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CONFISCATION AND FUNDAMENTAL RIGHTS: THE QUEST FOR A CONSISTENT EUROPEAN APPROACH

Abstract:

Confiscation is one important component of contemporary policies against serious crime and more largely to acquisitive crime. International organisations such as the EU are increasingly compelling or at least encouraging national legislators to introduce more effective and incisive tools to deprive criminals of their illicit gain, even in the absence of a final conviction. The risks of abuses and interferences with fundamental rights are, however, evident. On several occasions, the European Court of Human Rights has dealt with cases involving various forms of confiscation, but many aspects are still debated. This article aims to provide a brief overview of the variegated case law from Strasbourg, highlighting recent and possible future developments.

1. Introduction

In the past decades, various countries have introduced new forms of confiscation. Many have done so to comply with obligations under international and EU law, which are increasingly urging the development of strategies and tools aimed at depriving criminals of their illicit gain. The benefits of fighting 'dirty money' have been widely emphasized and nowadays confiscation is becoming one of the main objectives when dealing with organised crime and other serious offences – including but not limited to drug trafficking, corruption and money laundering.[1]

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[1] Stessens G., *Money Laundering. A New International Enforcement Model* (Cambridge University Press, 2000); Vervaele J., 'Economic Crimes and Money Laundering: A New Paradigm for the Criminal Justice System?', in B. Unger and D. van der Linde (eds.), *Research Handbook on Money Laundering* (Edward Elgar, 2013) 379; Manes V., 'L'ultimo imperativo della politica criminale: *nullum crimen sine confiscatione*' (2015) *Rivista italiana di diritto e procedura penale* 1259; Fernandez-Bertier M., 'The Confiscation and Recovery of Criminal Property: a European Union State of the Art' (2016) 17 *ERA Forum* 323.

Confiscation is part of the larger asset recovery strategy, which is constituted of distinct yet correlated phases including the financial investigation, detection and tracing of illicit property; the provisional freezing or seizure of (presumed) criminal property and their management; the permanent confiscation (or forfeiture) of the assets; and the recovery and re-use of the confiscated property.

The rationale for (modern) confiscation rests on several premises: criminals are motivated by profits and we should hit them where it hurts; significant proceeds may derive from crime and are therefore available for recovery; criminals should be prevented from using their resources to finance or commit crime; and traditional forms of law enforcement are not effective especially within the scope of acquisitive crime.

With this in mind, several functions of confiscation can be highlighted, which are often overlapping: retribution, for most legal systems have established confiscation as a form of criminal penalty; deterrence (general and specific) to further reduce or at least control crime; remediation through restoring the *status quo ante* by disgorging illicit property; and restitution to compensate victims.

Initially, the confiscation of criminal property was implemented globally through the traditional proceedings of 'criminal confiscation' (*standard confiscation*), which allow for the deprivation of the illicit gains of an offender after their criminal conviction for a specific (set of) crime(s). This 'conviction-based' form of confiscation is ordered by a court of law, as part of the offender's sentence, against the property that is proven to be connected to the offences they were found guilty for. Yet, standard confiscation rapidly proved to be insufficient, not to say inefficient. Beyond the quintessential question of the prosecutorial culture towards the confiscation of criminal property, the true limits of the traditional concept of (conviction-based) confiscation come from factors such as the difficulty to first secure the criminal conviction of an offender, the necessity to prove the nexus between the property subject to confiscation and the offence they were convicted for, and the evident budgetary and time constraints that relate to investigating and prosecuting criminal cases – all hindering the success of state authorities in depriving criminals from their ill-gotten gains.

Against that background, estimates have shown that crime does indeed pay, and quite well so: overall, the black economy (i.e. the illicit gains made by criminals) would amount to around 3.6% of the gross world product, and less than 1% of the money laundered globally – probably around 0.2% – would be effectively seized.[2] From an EU perspective, it is estimated that illicit markets would generate EUR 110 billion annually, i.e. 0.9% of the gross European product.[3] Only 2.2% of unlawful proceeds would be seized and only 1.1% would be effectively confiscated in the EU.[4]

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[2] United Nations Office against Drugs and Crime, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes*, Research report, Vienna (October 2011) 5 and 7.

[3] Savona E. U., Riccardi M., *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe*, Trento, Transcrime (2015).

[4] Europol, *Does crime still pay? Criminal Asset Recovery in the EU. Survey of statistical information 2010-2014* (2016) 4.

2. The development of modern confiscation models for the sake of efficiency

Over the time, and facing the aforementioned constraints and setbacks, European legislators have developed new forms of confiscation – supposedly more effective/efficient.[5] Two specific trends can be highlighted in this respect, which are the expansion of the scope and reach of post-conviction powers of confiscation (through the use of presumptions) coupled with an increased interest for the development of non-conviction-based models of confiscation. Yet, even more far-reaching models of asset recovery devices seem to have already emerged for the sake of efficiency.

Compared with a traditional concept of confiscation, whereby the deprivation of property (crime instrumentalities[6] and proceeds[7]) follows a conviction for a specific crime, the new forms of confiscation provide for a loosened link between offences and confiscated proceeds. Assets may be confiscated even if they are not proceeds of the crime for which the offender has been convicted (*extended confiscation*), if they belong to persons other than the offender (*third party confiscation*), or if they are the proceeds of an offence which has not been proven at trial (*non-conviction based confiscation*).

Extended confiscation has been one of the fastest developing new forms of deprivation with a view to alleviating the recovery of illicit property. It is generally understood as the deprivation of the 'unjustified property' of an offender. The term 'extended' relates to property other than directly connected to the crime the person was convicted for, property that goes beyond the direct proceeds of crime. Extended confiscation ordinarily follows the prior criminal conviction of a defendant for specific crimes, i.e. being a post-conviction form of confiscation. It generally relies on (rebuttable) presumptions of unlawful origin of the defendant's property, which may derive from a disproportion between their lawful income and their actual economic resources. It is then the task of the property owner to rebut the said statutory assertions to avoid confiscation. The mechanism thus entails a reversal, or at least a sharing, of the burden of proof between the prosecution and the individual.[8] Extended confiscation is a quite practical concept for enforcement purposes when it comes to prosecuting serious and organised crime offences – which rarely consist in a 'one shot' activity. Being able to rely on the presumption that the property of a convicted person derives from related (yet unproven) offences alleviates the associated investigatory and burden of proof hurdles. As often pointed out by the supporters of extended confiscation, it is easier for a convicted offender to prove the licit origin of their property than for the prosecution to

[5] For a history of confiscation, see Fernandez-Bertier M., 'The history of confiscation laws: from the Book of Exodus to the war on white-collar crime', in Ligeti K., Simonato M. (eds.), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 53-75.

[6] Ie the property used or intended to be used in any manner for the commission of a criminal offence

[7] Ie any economic advantage derived directly or indirectly from an offence.

[8] Boucht J., 'Extended confiscation and the proposed directive on freezing and confiscation of criminal proceeds in the EU: on striking a balance between efficiency, fairness and legal certainty'. Eur. J. Crime Crim. Law Crim. Justice **21**, 127–162 (2013), 129; Turone, G.: Legal frameworks and investigative tools for combating organized transnational crime in the Italian experience. In: UNAFEI 134th International Training Course Visiting Experts' papers, No. 48-64 (2007).

prove their unlawful character. Conversely, it is also easier for the prosecution to successfully claim confiscation through 'watering down some of the traditional criminal procedural safeguards'.[9] Extended confiscation does facilitate the task of law enforcement authorities in proving the illicit character of the assets through less rigorous judicial procedures than the standard conviction-based confiscation approach. Extended confiscation is now an established feature of EU confiscation law and of all Member states' domestic confiscation regime (see below **3**).

