

Fundamental rights in confiscation proceedings: An ECtHR state-of-the-art

Confiscation of criminal assets in the European Union

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Premise on confiscation and fundamental rights


- *“In all jurisdictions there is a potential conflict between asset confiscation processes and human rights which makes all such cases challenging to adjudicate”*
(Matrix Insight Ltd., 2009)
- There is a **continuing tension** between the use of **efficient crime control mechanisms** and the protection of **fundamental rights** of confiscation subjects

On the menu today

- **Typological** introduction to confiscation models
 - *NOT on the menu: third-party confiscation*
- Confiscation in tension with the **presumption of innocence**
- Confiscation in tension with the **right to a fair trial**
- Confiscation in tension with the **right to property**

Typological introduction to confiscation

Typology of confiscation models: *Evolution & Trends*

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- **Judicial, conviction-based** = standard confiscation
 - Judicial, conviction-based & **presumption-based*** = extended confiscation
 - Judicial, **non-conviction based** = civil confiscation
 - Judicial, non-conviction-based & **presumption-based*** = unexplained wealth orders, preventive confiscation
 - [**Non-judicial** = administrative confiscation]

* Presumption: shifting of burden of proof ;
leads to confiscation of unexplained property

Typology of confiscation models: *Evolution & Trends*

- **Judicial, conviction-based** = standard confiscation
- Judicial, conviction-based & **presumption-based*** = extended confiscation

C
B
C

- Judicial, **non-conviction based** = civil confiscation
- Judicial, non-conviction-based & **presumption-based*** = unexplained wealth orders, preventive confiscation

N
C
B
C

- [**Non-judicial** = administrative confiscation]

Typology of confiscation models:

Mechanisms subject to the ECtHR scrutiny



– Conviction-based confiscation (CBC)

- **Standard confiscation** = criminal confiscation of specific property that is proven to be linked to the crime for which the defendant was convicted
- **Extended confiscation** = criminal confiscation of unexplained wealth*, i.e. of additional proceeds that derive from similar/other crimes than the one(s) for which the defendant was convicted
 - ECtHR cases originating from the **UK** (i.e. *criminal lifestyle confiscation*) & the **NL** (i.e. *verruimde confiscatie*)

Typology of confiscation models:

Mechanisms subject to the ECtHR scrutiny



– Non-conviction-based confiscation (NCBC)

- **Civil confiscation** = non-conviction-based, *in rem* confiscation of specific property that is proven to be linked to a crime
 - ECtHR cases originating from the **UK** (i.e. *civil recovery / forfeiture*)
- **UWOs/preventive confiscation** = non-conviction-based confiscation of unexplained wealth*
 - ECtHR cases originating from **IT** (i.e. *confisca di prevenzione*) & **GA** (i.e. *UWOs*)

Confiscation in tension with...
... the presumption of innocence

Confiscation and the presumption of innocence

Art. 6(2) ECHR: *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*

To be examined under two aspects (*Gogitidze and Others v. Georgia* (2015)):

- **Narrow:** pending trial
- **Extensive:** after criminal proceedings have ended without conviction

→ Challenges raised in relation to **CBC** (extended confiscation) and **NCBC** (civil confiscation, UWOs)

Confiscation and the presumption of innocence

When is art. 6(2) triggered?

When confiscation amounts to the determination of a criminal charge

How to assess?

The “Engel Test” (*Engel and Others v. the Netherlands* (1976))

- Domestic classification of the measure
- Nature of the offence
- Degree of severity of the penalty

Confiscation and the presumption of innocence

CBC: Extended confiscation

▪ When confiscation targets proceeds of similar/other offences

(Phillips v. the United Kingdom (2001) & Van Offeren v. the Netherlands (2005))

Engel Test (*Phillips*):

- 1st criterion: *“it is clear that such an application does not involve any new charge or offence in terms of the criminal law”*
- 2nd & 3rd: *“the purpose of this procedure was not the conviction or acquittal of the applicant”*; *“it cannot be said that the applicant was “charged with a criminal offence”*;
[what about severity?]

