not a criminal "sanction" either, but rather deprivation of profits and illegally obtained property. Therefore, by implementing the Engel criteria, it can be concluded that criminal proceedings under the Chapter 59 should be considered under the civil limb of Article 6 of the Convention on Human Rights. Thus, it can be concluded that the property holder does not enjoy stricter standards of proof from a human rights perspective, such as the presumption of innocence, the standard of proof beyond a reasonable doubt, that are available under the criminal nature of the charge.

Despite a sparse number of overall cases of confiscation, the ECtHR has dealt with cases involving various forms of confiscation. It might be concluded that if adequate procedural safeguards are respected, the ECtHR has repeatedly considered non-conviction-based confiscation consistent with Article 6. Among many other principles, sufficient procedural safeguards that should be in place are the following: the proceedings should be adversarial in nature, a reasonable opportunity to present the case should be afforded, and the hearings should be publicly available to conform to the fair trial principle according to Article 6 (civil limb). Similar principles are laid down in Section 15 of the Criminal Procedure Law in Latvia, which strengthens the basic principle of criminal proceedings regarding rights and proceedings in a fair, impartial and independent court. This principle also covers "e.g., the right to oral hearings, the principle of equality between the parties, the right to proceedings within a reasonable time, the right to appeal, the principle of *ne bis in idem*, aspects of assessing the admissibility of evidence and the effects of the use of unlawful

evidence on the fairness of the proceedings”[170]. The Constitutional Court's also stated that the proceedings on criminal property in a democratic legal state must ensure that the principle of equal opportunities between the parties, which relates, *inter alia*, to the right of a person to familiarise themselves with the materials of the criminal property proceedings[171].

Returning to Chapter 59 and the confiscation procedure in Latvia, it should be noted that Section 627, paragraph four states that the case materials in proceedings regarding the criminally obtained property are investigative secret. The asset owner (person related to property) may become acquainted with the case materials with the permission of the person directing the proceedings and, in the amount specified thereby. Therefore, it can be assumed that the person responsible for providing evidence that the property is not criminally obtained is in a disadvantageous situation. First of all, the person might not receive permission, therefore would not be able to expose the allegations regarding the source of funds, or the investigator might arbitrarily add or not add some materials that, by the investigator’s unanimous decision, might be related to the evidence of the origin of the property. Thus, by allowing the property holder to be acquainted with all the materials of the proceedings in court, the right to a fair trial should be guaranteed with the disclosure of the case materials[172]. Without access to the case materials and evidence of the illicit origin of funds, it is not possible thoroughly verify whether the arguments set out in the decision to initiate proceedings regarding the criminally acquired property are justified and valid, nor can they be reasonably refuted and commented on. Therefore, Section 627, paragraph four contradicts the adversarial principle that has been mentioned in chapter four and is part of the right to a fair trial that the European Convention on Human Rights guarantees.

Also, Chapter 59 states that both parties have equal rights to submit recusation or requests, to submit evidence and written explanations. The third paragraph of Section 629 of the criminal proceedings Law provides an obligation to hear only certain persons - the investigator, a prosecutor,

---

[170]Kristīne Līce, Kriminālprocesa likuma 15.panta komentāri. Grām.:Zinātniskā monogrāfija prof. K.Stradas-Rozenbergas zinātniskā redakcijā. Kriminālprocesa likuma komentāri. A daļa (Comments of Section 15 of the Criminal Procedure Law. Ledger: Scientific monograph in the scientific version of Prof. K.Strada-Rozenberg. Comments from the Criminal Procedure Law.A part), Rīga, *Latvijas Vēstnesis*, 2019. 75.lpp.

[171] Latvijas Republikas Satversmes tiesas (The Constitutional Court of the Republic of Latvia) 2017.gada 23.maija spriedums lietā Nr. 2016-13-01 “Par Kriminālprocesa likuma 629. panta piektās daļas atbilstību Latvijas Republikas Satversmes 92. panta pirmajam teikumam”. Available (in Latvian) on: https://www.satv.tiesa.gov.lv/cases/?search[number]=2016-13-01. Accessed May 5, 2022.

[172] Non-disclosure is crucial in cases where ongoing investigations are still in process. The file in question can still be a secret of the investigation, as persons are alerted to non-disclosure in accordance with Article 396 of the Criminal Procedure Law on receipt of the said materials.

the property owner that was called, their representatives or defence counsels[173]. The procedure does not provide for the possibility of examining witnesses or experts, therefore limiting the option of providing an explanation of the origin of the funds. Such alleged infringements of property holder rights have already been red-flagged by legal practitioners in the practice of the Economic Court in Latvia[174]. National authorities should afford reasonable and sufficient opportunities to protect their interests adequately. Otherwise, a procedure in which a person is prevented from exercising their procedural rights and calling the witnesses by unduly removing one party in a significantly worse position is opposed to what is considered a fair trial[175]. As an example, can be mentioned the case *Mikelsons* v. *Latvia*. In this particular case, the ECtHR analysed the "secret" of the investigation, and the court noted that neither the submitter nor his defender had the opportunity to familiarise themselves with materials in a part that limited their capabilities to effectively refute the findings of law enforcement authorities and courts.[176] At the ECtHR's discretion, the investigation file based on the decision must also be made available to the defence party in good time. There is no doubt that in the proceedings on the proceeds of criminal property, the State is obliged to ensure the right to a fair trial in such a way as to provide for an adequate opportunity to be familiarised with the case materials. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Similarly, as it is with assessing the lawfulness of detention, ECtHR has clearly stated that information should be made available in an appropriate manner to the other party[177].