Non-conviction-based confiscation allows for the deprivation of tainted assets irrespective of any prior conviction (i.e. of the property owner/holder). Hence, the targeting of the assets may operate at a very early stage of the investigations. This form of confiscation of criminal property allows the authorities to quiet title to criminally-related property. The main justifications for non-conviction based orders today rely on the preventive and remedial functions of confiscation: to prevent property from being used for the commission of further unlawful activities (as the instrumentalities of crime), and/or to restore the *status quo ante* on basis of the unjust enrichment theory and the idea that the offender has no right whatsoever to ill-gotten gains (ie the proceeds of crime). One of the main interests for non-conviction-based confiscation, from a law enforcement perspective, is the absence of requirement of a prior conviction before initiating confiscation proceedings: the property is (somewhat) dissociated from its owner and confiscation is not conditional upon prior liability of any offender. Confiscation can therefore be ordered within the course of less rigorous judicial procedures than criminal proceedings since the prosecuting authorities only bear the burden to demonstrate that the property is related to an unlawful activity. Furthermore, the onus of proof that must be met by law enforcement authorities rests on a lower standard[10] than usually sought in criminal matters for the proceedings are most often conducted outside of the criminal justice system.[11] Non-conviction-based confiscation therefore proves useful either where prosecutors have not identified the owner of the tainted property, or where they are not able to build a case that would resist the 'beyond a reasonable doubt' criminal standard of proof. Although the majority of EU Member states have not established the possibility to confiscate criminal property regardless of any conviction, non-conviction-based confiscation is expected to keep on spreading to further jurisdictions in the future due to the avowed limited of criminal (including extended) confiscation.

In parallel to the expansion of extended confiscation and non-conviction-based confiscation, further-reaching confiscation models have recently emerged. This includes but is not limited to 'unexplained wealth orders', a form of non-conviction-based

[9] Boucht J., 'Extended confiscation and the proposed directive', 129.
[10] They rest on a medium (civil) standard of proof – i.e. the traditional balance of probabilities.
[11] Although in practice there is often a link between the preventive [NCBC] measures and criminal proceedings […]'. Panzavolta M., Flor R., 'A necessary Evil? The Italian "non-criminal system" of asset forfeiture', in Rui J.P., Sieber U. (eds.), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 118, 123.

confiscation orders that further relies on the use of presumptions that the targeted property had been acquired unlawfully. In essence, unexplained wealth orders combine the benefits of both extended confiscation and non-confiscation-based confiscation at once. From a procedural point of view, once law enforcement authorities have suspicions as to the legitimacy of transactions conducted by a person or of assets they possess, recovery proceedings may be initiated. It is then to the latter to justify the source of their wealth, absent which confiscation can be ordered by the competent court. Unexplained wealth orders prove therefore useful where enforcement authorities have moderate evidence as to the existence of a specific unlawful activity[12]. Unexplained wealth orders are not (yet) a widespread feature of confiscation models across the EU but have started to emerge in some jurisdictions.[13]

In all these cases, the fact that a previous fully-fledged assessment of the criminal conduct, and of the link with the assets, is not a decisive factor to apply a confiscation measure raises several questions as regards the general objectives of criminal justice systems and the balance between effectiveness or efficiency and human rights: the recent legislative developments have proven that legislators are moving away from the most traditional concepts of confiscation to adopt (allegedly) more efficient ways to permanently deprive criminals from their ill-gotten gains. Within this context, one can observe a 'slippery slope' that consists in departing from standard conviction-based concepts towards the creation and increasing use of presumption-based and/or non-conviction-based models, and even to non-judicial powers of confiscation, for the sake of efficiency yet at the expense of procedural rights.[14] The search for efficiency through the development of increasingly incisive and aggressive confiscation models leads inevitably to potential conflicts with human rights. Correlatively, it draws a path towards a decrease in fundamental protections of the persons who see their property taken away.

Quite logically, the ECtHR has been called on to exercise its scrutiny on various (modern) forms of confiscation, including but not limited to standard criminal confiscation, extended confiscation and non-conviction-based confiscation – as well as unexplained wealth orders. Human rights law, however, has not yet provided a firm answer to all questions arising about the compatibility of new forms of confiscation with fundamental rights. In particular, the ECtHR has a casuistic approach that makes it

[12] I.e. where the requirements for traditional NCBC (and incidentally criminal confiscation) might not be met.

[13] Such as in the UK through the Criminal Finances Act 2017. The UK UWO concept however mostly consists in an investigative tool that precedes non-conviction-based confiscation: if the targeted person fails to (reasonably) justify the source of their property, the presumption will be made that the property is 'recoverable' under subsequent non-conviction-based proceedings (without any further need to demonstrate the criminal origin of the property). Home Office, *Circular 003/2018: unexplained wealth orders*, 1 February 2018.

[14] See Fernandez-Bertier M., 'Targeting criminal proceeds: a call for equilibrium between efficiency and respect of human rights', in Hoc A., Wattier S., Willems G. (eds.), *Human rights as a basis for reevaluating and reconstructing the law*, (Bruylant, 2016) 185-198.

difficult to identify a solid framework to assess the legitimacy of confiscation regimes.[15] As observed by judge Pinto de Albequerque in his (partly concurring and partly dissenting) opinion in the *Varvara* case:

> 'Under the *nomen juris* of confiscation, the States have introduced *ante delictum* criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures *in rem*. Confronted with this enormous range of responses available to the State, the Court has not yet developed any consistent case-law based on principled reasoning'.[16]

The compelling questions concerning human rights, however, cannot be neglected, and the ECtHR– as well as the Court of Justice of the European Union (CJEU) – will be likely called again in the future to identify certain limits to confiscation measures that every State must respect. More recently, in *Gogitidze*,[17] the ECtHR has tried to put forward a more comprehensive vision concerning non-conviction-based confiscation regimes (including unexplained wealth orders), but still many issues remain without a clear answer. This article, without having the ambition of being exhaustive, aims to clarify some features of the recent ECtHR case law.

3. Common EU concepts of confiscation (and its limits)

It is difficult to provide a full picture of the ECtHR case law with regard to all specific forms of confiscation. This is due to the fact that in this field, more than in other areas of criminal law, great differences exist among national regimes, and some countries have introduced peculiar forms that are hardly comparable with homologue foreign concepts (e.g., the anti-mafia preventive confiscation in Italy).[18]

It is worth mentioning, however, that in the last years, the EU has contributed to the development of a common narrative in this field. The objectives of the EU are not necessarily different from those pursued by other international organisations, such as the United Nations (UN) or the Council of Europe (CoE). 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

[15] Boucht J., *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017).
[16] ECtHR, *Varvara v. Italy*, App. no. 17475/09, 29 October 2013.
[17] ECtHR, *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015.
[18] Panzavolta M., 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25; Nicosia E., *La confisca, le confische* (Giappichelli, 2012).

legal instruments, in some cases re-stating the obligations provided by international treaties, in other cases going beyond them.[19]

For example, the EU has been trying to make the already existing cooperation mechanisms swifter and more effective in practice (e.g., the Council Decision 2007/84/JHA concerning the cooperation between Asset Recovery Offices).[20] Furthermore, it has adopted instruments applying the principle of mutual recognition to freezing and confiscation orders (the recent Regulation (EU) 2018/1805[21] – which replaces Framework Decision 2003/577/JHA[22] and Framework Decision 2006/783/JHA and strengthens the existing regime in this regard[23]).