Confiscation and the presumption of innocence

CBC: Extended confiscation

- When confiscation targets proceeds of similar/other offences

Phillips & Van Offeren:

- *“the confiscation order procedure must therefore be regarded as analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on” a properly convicted offender and “did **not** involve the bringing of any new “charge” within the meaning of Article 6 § 2 of the Convention”*
- *“the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence “charged”. Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused’s character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new “charge””*

= No application of Art. 6(2)

Confiscation and the presumption of innocence

CBC: Extended confiscation

▪ **When confiscation targets proceeds of a crime for which the person was acquitted**

(Geering v. the Netherlands (2007))

- the applicant “*was never shown to be in possession of any assets for whose provenance he could not give an adequate explanation*”
- “*unlike in the Phillips and Van Offeren cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted*”
- this goes further than the voicing of suspicions: “*It amounts to a determination of the applicant's guilt without the applicant having been “found guilty according to law”*”

= Application & violation of Art. 6(2)

Confiscation and the presumption of innocence

NCBC: Standard civil confiscation

(*Butler* (2002) & *Walsh v. the United Kingdom* (2006))

- Engel Test
 - Proceedings regarded as civil in nature (not criminal)
 - Did not aim at convicting/acquitting the applicant (criminal charges never brought / Court never took into account any conduct in respect of which the applicant had been acquitted)
 - Severity is not itself determinative of the criminal nature (not punitive in nature in spite of hefty sum)
- Confiscation does **not** involve the determination of a criminal charge (but is preventive in nature; purpose is to take out illicit money from the legal economy)
- = **No** application of Art. 6(2)

Confiscation and the presumption of innocence

NCBC of unexplained wealth: Italian preventive confiscation

(M (1991), Teresi (1992), Raimondo (1994), Autorino (1998), Prisco (1999), Arcuri (2001), Riela and Others (2001) & Bocellari and Rizza (2007)... v. Italy)

- Engel Test (*M v Italy* (1991))
 - Preventive and not criminal in nature
 - Autonomous proceedings that do not involve the finding of guilt of the subject, conditional upon prior declaration of dangerousness, based on sufficient circumstantial evidence
 - Severity is not so great as to warrant its classification as a criminal penalty
- Confiscation does **not** entail a criminal charge, involve a finding of guilt or constitute a penalty (designed to prevent the commission of offences (*M (1991) & Raimondo (1994)*)
- = **No** application of Art. 6(2)

Confiscation and the presumption of innocence

NCBC of unexplained wealth: Georgian UWOs

(Gogitidze and Others (2015) & Devadze and Others v. Georgia (2016))

– Did not even conduct an Engel Test (!):

“the Court reiterates, 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 determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature and thus cannot give rise to the application of [Article 6 § 2]”

= No application of Art. 6(2)

N.B.: *Gogitidze* (unanimous judgment) = new leading case-law for NCBC?

Confiscation and the presumption of innocence

Takeout

- **CBC (extended)** does **not** trigger Art. 6(2) since it does not amount to a criminal charge but rather constitutes part of the sentencing process...
 - **except** when the scope of confiscated property includes assets linked to a crime for which defendant was actually acquitted
 - **NCBC** (be it **standard** or of **unexplained wealth**) does **not** trigger Art. 6(2) and the presumption of innocence since it does not amount to a criminal charge
- = Very limited applicability of Art. 6(2)

Confiscation in tension with...
... the right to fair trial

Confiscation and the right to a fair trial

Art. 6(1) ECHR: *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

→ Challenges raised in relation to **CBC** (extended confiscation) and **NCBC** (civil confiscation, UWOs)