Further, according to Section 629, paragraph three, the court proceedings regarding the criminally obtained property are heard in a closed court hearing. ECtHR case-law emphasises that a public hearing constitutes a fundamental principle that contributes to achieving the aim of Article 6 (1), namely a fair trial. Some substantial considerations should be met not to allow public hearings, and under the exceptional character of such circumstances should be justifiable[178]. Otherwise, civil proceedings on the merits which are conducted in private in accordance with a general and absolute principle, without the litigant being able to request a public hearing on the ground that his case presents special features, cannot in principle be regarded as compatible with

[173] Latvijas Republikas Kriminālprocesa likums (The Criminal Procedure Law of the Republic of Latvia), *supra* note 149, section 629.
[174] Rusanovs, *supra* note 161.
[175] Council of Europe/European Court of Human Rights, *supra* note 43, p. 88.
[176] *Miķelsons* v. *Latvia*, no. 46413/10, paras. 78-81, 3 November 2015.
[177] *Lamy* v. *Belgium*, 30 March 1989, para. 29, Series A no. 151, and *Garcia Alva* v. *Germany*, no. 23541/94, para. 42, 13 February 2001.
[178] Guide on Article 6, *supra* note 43, p. 46.

Article 6 (1) of the Convention. Other than in wholly exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, though the court may refuse the request and hold the hearing in private on account of the circumstances of the case and for pertinent reasons[179]. Reasons for dispensing from public hearings are unclear in Chapter 59, which might constitute a breach of Article 6 (1), stating that "everyone is entitled to a fair and public hearing"[180]. It can be concluded that public access to the court hearings is an essential component of the fair trial principle, and it cannot be neglected. Further analysis is needed to understand how legislators justify the closed hearing without actually addressing the reasons for exceptional circumstances and do not even allow to request public hearings.

Overall, Chapter 59, which regulates criminally acquired property proceedings, has several significant weaknesses that might lead to violations of Article 6 in particular cases brought to the court. Without properly addressing the issues mentioned in this chapter, the property holder's rights regarding the human rights enshrined in the European Convention on human rights might be violated.

5.4. Compatibility with Article 1 Protocol 1

ECtHR has already tested the compatibility of the confiscation orders with Article Protocol 1 in the other Member States. The principles governing the question of justification can also be applied to the Latvian non-conviction-based confiscation procedure analysis. It is possible to assess if Latvian criminal proceedings regarding criminally acquired property correspond with the decisions in the case-law of ECtHR. To recall, procedural safeguards should be the following - the interference needs to be lawful, in the public interest, strike a fair balance between the demands of the general interest and the applicants' rights and be in accordance with international law.

The ECtHR is strict in protecting procedural safeguards. In the number of analysed cases, ECtHR required the national authorities to provide at least some particulars as to the alleged unlawful conduct that has resulted in the acquisition of the assets to be forfeited and to establish some link between those assets and the criminal conduct. Therefore, it cannot be obtained legally. Without it, the law is not proportionate in limiting the rights under Article 1 Protocol 1. In Latvia, the deprivation of the criminally acquired property or non-conviction-based confiscation is based

[179] *Martinie* v. *France* [GC], no. 58675/00, para. 42, ECHR 2006-VI.
[180] Council of Europe, *supra* note 59.

on the Criminal Procedure Act, and it is undoubted lawful as it is required under Article 1 Protocol 1. However, another aspect of lawfulness is that the court proceedings should not be arbitrary. As discussed previously, the confiscation procedure under Chapter 59, Article 626, paragraph one contains two conditions under which it is possible to separate materials from a criminal case regarding criminally acquired property (non-conviction-based confiscation procedure) and initiate court proceedings[181]. As previously stated, besides grounds to believe that the property most probable is criminally acquired, there should be objective reasons why the transferal of the criminal case is not possible, or such transferal may cause substantial unjustified expenses. However, the author would like to emphasise that practitioners claim that the real reason for initiating proceedings regarding criminally acquired property or non-conviction-based confiscation is often that the time limits for limiting a person's property will soon expire[182]. Therefore, there are trends to apply the provisions of Chapter 59 of the Criminal Procedure Law in practice, not in the way that the law had intended. The risk of the arbitrariness decision of the law enforcement authorities is in place. In particular, the main thing is no longer evidence that the property in question was clearly criminally obtained to actually shift the burden of proof to the property owner. Neither the inability to transferal of the criminal case in the near future nor unjustified expenses have been mentioned by ECtHR case law to justify confiscation prior to conviction. Therefore, such conditions to initiate confiscation prior to conviction in the proceedings regarding the criminally acquired property eventually may lead to deprivation of property in violation of human rights.

In the case, of *Gogitidze and Others*, regarding the fight against corruption or like in *Phillips*, where the confiscation order deterred from engaging in drug trafficking and deprived a person of profits received from drug trafficking, the ECtHR concluded that deprivation of profits and illegally obtained property is an efficient instrument in combatting money laundering, and it is in the public interest[183]. As concluded by ECtHR, each State has a wide margin of appreciation to fight organised crime and implement crime prevention policies[184]. Taking into account the seriousness of the money-laundering activity in the banking sector of Latvia, the closure of the

---

[181] *Ibid.*, section 626, para. 1.