The most relevant EU efforts – at least for the purposes of this contribution – have been made as regards the harmonisation of national concepts of confiscation. In particular, Directive 2014/42/EU aims to put forward a common definition of extended confiscation,[24] third party confiscation,[25] and what some confusingly refer to as non-conviction based confiscation or even as 'criminal non-conviction-based-confiscation'[26] (as ordered within the scope of criminal proceedings).[27] Directive 2014/42/EU should

[19] Borgers M.J., 'Confiscation of the Proceeds of Crime: The European Union Framework' in C King and C Walker (eds.), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014) 27; Fernandez-Bertier M., 'The Confiscation and Recovery of Criminal Property: a European Union State of the Art' (2016) 17 *ERA Forum* 323; Ligeti K., Simonato M., 'Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation? An Introduction', in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 1.

[20] Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime [2007] OJ L332/103. The objective is to ensure close co-operation and direct communication between national authorities involved in the tracing of illicit proceeds and other property that may become liable to confiscation (see Recital 3). For this purpose, each ARO established in one Member State is able to send a specific and detailed request for information to its counterpart in another Member State. The rules for this co-operation are those set forth in Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89.

[21] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation [2018] OJ L 303/1.

[22] Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45.

[23] Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L328/59.

[24] See Art. 5 of Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39.

[25] Art. 6 of Directive 2014/42/EU.

[26] Commission staff working document, impact assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, 21 December 2016, SWD/2016/0468 final – 2016/0412 (COD).

[27] Art. 4(2) of Directive 2014/42/EU. This article however creates a 'hybrid' device which is no way akin to the traditional concept of non-conviction-based confiscation as intertwining criminal and non-criminal proceedings: it is only when the conviction route is impossible that the court may open the way to a non-conviction based order, what some have qualified as a 'semi-non-conviction based confiscation'. Alagna F.: 'Non-conviction based confiscation: why the EU directive is a missed opportunity'. Eur. J. Crim. Policy Res. 21(4), 447–461 (2015). For more developments on Art. 4(2), see among others Simonato, M.: Directive 2014/42/EU and non-conviction based confiscation: a step forward on asset recovery? New J. Eur. Crim. Law 6(2), 213–228 (2015); Fernandez-Bertier M., 'The Confiscation and Recovery of

have been transposed into national law by October 2016, which most Member states appear to have now done – with more or less delay.[28]

The complexity (if not impossibility) to reconcile a common and clear-cut typology and terminology of confiscation models even at EU level must however be highlighted: as argued by some authors,[29] not only the non-conviction based confiscation, but also the extended and the third-party confiscation can be considered to some extent as confiscations without previous conviction: in the extended confiscation, some of the confiscated assets derive from crimes for which there has not been any conviction, and the third parties owning the confiscated assets are, by definition, not involved in the criminal proceedings leading to the conviction. Yet, it must be reminded that non-conviction-based confiscation in its most essential meaning does not require any prior conviction to trigger confiscation. By contrast, extended confiscation and third party confiscation (as defined by the EU legislation) are indeed 'post-conviction' models of confiscation since securing the conviction of an offender is a pre-requisite for confiscation. In short, in spite of the efforts of the EU to harmonise the substantive concepts of confiscation across Member states, one may expect that the path to reconciling all their domestic variations will be a long one and will keep on generating much discussion and practical hurdles.

Further, in some cases due to treaty limitations (e.g., as regards the impossibility to propose a more far-reaching model of non-criminal confiscation) and in others to the difficulties to reach a common approach within the Council, the provisions of Directive 2014/42/EU do not cover every aspect of confiscation measures. Hence a broad margin of discretion is left to national legislators. For example, as regards extended confiscation, the Directive does not clarify to what extent a shift or reversal of the burden of proof is allowed, what underlying 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.[30] As regards 'criminal non-conviction-based confiscation', the EU provisions aim just at minimum harmonisation, since they suggest employing confiscation without conviction in very limited cases (i.e., if conviction-based/post-conviction confiscation is not possible due to illness or the absconding of the suspect) and it can be considered as a real obligation only for those

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Criminal Property: a European Union State of the Art' (2016) 17 ERA Forum 32; Rui, J.P., Sieber, U.: Non-conviction-based confiscation in Europe. Bringing the picture together. In: Rui, J.P., Sieber, U. (eds.) Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction. Duncker & Humblot, Berlin (2015).

[28] Although no official evaluation of its implementation has been completed so far. See https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0042.

[29] Panzavolta M., 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25.

[30] See Boucht J., 'Extended Confiscation: Criminal Assets or Criminal Owners?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 117; Simonato M., 'Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU' (2016) 41 *European Law Review* 727.

countries that do not provide for *in absentia* proceedings.[31] Most importantly, it does not deal with confiscation measures issued outside the context of a criminal procedure (ie the purest form of non-conviction-based confiscation). However, being a minimum harmonisation Directive, this does not preclude Member States to provide for them[32] in the end of 2016, the European Commission already estimated that around (i) 12 Member states had aligned (or were aligning) their confiscation regimes along the lines of Directive 2014/42/EU (including extended confiscation and criminal non-conviction-based confiscation in the cases of illness or absconding only), (ii) 8 Member states had gone beyond the requirements of the Directive to include other forms of criminal non-conviction based confiscation (in case of death of the offender or in the absence of conviction more generally) and (iii) 7 Member states had implemented (or were implementing) a true (ie administrative or civil) form of non-conviction-based confiscation.[33] We understand that such figures have further evolved in the past couple of years to the benefit of non-conviction-based concepts of confiscation.

It is worth mentioning that the Directive introduces a minimum level of procedural safeguards that must be implemented at national level, too: these basically consist of the obligation to communicate the order with its underlying reasons as well as the possibility of a judicial review.[34] Nevertheless, no clear limits are incorporated in the substantive regulation of these new confiscation measures. The EU legal framework does not even explicitly preclude, for example, the confiscation of all assets of the convicted person.[35] For this reason, the ECtHR case law plays an important role in the identification of the limits to such afflictive measures, and in the future a similar role could be played by the CJEU, which may be called to clarify the scope and content of the Charter of Fundamental Rights of the European Union (CFREU) in this context. For the past four decades, the ECtHR has tried to find a fair balance between the interests of the States and those of the confiscation subjects with respect to both conviction-based and non-conviction-based confiscation. The lessons of the ECtHR are therefore a valuable asset for the continuing development of confiscation as a leading (anti-profit) criminal policy measure to fight crime given its direct impact and applicability on national orders. That said, the case law developed by the ECtHR ought not to be considered as sacrosanct as only constituting minimum standards that Member states

[31] See Recital 15 of Directive 2014/42/EU.

[32] As it occurs, for example, in Italy, Ireland, Romania, the Slovak Republic, Slovenia, Bulgaria and the UK. Rui J.P., Sieber U., 'NCBC in Europe: Bringing the Picture Together', in J.P. Rui and U. Sieber (eds.), *Non-Conviction-Based Confiscation in Europe* (Duncker & Humblot, 2015) 263.

[33] Commission staff working document, impact assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, 21 December 2016, SWD/2016/0468 final – 2016/0412 (COD).

[34] Art. 8 of Directive 2014/42/EU.