Confiscation and the right to a fair trial

Ufairness of... **burden of proof**

Ruling: Although placing the burden of proof on the prosecution is a fragment of the general notion of a fair trial, this right is “*not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain with certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence*” (Phillips (2001))

Takeout: applying reasonable (and rebuttable) statutory assumptions and/or a civil standard of proof complies with art. 6(1) in both CBC and NCBC proceedings:

- **CBC: Extended** (Phillips (2001); Grayson and Barnham (2008); Minhas (2009));
- **NCBC: Standard** (Webb (2004)); **UWOs** (Gogitidze (2015))

Confiscation and the right to a fair trial

CBC (extended) – Phillips (2001):

- “*whilst the assumption was mandatory when the sentencing court was assessing whether and to what extent the applicant had benefited from the proceeds of drug trafficking, the system was not without safeguards. Thus, the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised. The principal safeguard, however, was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice. [...] Furthermore, the Court notes that, had the applicant’s account of his financial dealings been true, it would not have been difficult for him to rebut the statutory assumption”.*
- “Overall, therefore, the Court finds that the application to the applicant of the relevant provisions of the Drug Trafficking Act 1994 was confined within reasonable limits given the importance of what was at stake and that the rights of the defence were fully respected”.

Confiscation and the right to a fair trial

NCBC (standard) – Webb (2004):

- “The Court notes that the essence of the applicant’s argument is that he was deprived of his property in the absence of procedural safeguards. [...] As to compliance with the fair balance requirement, it is to be noted that the applicant had an adversarial procedure before Dover Magistrates’ Court. It was for HM Customs and Excise to satisfy the court that on a balance of probabilities the applicant’s money directly or indirectly represented the proceeds of drug trafficking and/or was intended for use in drug trafficking. The applicant, who was legally represented, could and did contest the factual basis of that argument. The fact that the proceedings before the magistrates were conducted according to the civil standard of proof does not vitiate the fairness of the procedure or support an argument that the forfeiture measure ordered was disproportionate in the circumstances”.
- “What is important for the Court is that the applicant was able to state his case before the magistrates in an adversarial procedure and had the possibility to remedy the only defect which he has identified in that procedure and to have the legality of the impugned decision reviewed and that, in any event, he had a statutory right of appeal by way of a full re-hearing of the forfeiture application. He did not duly avail himself of either opportunity”.

Confiscation and the right to a fair trial

Unreasonableness of... **length of proceedings**

Takeout: to be assessed taking a comprehensive view of the proceedings, including the total length of confiscation proceedings, the complexity of the case and the many stages of proceedings, the conduct of the parties

(**NCBC**: *Raimondo* (1994); *Ruga* (1995) & *Autorino* (1998) *v. Italy* = **no** violation)

Necessity of... **Right to public hearing (!)**

Takeout: confiscation subjects should at least have the opportunity to ask for a public hearing to challenge confiscation

(**NCBC**: *Bocellari and Rizza* (2007); *Bongiorno and Others* (2010) & *Pozzi* (2011) *v. Italy* = **violation**)

Confiscation in tension with...
... the right to property

Confiscation and the right to property

Art. P1-1: (1) *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall 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.*
(2) *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 the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

3 Rules : (*Sporrong / Lonroth v Sweden* (1982))

- General principle: **Peaceful enjoyment** of property;
- **Deprivation** exception: States are entitled to deprive property subject to certain conditions;
- **Control of the use** exception: States are entitled to control the use of property in accordance with the general interest.

→ Challenges raised in relation to **CBC** (extended confiscation) and **NCBC** (civil confiscation, UWOs)

Confiscation and the right to property

When is art. P1-1 and the right to property triggered?

When there is an **interference**: deprivation / control of the use of property rule

How to assess the existence of a violation?