[182] Aleksandrs Berezins, Process par noziedzīgi iegūtu mantu: sevišķs process vai atsevišķs jautājums (criminally acquired property procedure: special procedure or individual issue). Jurista Vārds, 2014. gada15. aprīlis, Nr. 15 (817), 24.-28. Lpp, and Kolomijceva J. Piezīmes par E. Rusanova rakstu «Procesa par noziedzīgi iegūtu manturegulējums Kriminālprocesa likumā» (Comments on the article by E. Rusanova «Provision of the criminal mantualisation process in the Criminal Procedure Law»). Available on: https://juristavards.lv/eseja/267893-piezimes-par-erusanova-rakstu-procesa-par-noziedzigi-iegutu-mantu-regulejums-kriminalprocesa-likuma. Accessed April 22, 2022.

[183] Gogitidze and Others, *supra* note 23, para 43.

[184] *Ibid.*, para. 86.

Latvian bank by FinCEN Notice 311[185] and the potential greylisting of Latvia in the Moneyval assessment[186], it is up to the national authorities to decide how to weigh competing public and individual interests. Latvia has its own power to implement those measures as soon as it has the foundation and does not contravene human rights. Latvian reputation has been dramatically damaged by the non-resident banking customers, who used the banking sector of Latvia to transfer billions of euros through the accounts[187]. Considering circumstances, implementing non-conviction-based confiscation and transferring the burden of proof to the property owner can be justifiable and in the public interests.

However, the confiscation procedure should still comply with human rights provisions. Procedural safeguards should be proportionate and strike a balance between general interest and the asset holder’s rights. In the number of the analysed case, the ECtHR concluded that the confiscation measures should be proportionate even in the absence of a conviction establishing the guilt of the accused persons[188]. It can be stressed that in the latest case, *Todorov and others*, the ECtHR indicated that the assessment of proportionality between the property, the extent of seizure and the property right must establish a causal relationship between any illegal activity and the property subject to seizure, namely that its origin is linked to the criminal offence[189]. Thus, ECtHR underlined that a link between confiscated property and any criminal activity should be established. Therefore, it can be concluded that property confiscation, which is only based on money laundering activity, or the conditions included in an object of evidence, might be considered an unproportionate measure and the persons concerned have had to bear an excessive burden.

Article 1 Protocol 1 also states that deprivation of property should be consistent with the general principles of international law. Therefore, the criminal procedure regarding confiscating a criminally obtained property should be observed through the international norms binding on Latvia. After analysing the international mechanisms, only limited confiscation regimes are mentioned and required by the international binding documents. International legal mechanisms and standards

[185] Fincen, *Press* Release, FinCEN Names ABLV Bank of Latvia an Institution of Primary Money Laundering Concern and Proposes Section 311 Special Measure. Available on: https://www.fincen.gov/news/news-releases/fincen-names-ablv-bank-latvia-institution-primary-money-laundering-concern-and. Accessed April 22, 2022.
[186] The Baltic-course, Likelihood of Latvia's inclusion in "grey list" uncomfortably high. Available on: http://www.baltic-course.com/eng/finances/?doc=152923. Accessed April 22, 2022.
[187] Antonio Greco (Transparency International Latvia), Money Laundering in Latvia and the Baltics Recent Developments, Ongoing Risks, and Future Challenges. Available on: https://delna.lv/en/2021/08/03/transparency-international-latvia-publishes-a-new-report-on-money-laundering-in-latvia-and-the-baltics. Accessed May 3, 2022.
[188] Todorov and Others, *supra* note 21, para. 18.
[189] *Ibid*, para. 276.

concerning confiscation of the proceeds of crime described before (UNCAC, UNTOC, FATF, OECD, World Bank and Directive 2014/42/EU) encourage the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences. Article 9 (6) of the Warsaw Convention states that it must be demonstrated that the funds have been derived from the predicated criminal offence, even though it is not necessary to prove from which exactly[190]. However, it still is necessary to prove that the assets are tainted (that is, they are either the proceeds of crime or the instrumentalities used to commit the crime)[191]. Also, it should be stressed that international bodies do not include the measures to confiscate property based on money laundering activities. International bodies allow non-conviction-based confiscation and shift the burden of proof in the following circumstances:

- conviction of the person based on the non-related criminal offence
- if the person is absent, died or is unreachable for the prosecution
- criminal conduct has been proven
- part of the organised group or linked to the organised group

Similar conditions are mentioned in the Directive 2014/42/EU. In interpreting Article 5 of the Directive 2014/42/EU, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence based on which the property concerned is considered to be the property that is derived from criminal conduct[192].

Latvia is not the first country to implement non-conviction-based confiscation as a tool in fighting money laundering or other serious crimes. UK and Italy have managed to implement a very modern confiscation procedure. Despite criticism and controversy, the UK and Italy framework has been scrutinised by ECtHR and considered proportionate to human rights. From the perspective of how other countries managed to implement effective procedures for non-conviction-based confiscation, the UK and Italy's experience is valuable as ECtHR scrutinised it. Looking at the practice in the UK and Italy, it might be considered that the only way to prove a link between the confiscated asset and possible crime is the link between the property holder and the particular criminal. As discussed in the paper previously, in the case of the UK, it is compulsory

[190] Council of Europe, *supra* note 92.
[191] Greenberg et al., *supra* note 97.
[192] Directive 2014/42/EU, *supra* note 105, article 5.

to determine the criminal conduct of the asset holder[193], or in the case of Italy, it is necessary to establish a link between the asset holder and the "Mafia"[194].