[35] Some limits can be found in Recitals 17 and 18. See Maugeri A.M., 'La Direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato nell'Unione europea tra garanzie ed efficienza: un "work in progress"' (2015) *Diritto penale contemporaneo. Rivista trimestrale* 300. It must be noted that confiscation of estate (i.e. of all assets of a person) is a possibility in France contrary to most countries.

have to abide with. Further, the Court is manifestly not immune to inconsistent interpretations and disputable judgments which have sparked criticism.

4. The key question: confiscation as a criminal sanction?

The identification of the fundamental rights that have to be protected, and to what extent, depends on a preliminary crucial question concerning the nature of a confiscation measure: is it a criminal sanction, or can it be considered as a different type of measure, different from a penalty? Obviously, only in the first case the full set of principles and safeguards applicable to criminal law cases must apply. For example, Article 6(2) and Article 6(3) ECHR would be engaged, and some features of civil proceedings – such as the standard of proof based on the balance of probabilities instead of the beyond any reasonable doubt principle – could be considered in contrast with due (criminal) process standards. Similarly, the principle of legality enshrined in Article 7 ECHR would be triggered, thereby imposing a non-retroactive legal basis. Even the *ne bis in idem* principle (Article 4 Protocol 7 ECHR) could be at stake, for example, if proceedings targeting assets were linked to a crime for which a final decision has already been issued.

The question about the nature of confiscation arises because national law often does not label a confiscation measure as a penalty, but rather as a security measure, a preventive measure, or as a remedial measure – all not aiming at the punishment of the culprit, but at the neutralisation of crime profit and at the removal of illegal proceeds from the licit economy. It is well-known, however, that the ECtHR adopts an autonomous concept of criminal matter, independent from national labels. Since the *Engel* judgment[36], the ECtHR has developed some criteria to assess whether a certain measure is substantially punitive, regardless of its formal classification at the national level: these criteria include the nature of the offence, and the degree of severity of the sanction.

Already at this point, however, when looking at the way in which these criteria have been applied to confiscation measures, it is quite difficult to decipher the rationale behind the ECtHR case law.[37] In some cases, measures that were defined as non-criminal by national law were treated as a penalty by the ECtHR. In other similar cases, the national classification has been upheld by the judges in Strasbourg.

An example of the first case, where the national label was re-qualified, concerns a confiscation measure for the illegal construction of buildings labelled as

[36] *Engel and Others v the Netherlands*, nos 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, 23 November 1976, §§ 80-85. The aim Engel test is to prevent national legislators from circumventing the application of fundamental guarantees that attach to criminal proceedings through different (and cosmetic) labeling. In brief, characterizing a measure as 'criminal' under the *Engel* test makes the guarantees protected by article 6, article 7 and article 4 of Protocol 7 ECHR all applicable. The *Engel* text requires the ECtHR to analyse (i) the domestic classification of the measure, (ii) the nature of the offence and (iii) the degree of severity of the penalty.

[37] Ivory R., *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge University Press, 2014) 150.

administrative in Italy ('confiscation of land'). It was applied despite the eventual acquittal of the defendant, on the basis of the consideration that the *actus reus* was anyway ascertained during the criminal proceedings. Italian courts, indeed, concluded that the building had been illegally built; however, since the local authority had granted the authorisation, they found that the accused was not guilty of negligence and had not had any unlawful intent: the law governing the authorisation system was not clear enough and the defendant's mistake was unavoidable. On the basis of these facts, in *Sud Fondi* the ECtHR condemned Italy for a violation of Article 7 ECHR, since the legal basis for the offence did not satisfy the criteria of clarity, accessibility and foreseeability. Consequently, it was impossible to foresee that a penalty could be inflicted.[38]

Some years later, another case concerning the same kind of 'administrative' confiscation was brought before the ECtHR: in this case, the criminal proceedings had been discontinued on the grounds that the prosecution had become time-barred after the applicant had been convicted in the first degree;[39] nonetheless, a confiscation measure was applied. In *Varvara*, the ECtHR considered that measure as a penalty, and punishing a defendant whose trial has not resulted in a conviction as incompatible with Article 7 ECHR:

> 'a system which punished persons for an offence committed by another would be inconceivable. Nor can one conceive of a system whereby a penalty may be imposed on a person who has been proved innocent or, in any case, in respect of whom no criminal liability has been established by a finding of guilt'.[40]

Such a judgment concerning an administrative confiscation, issued after an acquittal due to time-barred prosecution, has sparked a judicial 'dialogue' – as a matter of fact rather conflictual – with the Italian Constitutional Court, who held that Italian courts are obliged to implement only those ECtHR judgments that reflect a 'consolidated case law'. According to the Italian Court, this is not the case for *Varvara*, which is just the result of the casuistic approach followed by the judges in Strasbourg.[41]

Recently, the Grand Chamber of the ECtHR 'replied' to the Italian Court through an important judgment on some cases concerning the same confiscation measure applied after the criminal proceedings was time barred.[42] Such a judgment, however, is far from clarifying all the debated aspects outlined in this paper and from giving more consistency to the ECtHR case law in this field. At a first look, indeed, this new judgment seems to deviate from the previous *Varvara* judgment – and to lower the

[38] ECtHR, *Sud Fondi Srl v. Italy*, App. No. 75909/01, 20 January 2009.
[39] Contrary to the *Sud Fondi* case, therefore, the acquittal was not a decision on the merits.
[40] ECtHR, *Varvara v. Italy*, App. no. 17475/09, 29 October 2013, § 66-67.
[41] Italian Constitutional Court, 26 March 2015, no. 49.
[42] ECtHR, *G.I.E.M. s.r.l. v. Italy*, *Hotel promotion Bureau s.r.l. and Rita Sarda s.r.l. v. Italy*, *Falgest s.r.l. and Gironda v. Italy*, Applications no. 1828/06, 34163/07, and 19029/11, 28 June 2018.

standards of Article 7 ECHR – in order not to create further conflicts with the Italian Court. According to the Court, indeed, Article 7 does not necessarily require a 'formal' conviction (i.e., a conviction 'decided by criminal courts within the meaning of domestic law') for the application of a substantially-criminal sanction. A 'substantial' declaration of liability – as the one made by the Italian courts before the lapse of time that put an end to the criminal proceedings – may be 'capable of satisfying the prerequisite for the imposition of a sanction compatible with Article 7 of the Convention',[43] according to the ECtHR.

It is worth observing that this conclusion was certainly – and to some extent understandably – determined by the need to respect the discretion of the States in choosing what to consider as criminal or administrative.[44] As said, the application of the *Engel* criteria does not oblige the States to transfer administrative cases to criminal courts, but just to ensure the respect of certain criminal-law safeguards also in administrative punitive proceedings. However, the judgment leaves the impression that such a watered-down interpretation of Article 7 ECHR was mainly reached on the basis of two arguments that have been strongly criticised in the separate opinions,[45] namely on those concerning the need to avoid impunity and the complexity of crimes that, combined with short time limitation periods, would cause such an impunity.[46]

Furthermore, the same separate opinions point out the incoherent results of this judgment. If such a confiscation measures does not represent a violation of Article 7 in respect to one applicant, on the other hand it does violate the right to be presumed innocent until proven guilty according to law, protected by Article 6(2) ECHR. According to the ECtHR, a problem arises 'where a court which terminates proceedings because they are statute-barred simultaneously quashes acquittals handed down by the lower courts and, in addition, rules on the guilt of the person concerned'.[47] And this is what happens in the Italian case, since the substantial demonstration of liability (sufficient to ensure compliance with Article 7) is seen as a declaration of guilt incompatible with the presumption of innocence. For this reason, the Court seems to have accommodated the views of the Italian constitutional court as regards Article 7, but on the other hand does not 'save' such a peculiar non-conviction-based form of confiscation, and raises the higher barrier of Article 6(2).