(summarized in *Gogitidze* (2015))

P1-1 'Fair-Balance' Test:

- **Lawfulness** of the interference
- **Legitimacy** of the aim pursued
- **Proportionality** of the interference
 - Whether the procedure for confiscation was arbitrary
 - Whether the domestic courts acted without arbitrariness

Confiscation and the right to property

P1-1 'Fair-Balance' Test:

– Lawfulness

- I.e. legal certainty: accessibility, foreseeability, precision
(*Baklanov* (2005), *Frizen* (2005), *Sun* (2009) & *Vasilyev and Kovtun* (2011) v. *Russia*
= **violation**)

– Legitimacy

- I.e. in the public or general interest: wide margin of appreciation of MS

– Proportionality (!)*

- I.e. fair balance v. arbitrariness: “*whether the interference was proportionate and whether the applicant did not have to bear an excessive individual burden*”
(*Zakova v. the Czech Republic* (2014))

Confiscation and the right to property

* The proportionality criterion

- “Reasonable relationship of proportionality between the means employed and the aim sought to be realised” (Phillips (2001))
- The proportionality of the interference is based on...
 - The particular circumstances of the case ("deprivation" v. "control of the use" of property)
 - The conduct of the individual applicant
 - The conduct of the State respondent
 - Whether the applicant was afforded a **reasonable opportunity** to put its case before relevant authorities (!)**

Confiscation and the right to property

** Reasonable opportunity to put its case before relevant authorities

- Very much akin to the right to a fair trial (link with art. 6(1))
 - “*Flagrant denial of justice*” would indeed constitute violation of P1-1 (*Insanov v. Azerbaijan* (2013))
 - Absence of judicial review should lead to violation of P1-1 (*Microintelect Ood v. Bulgaria* (2014))
 - P1-1 may also be violated when the scope of judicial review is too narrow (*Paulet v. the United Kingdom* (2014))
 - Presumptions of fact and law call for effective review, opportunity to rebut, adversarial proceedings (*M* (1991); *Butler* (2002)...))
 - Right to rehearing supports fair balance
 - ...

Confiscation and the right to property

** Reasonable opportunity to put its case before relevant authorities

– E.g. **CBC (Extended)** – *Butler (2002)* :

– *Defendant*: able to dispute the reliability of the evidence at oral hearing; not faced with irrefutable presumptions of fact or law; open to the applicant to adduce documentary or oral evidence; right to a re-hearing...

– *Court*: power subject to judicial supervision; not unfettered discretion to confiscate; relied on forensic and circumstantial evidence; weighed the evidence and assessed it carefully; refrained from automatic reliance on presumptions...

– E.g. **NCBC (UWOs)** – *Gogitidze (2015)*:

– *Defendant*: duly summoned; opportunity to adduce written submissions in reply; took part in an oral hearing; could have designated lawyers to represent him; benefitted from adversarial proceedings; interference corresponds to severity of infringement

Confiscation and the right to property

Takeout

- Type of **interference** bears limited weight on the analysis
- **Lawfulness** is quite foreseeable yet has lead to violations in practice
- **Legitimacy** is only subject to a very marginal control by the ECtHR
- **Proportionality** (fair balance) is the intrinsic part of the analysis

Few decisions have concluded to a violation of P1-1

→ Must be a blatant violation (?)

See concur./dis. opinion of J. Pinto de Albuquerque in *Varvara v. Italy* (2013)

Questions?



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Selected work on confiscation:

- M. Fernandez-Bertier, “The history of confiscation laws: from the Book of Exodus to the war on white-collar crime”, in K. Ligeti and M., Simonato (eds.), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Oxford, Hart Publishing, 2017) 53-75
- M. Fernandez-Bertier, “The confiscation and recovery of criminal property: a European Union state of the art” (2016) 17 *ERA Forum* 323, 323-342
- M. Fernandez-Bertier, “Targeting criminal proceeds: a call for equilibrium between efficiency and respect of human rights”, in A. Hoc, S. Wattier and G. Willems (eds.), *Human rights as a basis for reevaluating and reconstructing the law* (Bruxelles, Bruylant, 2016) 185-198