The current practice of the ECtHR regarding deprivation of property based on the confiscation orders contravenes the current procedure in the Criminal Procedure Law of Latvia. It can be concluded that Section 125, paragraph 3 does not correspond to proportionality under Article 1 Protocol 1 and is not by international law as prescribed by Warsaw Convention, Directive 2014/42/EU and UNCAC. Latvian confiscation procedures went beyond international binding treaties. According to the ECtHR case law, it should be established for deprivation of property in non-conviction-based confiscation that the person is linked to the organised crime groups or criminal offence and that there had been a considerable discrepancy between their financial resources and their income[195]. In Latvia, it is sufficient suspicious activity based on the typology to shift the burden of proof. It is not necessary to prove "from the contrary" that the person of the property performed the legalisation activity knowing the property is criminally acquired. Therefore, it cannot explain the origin of the property. Such conditions for the shift of the burden of proof are not envisaged by binding international conventions and might violate principles observed in ECtHR case law. Without accurate and precise determined criminal conduct, the affected person has no possibility to explain the origin of funds based on the predominance of probabilities as stated in Section 125, paragraph three of the Criminal Procedure Law in Latvia[196]. Therefore, it is merely impossible to prove the most likeliness of the lawful origin of the property.

---

[193] UK, Proceeds of Crime Act 2002, *supra* note 115.

[194] Raimondo*, supra* note 71, para. 30.

[195] see *Arcuri and Others* v. *Italy* (dec.), no. 52024/99, ECHR 2001-VII; *Riela and Others* v. *Italy* (dec.), no. 52439/99, 4 September 2001; *Perre and Others* v. *Italy* (dec.), no. 1905/05, 12 April 2007.

[196] Latvijas Republikas Kriminālprocesa likums (The Criminal Procedure Law of the Republic of Latvia), *supra* note 144, section 125, para. 3.

6. CONCLUSION

As discussed, ECtHR gives the States a wide margin of appreciation in implementing policies to fight crime, including confiscation of property presumed to be of unlawful origin. The reputational challenge that Latvia has faced with regard to the pressing need to combat money laundering and organised crime is rather unique. Not very often, FinCEN names a local financial institution an institution of primary money laundering concern and proposes section 311 special measure, like it was in Latvia in 2018[197]. However, this does not *per se* justify a departure from the protection of fundamental human rights.

The analysis of the ECtHR case law revealed that various measures could be used for the purposes of combating unlawful enrichment from the proceeds of crime. Latvia is not the first country that tried to implement confiscation of property without conviction or outside of criminal proceedings, where confiscation is not based on the perpetrator's guilt but on the origin of the property and is aimed at the assets as such. ECtHR attaches particular importance to various procedural guarantees that should be available in confiscation proceedings. Absent some protections, non-conviction-based confiscation can be problematic as far as it encroaches on property rights while relying on lower procedural safeguards and human rights protections than applies typically for criminal proceedings[198].

After the analysis of the binding Conventions, guidelines by the intergovernmental bodies, EU legislation, ECtHR case law and other countries' experience, common European and even universal legal standards can be said to exist. In the first place, it encourages the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction. Secondly, the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation.

As mentioned earlier, criminal procedural safeguards are justified by reference to the relationship between the State and the individual, the balance of resources between them, the consequences of an adverse judgment for a property holder, and respect for individual dignity and autonomy. In non-conviction-based confiscation proceedings, such safeguards are sidestepped

[197] FinCEN, *supra* note 184.
[198] Mat Tromme, "Waging War Against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with The Rule of Law", *29 Duke J. Comp. & Int'l L. 165*.

despite such proceedings being, in essence, concerned with matters of criminal law and deprivation of property. Without proper procedural safeguards, legislation may have notable weaknesses that might lead to disbalance between two parties, the State and the property holder and violations of the property holder's rights in proceedings regarding the criminally acquired property.

In Latvian non-conviction-based confiscation, such balance has been breached, and a number of crucial shortcomings of the procedure have been identified. It has not been found in ECtHR case law or other analysed sources that it is in accordance with human rights to shift the burden of proof if suspicion of an illegal source of funds is detected merely in the form of suspects' unexplained wealth or on the basis of suspicion of money laundering activity. ECtHR case law clearly states that without the link with criminal offence or conduct, the non-conviction-based confiscation will be determined on a vague and unsubstantiated basis, where the link between the property and criminal conduct is broken. Current legislation in Latvia does not ask for a convincing set of evidence on the origin of the money for deprivation of property as it should be according to the analysed case law of ECtHR.

The procedural rights of the property holder that should be in place to balance the rights of both parties should be compatible with the principle of the equality of arms and all the guarantees of a fair trial. A number of limitations in proceedings regarding the criminally acquired property have been identified, such as limited access to investigation materials, inability to call witnesses or experts, and only closed public hearings are permitted. Eventually, such limitations for proceedings regarding criminally acquired property may allegedly lead to violation of Article 6 and Article 1 Protocol 1 in particular cases brought to ECtHR. Taking into account the high overall number of Latvian courts cases regarding criminally acquired property and a high proportion of judgments recognising property that has been criminally acquired[199], it can be expected that ECtHR will investigate domestic decisions regarding criminally acquired property in the near future. This paper just gave an initial overview of the principles that might be breached in Latvia. However, particular cases should be analysed to reveal human rights violations in Latvia's current non-conviction-based confiscation procedure.