Besides the Italian 'confiscation of land', the ECtHR has addressed on various occasions the national labelling and has analysed the impact of confiscation measures related to serious and/or organised crime on this essential safeguard.

In *Paraponiaris*, a pecuniary measure was applied to the applicant after he had been acquitted because of a time-barred prosecution, since the national courts held that the offence was 'objectively' ascertained despite the eventual acquittal. In this case, the

[43] ECtHR, *G.I.E.M. s.r.l. v. Italy* § 258.
[44] ECtHR, *G.I.E.M. s.r.l. v. Italy* § 253.
[45] See in particular those of Judge Pinto de Albuquerque (p. 81) and Judges Sajó, Karakas, Pinto de Albuquerque, Keller, Vehabovic, Kuris and Grozev (p. 154).
[46] ECtHR, *G.I.E.M. s.r.l. v. Italy* § 260.
[47] ECtHR, *G.I.E.M. s.r.l. v. Italy* § 316.

ECtHR found a violation of Article 6(2) ECHR since the application of a sanction after an acquittal, because the offence had actually been committed, is comparable to a determination of guilt without a due process.[48] In *Welch*, for example, dealing with the retrospective application of an *extended* form of *confiscation* related to drug trafficking, which was considered by the British legislator as a preventive measure aimed at removing the value of the proceeds from possible future use in the drugs trade, the ECtHR held that in reality that confiscation amounted to a penalty within the meaning of Article 7 ECHR, and that therefore it could not have retroactive application. To reach such a conclusion the ECtHR observed, on the one hand, that the purpose of the measure is not conclusive, since the 'aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment';[49] on the other hand, that not even the severity of the measure is decisive, since 'many non-penal measures of a preventive nature may have a substantial impact on the person concerned'.[50] The Court, therefore, found indications of a regime of punishment in other factors, such as the existence of statutory presumptions that reverse the burden of proof, the fact that the order was not limited to actual enrichment or profit but to all proceeds of crime, the discretion left to the judge, and the fact that a confiscation order could be converted into a prison sentence.

In the famous case *Phillips* – concerning the English regime of extended confiscation, i.e. a conviction-based confiscation also of assets deriving from other criminal conduct, for which there has been no conviction – the ECtHR was asked to establish whether the applicant was subject to new charges (as regards the assets deriving from un-proven criminal conduct) and, if not, whether the presumption of innocence produced an effect, notwithstanding the absence of new charges.[51] The main argument leading the Court to find Article 6(2) ECHR non applicable to those facts is that the purpose of the reference to other criminal conduct 'was not the conviction or acquittal of the applicant for any other drug-related offence' but 'to enable the national court to assess the amount at which the confiscation order should properly be fixed'. In other words, the Court considered the reference to other offences only as a criterion to determine the extent of the confiscation, operating in the sentencing phase (for the judged offences) but not representing a new charge for the other non-judged offences allegedly committed by the convicted person. As to the other prong of the question – whether the presumption of innocence applies even if no new charges are brought – the ECtHR noted that Article 6(2) ECHR 'can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process,

[48] ECtHR, *Paraponiaris v. Greece*, App. no. 42132/06, 25 September 2008. See Panzarasa M., 'Confisca senza condanna? Uno studio *de lege lata* e *de iure condendo* sui presupporti processuali dell'applicazione della confisca' [2010] *Rivista italiana di diritto e procedura penale* 1672, 1691.
[49] ECtHR, *Welch v. The United Kingdom*, App. no. 17440/90, 9 February 1995, § 31.
[50] ECtHR, *Welch v. The United Kingdom*, App. no. 17440/90, 9 February 1995, § 32.
[51] ECtHR, *Phillips v. The United Kingdom*, App. no. 41087/98, 5 July 2001. See also ECtHR, *Van Offeren v. The Netherlands* (dec.), App. no. 19581/04, 5 July 2005; and ECtHR, *Walsh v. The United Kingdom*, App. no. 43384/05, 21 November 2006.

unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning', without further elaborating on the nature and degree of those specific accusations deriving from the confiscation procedure. Furthermore, the ECtHR held that the reversal of the burden of proof – provided in the UK in order to ascertain the link between assets and other offences – did not violate the notion of a fair hearing under Article 6(1) ECHR. According to the ECtHR, the applicant benefited from adequate safeguards: among them, a public hearing where he could adduce documentary and oral evidence, and the effective possibility to rebut the presumption of the criminal origin of the assets targeted by the extended confiscation.

By contrast, a violation of the presumption of innocence was found in *Geerings*, where the Court condemned the Netherlands because an extended confiscation order, issued after a conviction, covered assets deriving from crimes for which the applicant had been previously acquitted. This, according to the ECtHR, amounted to a determination of guilt without the applicant having been found guilty according to law.[52]

In *Butler*, a case brought against the United Kingdom concerning its regime of *non-conviction-based confiscation* (civil asset forfeiture) related to drug trafficking – which, according to the applicant, is criminal in nature and should, therefore, attract the safeguards of the criminal process – the Court declared the application inadmissible *ratione materiae*. The main reason is that those kind of confiscation orders do not involve the determination of any criminal charge, more or less like the reference to other criminal conduct in extended confiscation assessed in *Phillips*. This makes it incomparable with a criminal sanction, since the non-conviction-based confiscation regime applied in the case under scrutiny 'was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs'.[53]

On several occasions[54], the Italian (non-conviction-based) anti-mafia preventive confiscation regime has been considered as a non-criminal measure, too. Since several decades, Italy has introduced a peculiar system of rather burdensome 'preventive measures', both personal (i.e., limiting the liberty of persons) and patrimonial (i.e., touching upon their property). They are devised to tackle organised crime more effectively than criminal proceeding, since they can be applied to persons who are not convicted, but only suspected of being connected to a mafia organisation (or, since more recently, involved in other serious offences). As regards the patrimonial side, the nature of that peculiar confiscation has been long debated in Italian case law, which tend to emphasise its preventive non-criminal facet, and literature, which is generally much more critical against the non-criminal label and the consequent lowering of

[52] ECtHR, *Geerings v. The Netherlands*, App. no. 30810/03, 1 March 2007.
[53] ECtHR, *Butler v. United Kingdom* (dec.), App. no. 41661/98, 27 June 2002.
[54] Starting with ECtHR, *M v Italy* (dec.), App. no 12386/86, 15 April 1991.

safeguards.[55] It is worth mentioning that the scope of application of these measures is being further extended by the legislator in these very months. The ECtHR has never found this kind of preventive confiscation to be criminal in nature and to attract the safeguards typical of criminal proceedings.[56] The only aspect that determined a condemnation of Italy for a violation of the civil limb of Article 6 ECHR has been the lack of the possibility to request a public hearing to decide for their application.[57] This led some authors to observe that the ECtHR has been 'tolerant'[58] and has 'shown a readiness to display considerable deference towards how states construct and use asset confiscation as a means of crime control'.[59]

Recently, the Georgian non-conviction-based confiscation and unexplained wealth orders system has been repeatedly challenged before the Court. Such a system allows enforcement authorities to recover assets wrongfully or inexplicably accumulated by public officials accused of certain offences, without obtaining their conviction and through relying on the use of presumptions. In these cases, however, the ECtHR has underlined that the non-conviction-based confiscation of property as a result of civil proceedings, which results from unexplained wealth orders and does not involve the determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature, and therefore does not entail the application of Article 6(2) and 6(3) ECHR.[60] Interestingly, the ECtHR first conducted an analysis as to whether the 'more extensive'[61] or the 'most limited'[62] aspect of Article 6(2) ECHR was concerned – should the Court conclude to the applicability of the provision. It found that the more extensive aspect was of no relevance since the non-conviction-based proceedings did not take place after criminal prosecution of the confiscation subject but preceded it. It then denied the applicability of the more limited aspect of Article 6(2) since civil *in rem* confiscation proceedings 'do not stem from a criminal conviction or sentencing

[55] Panzavolta M., Flor R., 'A Necessary Evil? The Italian "non-criminal" System of Asset Forfeiture' in J.P. Rui and U. Sieber (eds.), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 111.