[199] 125 proceedings were initiated regarding criminally acquired property out of total 161 criminal proceedings initiated during the first 9 months of work since the establishing Economic court in 2021. In majority of judgments (93) the property has been recognized as criminally acquired. Available on: https://juristavards.lv/zinas/280374-ekonomisko-lietu-tiesa-devinos-menesos-izskatijusi-197-lietas. Accessed May 9, 2022.

BIBLIOGRAPHY

Primary sources

Legislation

United Nations

1. UN General Assembly, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 8 January 2001, A/RES/55/25. Available on: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html. Accessed May 5, 2022.
2. UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422. Available at: https://www.unodc.org/unodc/en/treaties/CAC. Accessed 22 April 2022.
3. UN Security Council, Threats to international peace and security caused by terrorist acts in Resolution 1617. Available on: http://unscr.com/en/resolutions/1617. Accessed May 3, 2022.

Council of Europe

4. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005), Council of Europe, Rome 04/11/1950. Available on: https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed May 9, 2022.
5. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), Council of Europe, Strasbourg, 8.XI.1990. Available on: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=141. Accessed May 9, 2022.
6. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No. 198, Council of Europe, Warsaw, 16.V.2005. Available on: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=198. Accessed May 5, 2022.

European Union

7. Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, p. 39–50. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0042. Accessed 17 February 2022.

Latvia

8. Latvijas Republikas Krimināllikums (Criminal Law of the Republic of Latvia) (17 June 1998). Available: https://likumi.lv/ta/en/en/id/88966-criminal-law. Accessed February 3, 2022.

9. Latvijas Republikas Kriminālprocesa likums (The Criminal Procedure Law of the Republic of Latvia) (21 April 2005). Available on: https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law. Accessed February 3, 2022.

10. Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma un proliferācijas finansēšanas novēršanas likums (Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing) (17 July 2008). Available on: https://likumi.lv/ta/en/en/id/178987. Accessed April 22, 2022.

United Kingdom

11. The UK, Proceeds of Crime Act 2002.

Case-law

Courts of Latvia

1. Latvijas Republikas Satversmes tiesas (The Constitutional Court of the Republic of Latvia) 2017.gada 23.maija spriedums lietā Nr. 2016-13-01 "Par Kriminālprocesa likuma 629. panta piektās daļas atbilstību Latvijas Republikas Satversmes 92. panta pirmajam teikumam". Available (in Latvian) on: https://www.satv.tiesa.gov.lv/cases/?search[number]=2016-13-01. Accessed May 5, 2022.

Courts of the United Kingdom

2. *Director of the Assets Recovery Agency* v. *Green*, [2005] EWHC 3168 (Admin). Available on: Westlaw UK database.
3. *Director of Assets Recovery Agency* v. *Szepietowski*, [2007] EWCA Civ 766. Available on: Westlaw UK database.
4. *Director of Assets Recovery Agency* v. *Olupitan*, [2008] EWCA Civ 104. Available on: Westlaw UK database.
5. *Gale* v. *SOCA*, 2011, [2011] UKSC 49. Available on: Westlaw UK database.

Court of Justice of the European Union

6. Judgment of the Court (Third Chamber) of 19 March 2020, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo* v. *BP* and Others, C-234/18, ECLI:EU: C:2019:920.
7. Judgment of the Court (Third Chamber) of 21 October 2021, *Bulgaria* v *DR*, C-845/19, and *TS*, C-863/19, ECLI:EU: C:2021:864.

European Court of Human Rights

1. *Engel and Others* v. *the Netherlands*, 8 June 1976, Series A no. 22.

2. *Feldbrugge* v. *the Netherlands*, 29 May 1986, Series A no. 99.

3. *Lithgow and Others* v. *the United Kingdom*, 8 July 1986, Series A no. 102.

4. *Barberà, Messegué and Jabardo* v. *Spain*, 6 December 1988, Series A no. 146.

5. *Brandstetter* v. *Austria*, 28 August 1991, Series A no. 211.

6. *Raimondo* v. *Italy*, 22 February 1994, Series A no. 281-A.

7. *Hentrich* v. *France*, 22 September 1994, Series A no. 296-A.

8. *Air Canada* v. *the United Kingdom*, 5 May 1995, Series A no. 316‑ A.

9. *Nideröst-Huber* v. *Switzerland*, 18 February 1997, Reports of Judgments and Decisions 1997-I.

10. *Immobiliare Saffi* v. *Italy* [GC], no. 22774/93, ECHR 1999-V.

11. *Rowe and Davis* v. *the United Kingdom* [GC], no. 28901/95, ECHR 2000-II.

12. *Beyeler* v. *Italy* [GC], no. 33202/96, ECHR 2000-I.

13. *Walsh* v. *the United Kingdom* (striking out), no. 33744/96, 4 April 2000.

14. *Phillips* v. *the UK,* no. 41087/98, ECHR 2001-VII.

15. *Telfner* v. *Austria*, no. 33501/96, 20 March 2001.

16. *Malhous* v. *the Czech Republic* [GC], no. 33071/96, 12 July 2001.

17. *Riela and Others* v. *Italy* (dec.), no. 52439/99, 4 September 2001.

18. *Butler* v. *the UK* (dec.), 27 June 2002, no. 41661/98, ECHR 2002-VI.