[56] ECtHR, *Arcuri and others v. Italy* (dec.), App. no. 52024/99, 5 July 2001; ECtHR, *Licata v. Italy* (dec.), App. no. 32221/02, 27 May 2004; ECtHR, *Riela and others* (dec.), App. no. 52439/99, 4 September 2001.

[57] ECtHR, *Bocellari and Rizza v. Italy*, App. no. 399/02, 13 November 2007; ECtHR, *Bongiorno and others v. Italy*, App. no. 4514/07, 5 January 2010.

[58] Panzavolta M., 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25.

[59] Boucht J., *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 23.

[60] See, among others, ECtHR, *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015; ECtHR (dec.), *Giorgi Devadze v. Georgia*, App. no. 21727/05, 3 November 2016.

[61] 'The role of which is to prevent the principle of presumption of innocence from being undermined after the relevant criminal proceedings have ended with an outcome other than conviction (such as acquittal, discontinuation of the criminal proceedings as being statute-barred, the death of an accused, and so on'. *Gogitidze and others v. Georgia*, § 125.

[62] 'The role of which is to protect an accused person's right to be presumed innocent exclusively within the framework of the pending criminal trial itself'. *Gogitidze and others v. Georgia*, § 126.

proceedings and thus do not qualify as a penalty' and cannot amount to the determination of a criminal charge.

Overall, and as already said, a point of criticism often raised toward the case law of the ECtHR concerns its incoherence, and therefore the unpredictability of its outcome in a specific case. This might be due, for example, to the fact that the ECtHR often seems to ground its conclusions on the assessment of the purpose of the measure, excluding the nature of penalty whenever there is not a clear punitive aim.

5. Confiscation as something else than a criminal sanction

If the answer to the question concerning the nature of a confiscation measure, even after applying the *Engel* criteria, is that confiscation is not a penalty, but a different kind of measure, it does not follow – of course – that fundamental rights do not apply at all, but just that different rights, or different aspects of those rights, are at stake. Consequently, certain safeguards can be diluted, but do not disappear. A legal basis is still necessary, even if the legality principle is less stringent, the defence rights are those that fall within the civil limb of Article 6 (instead of the full set of guarantees provided for criminal proceedings), the standard of proof can be based on the balance of probabilities instead of the beyond any reasonable doubt, the use of presumption (thereby the reversal of the burden of proof) can be more extensive, etc.[63]

How much weaker the protection of fundamental rights outside the realm of criminal law can be, however, is not self-evident. European and national case law, as well as scholarly literature, are still struggling to identify what safeguards ought to apply to non-criminal (or quasi-criminal, being in any case a component of the public response to crime) confiscation proceedings. Rather that within the scope of Article 6 and 7, the answer is sought in the realm of the right to property. Article 1, Protocol 1, ECHR provides, indeed, that no one can be deprived of his possessions 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The ECtHR has clarified that this means that the Convention requires a legal basis for any interference with the 'peaceful enjoyment' of one's possessions (lawfulness), and that such an interference, based on public interests, is proportionate to the legitimate aim pursued (proportionality).[64]

As regards the lawfulness, the ECtHR clarified that, in order to ensure adequate protection against arbitrary action on the part of the authorities, it exercises a scrutiny on the 'quality of the law', in the sense that the requirement of lawfulness means also

[63] Panzavolta M., 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25, 34.

[64] More precisely, the Court held that 'where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (…) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1' (ECtHR, *Gogitidze and others v. Georgia*, App. No. 36862/05, 12 May 2015, § 94)

compatibility with the rule of law. Domestic rules, therefore, must be sufficiently precise and foreseeable, and the law must provide legal protection against arbitrariness. Recently, for example, the ECtHR condemned Bulgaria in a case concerning an unexplained wealth order (i.e. non-conviction-based confiscation issued against unexplained – therefore allegedly 'unlawful' – income). One of the reasons for the violation of Article 1, Protocol 1, ECHR was identified in the fact that no time limits were provided for the possibility for the State to require evidence about personal revenues and expenditure, therefore, in principle, prosecution authorities would be free to 'open, suspend, close and open again proceedings at will at any time'.[65]

In this regard, it is worth mentioning that there is the possibility that the ECtHR approach to the Italian preventive confiscation (see above) might change if the Court decides to go down the road recently taken by the Grand Chamber in *De Tommaso*.[66] That case concerned the application of *praeter delictum* personal 'preventive measures', namely a sort of special police supervision accompanied by several obligations (such as not changing place of residence, or leading a 'honest and law-abiding life'). In that case, the ECtHR held that such measures violated Article 2 Protocol 4 ECHR, which provides that any measure restricting the liberty of movement must be adopted in accordance with domestic law, pursue one of the legitimate aims referred to in the third paragraph of that Article, and strike a fair balance between the public interest and the individual's rights. The Court recalled that the legal basis to adopt such measures must be accessible to the persons concerned and foreseeable to its effects: this means that the law, in order to protect individuals against arbitrary interferences by the public authorities, must be formulated 'with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[67] This is not the case with such measures, according to the ECtHR, since Italian law does not clearly identify the 'factual evidence' or the specific types of behaviour that can be taken into consideration to assess the dangerousness of the individual, which may give rise to the preventive (personal) measure; in other words, the vagueness of the law regulating the conditions to apply such measures, as well as their content, does not provide sufficient protection against arbitrary interferences with the freedom of movement.