19. *Hutten-Czapska* v. *Poland* [GC], no. 35014/97, ECHR 2006-VIII.

20. *Anheuser-Busch Inc.* v. *Portugal* [GC], no. 73049/01, ECHR 2007-I.

21. *Matyjek* v. *Poland*, no. 38184/03, 24 April 2007.

22. *Saccoccia* v. *Austria,* 18 December 2008, no. 69917/01.

23. *Grayson and Barnham* v. *the United Kingdom*, nos. 19955/05 and 15085/06, 23 September 2008.

24. *Sun* v. *Russia*, no. 31004/02, 5 February 2009.

25. *Denisova and Moiseyeva* v. *Russia*, no. 16903/03, 1 April 2010.

26. *Vistiņš and Perepjolkins* v. *Latvia* [GC], no. 71243/01, 25 October 2012.

27. *Arras and Others* v. *Italy*, no. 17972/07,14 February 2012.

28. *Centro Europa 7 S.r.l. and Di Stefano* v. *Italy* [GC], no. 38433/09, ECHR 2012.

29. *Silickienė* v. *Lithuania*, no. 20496/02, 10 April 2012.

30. *Fazliyski* v. *Bulgaria*, no. 40908/05, 16 April 2013.

31. *Azienda Agricola Silverfunghi S.a.s. and Others* v. *Italy,* nos. 48357/07, 52677/07, 52687/07 and 52701/07, 24 June 2014.

32. *East West Alliance Limited* v. *Ukraine*, no. 19336/04, 23 January 2014.

33. *Ališić and Others* v. *Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, ECHR 2014.

34. *Adorisio and Others* v. *the Netherlands* (dec.) - 47315/13, 48490/13 and 49016/13, 9 April 2015.

35. *Huitson* v. *the United Kingdom* (dec.), no. 50131/12, 13 January 2015.

36. *Rummi* v. Estonia, no. 63362/09, 15 January 2015.

37. *Veits* v. *Estonia*, no. 12951/11, 15 January 2015.

38. *Ünsped Paket Servisi SaN. Ve TiC. A.Ş.* v. *Bulgaria*, no. 3503/08, 13 October 2015.

39. *Miķelsons* v. *Latvia*, no. 46413/10, 3 November.2015.

40. *Gogitidze and Others* v. *Georgia,* no. 36862/05, 12 May 2015.

41. *Zschüschen* v *Belgium,* no. 23572/07, ECHR 178 (2017).

42. *Regner* v. *the Czech Republic* [GC], no. 35289/11, 19 September 2017.

43. *Telbis and Viziteu* v. *Romania*, no. 47911/15, 26 June 2018.

44. *G.I.E.M. S.R.L. and Others* v. *Italy* ([GC], nos. 1828/06 and 2 others, 28 June 2018.

45. *Lekić* v. *Slovenia* [GC], no. 36480/07, 11 December 2018.

46. *Balsamo* v. *San Marino*, nos. 20319/17 and 21414/17, 8 October 2019.

47. *Gestur Jónsson and Ragnar Halldór Hall* v. *Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020.

48. *odorov and Others* v. *Bulgaria,* nos. 50705/11 and 6 others, 13 July 2021.

49. *Yel and Others* v. *Turkey,* no. 28241/18, 13 July 2021.

50. *Kilin* v. *Russia*, no. 10271/12, 11 May 2021.

51. *Imeri* v. *Croatia*, no. 77668/14, 24 June 2021.

Secondary sources

Scholarly secondary sources

1. Bacarese, Alan and Sellar, Gavin. "Civil Asset Forfeiture in Practice" in *Non-Conviction-Based Confiscation in Europe,* edited by Jon Petter Rui and Ulrich Sieber, pp. 211-224. Berlin:Duncker & Humblot, 2015.

2. Borgers, Matthias J. "Confiscation of the proceeds of crime: the European Union framework". *In:* Colin King, Clive Walker. *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Ashgate Publishing, 2014.

3. Ciopec, Flaviu. "Extended Confiscation. Repression and beyond". Journal of Eastern-European Criminal Law 2016, no. 2, 2016, pp. 98-104.

4. Esser, Robert. "A Civil Asset Recovery Model. The German Perspective and European Human Rights" in *Non-Conviction-Based Confiscation in Europe,* edited by Jon Petter Rui and Ulrich Sieber, pp. 69-110. Berlin:Duncker & Humblot, 2015.

5. Hamran, Ladislav. „Confiscation of Proceeds from Crime: a Challenge from Criminal Justice". In: ed. Flora A.N.J. Goudappel, Ernst M.H. Hirsch Ballin. *Democracy and Rule of Law in the European Union*, Hague: T.M.C. Asser Press, 2016.

6. Greenberg, Theodore S, et al. *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*. World Bank Publications, 2009. Available on: ProQuest Ebook

Central, http://ebookcentral.proquest.com/lib/lulv/detail.action?docID=459488. Accessed May 9, 2022.

7. King, Colin. “Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture”, *E&P*, Vathek Publishing, 2022, E. & P. 2012, 16(4), pp. 337-363.

8. Hendry, Jennifer and Colin, King. “How far is too far? Theorising non-conviction-based asset forfeiture?”. *Int. J.L.C. 2015*, 11(4), 398-411.

9. Kwan, Justin Bong and Jonathan Fisher QC, “Confiscation: deprivatory and not punitive – back to the way we were”, Crim L.R, pp. 192-201.