Although this case concerns personal measures, there might be consequences on the future case law concerning the preventive non-conviction-based confiscation, since the two legal regimes, and the requirements to apply the respective measures, are quite similar.[68] As said above, the ECtHR did not consider the Italian personal preventive measures as criminal in nature: only the civil aspects of Article 6 ECHR were

[65] ECtHR, *Dimitrovi v. Bulgaria*, App. no. 12655/09, 3 March 2015, § 46
[66] ECtHR (GC), *De Tommaso v. Italy*, App. no. 43395/09, 23 February 2017.
[67] ECtHR (GC), *De Tommaso v. Italy*, App. no. 43395/09, 23 February 2017, § 107.
[68] Viganò F., 'La Corte di Strasburgo assesta un duro colpo alla disciplina italiana delle misure di prevenzione personali', in www.penalecontemporaneo.it, 3 March 2017.

considered applicable, and no violation was found in that respect. Hence despite the various arguments used by scholars and dissenting judges, [69] there are no real reasons to expect that this is likely to happen soon with regard to patrimonial preventive measures. Nevertheless, applying to patrimonial measures the reasoning followed by the ECtHR in *De Tommaso* (as regards the personal measures) may lead to a more severe scrutiny of the 'quality of law' needed to adopt measures restricting the right to property.[70]

As regards the proportionality, it is worth mentioning that this concept is not explicitly mentioned in the ECHR, but has acquired an important role due to the development of the ECtHR case law especially as regards the 'qualified rights', i.e. those non-absolute rights that can be subject to legitimate limitations, such as the right to private life, the right to manifest one's religion or belief, the right to freedom of expression, and indeed the right to property. The proportionality test is conducted when there is an interference with a fundamental right, and aims to assess whether such an interference pursues a legitimate objective, whether the measure is suitable to reach that objective, whether it is necessary (i.e., if no other less intrusive means were available) and whether it is proportionate to the final objective (proportionality *stricto sensu*).[71] This implies, in other words, an assessment of the relation between means and ends, which requires a fair balance between the competing interests protected by the human right and those of the community as a whole.[72]

In some cases, the ECtHR has affirmed that an interference with the right to property violates the principle of proportionality – compromising the fair balance between individual right and general interest – when an excessive burden is imposed on the property-owner. In *Paulet*, the applicant complained that the confiscation orders (following a conviction for obtaining employment using a false passport) had been disproportionate as it amounted to the confiscation of his entire savings over nearly four years of genuine work, without any distinction being made between his case and those involving more serious criminal offences such as drug trafficking or organised crime. The Court specified that, '[a]lthough the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake'.[73] This was not the case in the domestic proceedings, according to the ECtHR: the UK courts simply considered that the confiscation order had been issues in the public interests, but they did not go further to conduct the other aspects of the proportionality test, meaning they did not balance the

[69] In his partly dissenting opinion in *De Tommaso*, judge Pinto de Albuquerque explains why he considers these preventive measures criminal in nature in light of the *Engel* criteria.
[70] Judge Pinto de Albuquerque (§ 60) concluded that 'the Italian legislature evidently has to draw all the logical conclusions from the present judgment with regard to the recent Legislative Decree no. 159/2011, and the sooner the better.
[71] See Alexy R., 'Constitutional Rights and Proportionality' (2014) *Revus* [online] 22.
[72] See, as regards Art. 8 ECHR, *Von Hannover v. Germany*, App. no. 59320/00, 24 June 2004, § 57.
[73] ECtHR, *Paulet v. The United Kingdom*, App. no. 6219/08, 13 May 2014, § 65.

interference in the public interest with the right to peaceful enjoyment of an individual's possessions as recognised by the ECHR. The scope of their review, in other words, had been too narrow to satisfy the requirement of seeking a fair balance between opposite interests.

In *Microintelect*, a case dealing with Bulgarian confiscation in administrative punitive proceedings concerning the selling of alcohol without the required authorisation, the ECtHR stressed that, when finding the balance between property rights and general interests, the States have a wide margin of appreciation when passing laws for the purpose of securing the payment of taxes, since decisions in this area 'commonly involve the consideration of political, economic and social question which the Convention leaves within the competence of the Contracting States'.[74] In that case, however, Bulgaria was condemned for a violation of Article 1, Protocol 1, ECHR because the applicant – a 'third party' whose property was affected – could not intervene in the proceedings against the alleged offender. In addition, since there was no legal basis for a judicial review of the decision, the Court did not find that national law provided adequate safeguards against unjustified interferences with property rights.

Even the assessment of the proportionality of the interference with the right to property may, therefore, be influenced by the level of procedural safeguards granted to the applicant. In *Webb*, for example, the Court observed that the applicant had an adversarial procedure before the national authorities who decided on the (non-criminal) confiscation, and that proceedings applying the civil standard of proof do not entail that the measure is disproportionate. In that case, a potential violation of Article 6(1) ECHR (civil limb) was rather identifiable in the lack of reasoning for the decision; however, the application was declared inadmissible because of the non-exhaustion of all domestic remedies.[75]

This emerged even more clearly in the above-mentioned *Gogitidze*, a case concerning unexplained wealth orders (namely non-conviction based confiscation related to corruption offences), where the ECtHR recognised the legitimacy, in the anti-corruption field, of 'internationally acclaimed standards' concerning *in rem* confiscation measures that entail, *inter alia*, the possibility of lowering the standard of proof and to tackle assets belonging to third parties ('family members and other closer relatives who were presumed to possess and manage the ill-gotten property informally on behalf of the suspected offenders, or who otherwise lacked the necessary *bona fide* status'). Assessing, and confirming, the proportionality of the national measures, the ECtHR stressed that States have a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of property.[76] Most decisively, the Court acknowledged that the applicants were afforded 'a reasonable opportunity of putting their arguments before the domestic courts', both in writing and

[74] ECtHR, *Microintelect Odd v. Bulgaria*, App. no. 34129/03, 4 March 2014, § 42. See also ECtHR, *Aboufadda v. France*, App. no. 28457/10, 4 November 2014, § 22.
[75] ECtHR, *Webb v. The United Kingdom* (dec.), App. no. 56054/00.
[76] ECtHR, *Gogitidze and others v. Georgia*, App. No. 36862/05, 12 May 2015, § 108

at an oral hearing; that the proceedings were conducted in an adversarial manner; and that the domestic courts duly examined the prosecutor's claim in the light of numerous supporting documents available in the case file.[77]

All in all, there are not many cases in which the Court found the interference with property rights disproportionate as such. This is not surprising, since there are no clear cut criteria to determine what amounts to a disproportionate interference with the right to property. Proportionality, as developed by the ECtHR, is a rather 'procedural' concept, which serves as an analytical framework that may lead to different results according to the specific weight of the various factors taken into consideration in the different contexts, particularly those related to the procedure that led to the adoption of the confiscation order.[78] Such a reliance on proportionality in human rights adjudication has been subject to criticism because of the lack of clear guidance to the judge as to how to determine when a concrete measure does not represent a fair balance, or when the adopted means could be proportionate to the legitimate objective.[79] As regards measures against the right to property, the ECtHR has shown a tendency to apply a less stringent proportionality test compared with the one conducted as regards other fundamental rights,[80] in particular when such measures are part of an enforcement strategy against serious crime like drug trafficking, organised crime, and – more recently – corruption. Also for this reason, one may conclude that the protection offered by the ECHR as regards the right to property is lower than that provided by the full set of provisions of Article 6 and 7 ECHR. The question concerning the true nature of confiscation measures, therefore, maintains its relevance.

6. Conclusions

Confiscation has been increasingly acquiring a prominent place in the design of criminal policies in the field of serious and/or organised crime and terrorism, but also more in general in the field of economic and financial crime. The interest of national legislators and practitioners in fostering the effectiveness of measures against criminal property has certainly risen in the last years. The risks of such a trend are to be assessed by taking into consideration the various fundamental rights endangered by these measures. At the national level, domestic courts are struggling to find a balance between effectiveness of crime control mechanisms and protection of human rights. In the European context, both the ECHR and the CFREU contain provisions that imply certain limits to confiscation measures, and a minimum level of safeguards for convicted

[77] ECtHR, *Gogitidze and others v. Georgia*, App. No. 36862/05, 12 May 2015, § 109-113.
[78] Mc Bride J., 'Proportionality and the European Convention on Human Rights', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999) 23; Harbo T., *The Function of Proportionality Analysis in European Law* (Brill Nijhoff, 2015) 63; Boucht [6] 168; Marletta A., *Il principio di proporzionalità della disciplina del mandato d'arresto europeo* (Cedam, forthcoming).
[79] Urbina F.J., *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) 2-7.
[80] Boucht J., *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 174.

persons, defendants, or simple property owners. So far, the ECtHR has dealt with a number of cases involving examples of extended, non-conviction based (including unexplained wealth orders), and third party confiscation, i.e. the most recent and afflictive forms of confiscation. In the future, the CJEU may also be asked to clarify the content and scope of the rights provided by the CFREU.