10. Kūtris, Gunars. “Noziedzīgi iegūtā konfiskācijas iespējas un pamats” (Possibilities and grounds for confiscation of crime proceeds.), Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās: Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums/redaktors Anita Rodiņa, *Rīga: LU Akadēmiskais apgāds*, 2020. 202.-208.lpp. Available on: https://doi.org/10.22364/juzk.78.22. Accessed 16 February 2022.

11. Kūtris, Gunars. “Mantas konfiskācija un nevainīguma Prezumpcija” (Confiscation and Presumption of Innocence). Legal Science: Functions, Significance and Future in Legal Systems I: The 7th International Scientific Conference of the Faculty of Law of the University of Latvia, 16-18 October 2019, Riga: Collected conference papers / red. Kalvis Torgāns, Anita Rodiņa, Carlo Amatucci, Frank L. Schäfer ... [et al.] *Rīga: Latvijas Universitāte*, 2019 353.-365.lpp. https://doi.org/10.22364/iscflul.7.31. Accessed April 22, 2022.

12. Kenneth, Paul and Mwirigi, Kinyua. “Non-Conviction-Based Confiscation in Europe: Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction”, *New Journal of European Criminal Law 7*, no. 3 (2016): 381-[ii].

13. Levim, Michael and Reuter, Peter. “Money Laundering”, *Crime and Justice: A Review of Research*, 34, 2006, pp. 289-376.

14. Līce, K. Kriminālprocesa likuma 15.panta komentāri. Grām.:Zinātniskā monogrāfija prof. K.Stradas-Rozenbergas zinātniskā redakcijā. Kriminālprocesa likuma komentāri. A daļa (Comments of Section 15 of the Criminal Procedure Law. Ledger: Scientific monograph in the scientific version of Prof. K.Strada-Rozenberg. Comments from the Criminal Procedure Law.A part), Rīga, *Latvijas Vēstnesis*, 2019. p. 75.

15. Milone, Sofia. “On the Borders of Criminal Law. A Tentative Assessment of Italian Non-Conviction Based Extended Confiscation”, *NJECL 8*, no. 2 (2017), pp. 150-170.

16. Panzavolta, Michele and Flor, Roberto. "A Necessary Evil. The Italian "Non-Criminal System" in *Non-Conviction-Based Confiscation in Europe,* edited by Jon Petter Rui and Ulrich Sieber, pp. 111-150. Berlin:Duncker & Humblot, 2015.

17. Panzavolta Michele. "Confiscation and the concept of punishment: can there be a confiscation without a conviction?" In: *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* edited by Katalin Ligeti amd Michele Simonato, Hart Publishing, Oxford, 2017, p. 25.

18. Rakitovan, Darian. "Extended Confiscation - Sui Generis Measure," *Journal of Eastern-European Criminal Law 2016, no. 2*, 2016, pp. 78-97.

19. Rui, Jon Petter and Sieber, Ulrich. *Non-Conviction-Based Confiscation in Europe*. Berlin:Duncker & Humblot, 2015.

20. Simonato, Michele. "Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery?", *2015, New Journal of European Criminal Law, 213*.

21. Simonato, Michele. "Confiscation and fundamental rights across criminal and non-criminal domains", *ERA Forum 18*, 365–379, 2017. Available on: https://doi.org/10.1007/s12027-017-0485-0. Accessed May 3, 2022.

22. Simonato Michele. "Extended confiscation of criminal assets: limits and pitfalls of minimum harmonisation in the EU". *E.L. Rev. 2016*, 41(5), 727-740.

23. Stukāns, Juris. "Mantas atzīšanas par noziedzīgi iegūtu tiesiskais regulējums un tā piemērošanas problemātikā" (Legal framework for the recognition of property and its application), Promocijas darba kopsavilkums: apakšnozare – krimināltiesības, Darba Zinātniskais Vadītājs Dr.iur. Andrejs Vilk, Rīgas Stradiņa universitāte, 2019. Available on: https://doi.org/10.25143/prom-rsu_2019-03_pdk. Accessed February 4, 2022.

24. Strada-Rozenberga, Kristīne. "Vispārīgs ieskats jautājumos, ko rada 21.11.2019. Grozījumi kriminālprocesa likumā" (General insight into issues arising from 21.11.2019. Amendments to criminal procedure law), Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās : Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums / redaktors Anita Rodiņa, Rīga: *LU Akadēmiskais apgāds*, 2020. 189.-201.lpp. https://doi.org/10.22364/juzk.78.21. Accessed April 22, 2022.

25. Tromme, Mat. "Waging war against corruption in developing countries: how asset recovery can be compliant with the rule of law", *29 Duke J. Comp*. & Int'l L. 165.

26. Testa, Francesco. “International cooperation for the detection of corruption offences and for identification, freezing and confiscation of assets: the Italian system of non-conviction-based confiscation”, *166th international training course visiting experts' lectures, resource material series no. 103*. Available on: https://www.unafei.or.jp/publications/pdf/RS_No103/No103_5_2_VE_Testa.pdf. Accessed May 3, 2022

Non-scholarly secondary sources

1. Baltic-course, *Likelihood of Latvia's inclusion in "grey list" uncomfortably high*. Available on: http://www.baltic-course.com/eng/finances/?doc=152923. Accessed April 22, 2022.