Over the past four decades, the developments of the ECtHR on the compliance of confiscation orders with fundamental rights have been quite extensive. In most instances, applicants have argued that the confiscation order they had faced violated their right to be presumed innocent (under Article 6(2) ECHR), the right to a fair trial (under Article 6(1)) and/or their right to property (Article P1-1). Without any attempt to draw comprehensive conclusions from the ECtHR's case law, it is interesting to highlight a few high level lessons learned from the Court in this area:[81]

Article 6(2), which protects the presumption of innocence, shall only apply in very limited instances: (extended) criminal confiscation should not trigger Article 6(2) for it does not amount to a criminal charge but rather constitutes part of the sentencing process… except when the scope of confiscated property includes property linked to a crime for which defendant was actually acquitted. Similarly, non-conviction-based confiscation (including unexplained wealth orders) should not trigger the presumption of innocence since it does not amount to a criminal charge and therefore does not qualify as a penalty.[82]

Article 6(1) and the right to a fair hearing shall always apply – under either its civil or its criminal limb: reasonable (and rebuttable) statutory assumptions should generally be held to comply with Article 6(1) in both (extended) conviction-based and non-conviction-based proceedings. The ECtHR has also been attentive to the reasonable length of confiscation proceedings and to the need that confiscation subjects be at least granted the opportunity to ask for a public hearing to challenge the confiscation order.[83]

Article P1-1 shall always be triggered by a confiscation order. However, only a limited number of ECtHR judgments have concluded to a violation of the right to property: where confiscation is considered to be lawful, it is the analysis of the proportionality of the interference that bears the more weight, ie whether the procedure

[81] Summary of Fernandez-Bertier M., 'Fundamental rights in confiscation proceedings: An ECtHR state-of-the-art', presentation made at the *Confiscation of criminal assets in the European Union* conference, Utrecht University, 23 November 2017, available at www.improvingconfiscation.eu.

[82] See among others ECtHR, *M. v Italy* (dec.), App. no. 12386/86, 15 April 1991; *Raimondo v Italy*, App. no. 12954/87, 22 February 1994; *Phillips v the United Kingdom*, App. no. 41087/98, 5 July 2001; *Butler v the United Kingdom* (dec.), App. no. 41661/98, 27 June 2002; *Van Offeren v the Netherlands* (dec.), App. no. 19581/04, 5 July 2005; *Walsh v the United Kingdom* (dec.), App. no. 43384/05, 21 November 2006; *Geerings v the Netherlands*, App. no. 30810/03, 1 June 2007; *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015; ECtHR (dec.).

[83] See among others ECtHR, *Autorino v Italy* (dec), App. no. 39704/98, 21 May 1998; *Phillips v the United Kingdom*, App. no. 41087/98, 5 July 2001; *Webb v United Kingdom*, App. no. 56054/00, 10 February 2004; *Grayson and Barnham v United Kingdom*, App. nos. 19955/05 and 15085/06, 23 September 2008; *Minhas v the United Kingdom* (dec), App. no. 7618/07, 10 November 2009; *Pozzi v Italy*, App. no. 55743/08, 26 July 2011; *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015

for confiscation was arbitrary and whether the domestic courts acted without arbitrariness. What matters is the respect of a 'fair balance', ie making sure that the interference was proportionate and that the applicant did not have to bear an excessive individual burden, and in particular that the applicant had a reasonable opportunity to put its case before relevant authorities.[84]

Overall, safeguards and limits differ depending on whether confiscation measures are criminal in nature or not. The criminal limb of Article 6 ECHR, as well as Article 7 ECHR, apply to confiscation measures whose nature is that of a penalty, whatever the national label is. The assessment of the nature carried out by the ECtHR is, therefore, crucial to determine the violation of those conventional rights. However, the application of the long-established criteria to guide such an assessment – national qualification, nature of the offence, and severity of the sanction – do not always lead to predictable and consistent outcomes. The assessment seems to strongly depend on the purpose of the sanction – preventive and/or compensatory rather than punitive – but this is a debatable approach, since penalties too may combine punitive with preventive purposes.[85]

In the future, therefore, the Court may strive to refine the common European understanding of criminal charge and criminal sanction, further clarifying the distinction between punitive, preventive and reparative purposes, as well as to clarify the scope of Article 6, Article 7 and Article 1 Protocol 1 ECHR in relation to the different confiscation measures. As several authors suggest, to make the outcome of its case law more predictable and unfluctuating, the ECtHR might also endeavour to find a more 'principled reasoning' to distinguish the various forms of confiscation, based for example on the forfeitable object or the procedure followed to adopt the measure.[86] However, the recent judgments – in particular the *G.I.E.M. S.R.L. and others v. Italy* issued in June 2018 – appear as a missed opportunity, and further contribute to making some features of the fundamental rights at stake unclear. For example, it often happens that the procedural guarantees (Article 6 ECHR) are taken into consideration to assess the substantive aspects of Article 7 ECHR.[87]

In *Varvara*, Judge Pinto de Albuquerque indicated that the ECtHR has tended to afford weaker guarantees to more severe and more intrusive confiscation orders, whereas it grants stronger protections to less serious deprivation measures. The

[84] See among others ECtHR, *Butler v the United Kingdom* (dec.), App. no. 41661/98, 27 June 2002; *Vasilyev and Kovtun v Russia*, App. no. 13703/04, 13 December 2011; *Zakova v the Czech Republic*, App. no. 2000/09, 3 October 2013; *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015.

[85] Mazzacuva F., 'The Problematic Nature of Asset Recovery Measures: Recent Developments of the Italian Preventive Confiscation', in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 101. See also the partly dissenting opinion of judge Pinto de Albuquerque in *De Tommaso*, § 37.

[86] Panzavolta M., 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25.

[87] See the dissenting opinion of Judges Sajo, Karakas, Pinto de Albuquerque, Keller, Vehabovic, Kuris and Grozev in *G.I.E.M. S.R.L. and others v. Italy*, § 21-24.

Strasbourg judge decried that the ECtHR casuistic approach has resulted in a 'contradictory and incoherent' case law which even surpasses the contradictions between cases dealing with measures of substantially same nature. Given the multiplicity of established confiscation powers – i.e. preventive measures (*ante delictum*), criminal penalties, security measures or administrative orders – the ECtHR has yet failed in developing a 'coherent jurisprudence based on a policy rationale'.[88] About six years after J. Pinto de Albuquerque's opinion in *Varvara*, the tension between efficient confiscation measures and the protection of fundamental freedoms remains imbalanced – to the disadvantage of the latter.

Considering the proliferation of national laws extending confiscation powers, the need of a more coherent and comprehensive assessment of the various types of measures – as well as clearer indication of the limits of law enforcement powers deriving from fundamental rights – remains a high priority.

[88] J. Pinto de Albuquerque's partly dissenting and partly concurring opinion in ECtHR, *Varvara v. Italy*, App. no. 17475/09, 29 October 2013, 28-30.