2. Berezins A. Process par noziedzīgi iegūtu mantu: sevišķs process vai atsevišķs jautājums (criminally acquired property procedure: special procedure or individual issue). Jurista Vārds, 2014. gada15. aprīlis, Nr. 15 (817), 24.-28. Lpp, and Kolomijceva J. Piezīmes par E. Rusanova rakstu «Procesa par noziedzīgi iegūtu manturegulējums Kriminālprocesa likumā» (Comments on the article by E. Rusanova «Provision of the criminal mantualisation process in the Criminal Procedure Law»), Jurista Vārds, domnīca/eseja, 8 January 2016. Available on: https://juristavards.lv/eseja/267893-piezimes-par-erusanova-rakstu-procesa-par-noziedzigi-iegutu-mantu-regulejums-kriminalprocesa-likuma. Accessed April 22, 2022.

3. Cabinet of Ministers, Press release, *The overhaul of Latvia's financial sector supervision has been a resounding success – we have re-established the reputation of our country and created a strong and robust anti money laundering system*. Available on: https://www.mk.gov.lv/en/article/karins-overhaul-latvias-financial-sector-supervision-has-been-resounding-success-we-have-re-established-reputation-our-country-and-created-strong-and-robust-anti-money-laundering-system. Accessed May 3, 2022.

4. European Commission, *Commission Staff Working Document. Analysis of non-conviction-based confiscation measures in the European Union*, 12.4.2019, SWD (2019) 1050 final.

5. European Commission, *Proposal for a directive of the European parliament and of the council on the freezing and confiscation of proceeds of crime in the European Union*, 12.3.2012, COM (2012) 85 final. Available on: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:EN:PDF. Accessed April 22. 2022.

6. European Commission, *Report from the commission to the European Parliament and the Council*, 2.6.2020 COM (2020) 217 final. Available on ec.europa.eu/home-affairs/system/files/2020-06/20200602_com-2020-217-commission-report_en.pdf. Accessed April 19, 2022.

7. Council of Europe, Economic Crime and Cooperation Division, Action against Crime Department, Directorate General Human Rights and Rule of Law, *The Use of Non-Conviction Based Seizure and Confiscation*. Available on: https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3. Accessed May 3, 2022.

8. Council of Europe/European Court of Human Rights, 2013, *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)*, 2013. Available on: https://rm.coe.int/1680700aaf#:~:text=%E2%80%9C1.,impartial%20tribunal%20established%20by%20law.Accessed May 3, 2022.

9. Council of Europe, Economic Crime and Cooperation Division. T*he Use of Non-Conviction Based Seizure and Confiscation*. Available on: https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3. Accessed February 3, 2022.

10. Council of Europe/European Court of Human Rights, 2013, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*, updated on 31 December 2021. Available on: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf. Accessed May 5, 2022.

11. European Parliament, Special Committee on Organized Crime, Corruption and Money Laundering, *Draft report on organized crime, corruption, and money laundering: recommendations on action initiatives to be taken 2009–2014*, 2013/2107 (INI), 10 June 2013.

12. FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF Recommendations, February 2012, updated March 2022. Available on: https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html. Accessed May 5, 2022.

13. Fincen, *FinCEN Names ABLV Bank of Latvia an Institution of Primary Money Laundering Concern and Proposes Section 311 Special Measure*, press release. Available on: https://www.fincen.gov/news/news-releases/fincen-names-ablv-bank-latvia-institution-primary-money-laundering-concern-and. Accessed April 22, 2022.

14. Greco, Antonio (Transparency International Latvia). *Money Laundering in Latvia and the Baltics Recent Developments, Ongoing Risks, and Future Challenges*. Available on:

https://delna.lv/en/2021/08/03/transparency-international-latvia-publishes-a-new-report-on-money-laundering-in-latvia-and-the-baltics. Accessed May 3, 2022.

15. Home office, *Serious Crime Bill. Fact sheet: Overview of the Proceeds of Crime Act 2002*. Available on: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/317904/Fact_Sheet_-_Overview_of_POCA__2_.pdf#page46. Accessed February 3, 2022.

16. Ministry of Justice, *Manual for Action with Property in Criminal Procedure*. Available on: https://www.tm.gov.lv/lv/jaunums/izstradata-rokasgramata-ricibai-ar-mantu-kriminalprocesa-0?utm_source=https%3A%2F%2Fwww.google.com%2F. Accessed May 5, 2022.

17. Rusanovs, Egons. *ECT atziņas: mantisko jautājumu risināšana kriminālprocesā. IV.Aizsardzība pret patvaļu mantas konfiskācijas procesā* (ECtHR disputes: Tackling human issues in criminal proceedings. IV. Protection against arbitrariness in seizure of property), Jurista Vārds, domnīca/eseja, 3 September 2021, Domnīca/Eseja. Available on: https://juristavards.lv/eseja/279439-ect-atzinas-mantisko-jautajumu-risinasana-kriminalprocesa-iv-aizsardziba-pret-patvalu-mantas-konfisk/. Accessed May 4, 2022.

18. Rusanovs, Egons, *Procesa par noziedzīgi iegūtu mantu regulējums Kriminālprocesalikumā* (Regulation of the criminal property process in Criminal proceedings), Jurista Vārds, 5. janvāris 2016 /nr. 1 (904). Available on: https://juristavards.lv/doc/267842-procesa-par-noziedzigi-iegutu-mantu-regulejums-kriminalprocesa-likuma/. Accessed May 5, 2022

19. World Bank. *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*. Available on: https://www.unodc.org/pdf/Star_Report.pdf. Accessed May 3, 2022.