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LABEL V. CONTENT: THE PROBLEM OF NON-RECOGNITION OF CIVIL CONFISCATION ORDERS IN EUROPE

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ABSTRACT

The paper discusses the problem of non-recognition of civil confiscation orders in Europe. Despite the breakthrough in international cooperation in the freezing and confiscation of crime proceeds in the criminal law domain, the formal approach in some European states destroys the potential of one of the most advanced instruments against crime proceeds—civil confiscation orders. The study offers a comparative analysis of the concepts of the confiscation of crime proceeds within and outside the frameworks of criminal proceedings. The analysis serves as the basis for the discussion of whether there is reasonable ground for the formal distinction between these concepts.

The author concludes that the formal elimination of the civil confiscation orders has no substantial background. The analysis of both extended powers of confiscation in the criminal law domain in Europe and the Lithuanian Law on Civil Confiscation in the light of principles of proportionality and fair proceedings shows that civil confiscation regimes outside the

framework of criminal proceedings may provide adequate safeguards to those provided in the confiscation regimes within criminal proceedings.

The paper contributes to the discussion that is relevant to any European state that considers enacting or amending the civil confiscation legal framework or the legal regulation on recognising and executing crime proceeds confiscation orders. The paper elaborates on the approach that could enhance cooperation among European states in the prevention of organised crime.

KEYWORDS

Civil confiscation, recognition of confiscation orders, Regulation 2018/1805, crime proceeds

INTRODUCTION

It would be fair to state that the new era in the fight against organised crime and corruption through the targeting of illicit gains began since two major developments were acknowledged and started to be implemented. The first development was the acknowledgement of the necessity of abandoning the strict "classic" concept of recoverable assets as assets that have direct and clearly established (on the criminal standard of proof) criminal origin. In many cases, this concept has proved ineffective against the sophisticated management of illicit assets. Building an understanding that the recovery of illicit assets is a restorative, rather than punitive, measure contributed to the mental shift toward an approach that allowed a lower standard of proof, gave more weight to indirect evidence along with the contextual assessment of the circumstances of the case, and even allowed rebuttable presumptions of the illicit origin of the unexplained assets in some cases.[1] In other words, the new approach accepted some elements from civil proceedings. The new "hybrid" approach has become mandatory on the European Union level in the form of extended confiscation in criminal proceedings.[2] A growing number of European states are taking further-reaching steps by introducing more advanced strategies for confiscating illicit assets, which have different labels (civil confiscation, unexplained wealth orders, independent confiscation, etc.) and different legal placements. Specific provisions may be placed in the penal laws or other laws, often of a hybrid legal nature.[3] Those strategies may be conducted in parallel with or after criminal proceedings, or even with no link to the criminal proceedings against the defendant.

The second significant development was the acknowledgement of the necessity of speedy and efficient international cooperation in tracing, freezing, investigating the suspicious assets and also recognising and executing confiscation orders. Both developments are crucial and complement each other. Even advanced and potentially highly efficient confiscation proceedings would have a vague practical role if their confiscation orders were not recognised and executed by foreign authorities, thus

[1] *European Court of Human Rights: judgment in the Case Phillips v. the United Kingdom"*, application no. 41087/98 (2001); *judgment in the case Balsamo v. San Marino"*, applications nos. 20319/17 and 21414/17 (2019).

[2] *European Union (2005), Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property*, OJ L 68, 15.3.2005, p. 49–51; *European Union (2014), "Directive 2014/42/EU of the European Parliament and of the Council of 3 April on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union"*, OJ L 127, 29 April 2014, pp. 39–50.

[3] After the reform of 2017, Germany introduced so-called "independent confiscation" (*selbständige Einziehung*) which is, according to the law draft authors, a close analogue to the civil confiscation (Matthias Korte, "Vermögensabschöpfung reloaded", *Zeitschrift für Wirtschafts- und Steuerstrafrecht* No. 1 (2018)), and placed it into the penal and penal proceedings codes (Art. 76a Section 4 of the Penal Code, StGB, Art. 437 of the Criminal Proceedings Code, StPO). Georgia (2014), Ukraine (2019), Lithuania (2020), Slovenia (2011), and Slovakia (2010) provided in their laws that civil confiscation proceedings shall be conducted following the rules of civil proceedings unless special provisions provide otherwise.

restricting their operation to the national area. Efforts to target organised crime assets without the capacity to target them abroad could hardly ever be a promising mission.

The EU Regulation 2018/1805 provides the mechanism that enables the most direct and immediate cooperation between member states in enforcing freezing and confiscation orders. The Regulation is a major achievement that has the potential to give the ultimate boost to international cooperation in the recovery of illicit assets. However, the Regulation is based on a formal distinction between asset recovery instruments enacted in explicitly penal laws and other laws. It does not cover freezing orders and confiscation orders issued within the proceedings labelled as civil or administrative. Many European states also follow a formal approach and would not execute said orders if they were not issued in the framework of criminal proceedings, without even considering the safeguards provided by the framework of the civil confiscation proceedings. In 2021, the National Member for Lithuania at Eurojust made a survey among European partners to see if Lithuanian civil confiscation orders would be recognised and executed in their jurisdictions. Only nine of the 21 responses received were affirmative, and only four of the affirmative ones came from jurisdictions where no confiscation proceedings outside the framework of criminal proceedings were provided by national laws. In other words, only four European jurisdictions that have no civil confiscation proceedings treat non-criminal confiscation orders by examining the actual content of the legal framework of confiscation and the actual grounds for confiscation and do not treat them formally. Negative responses were indeed based on a purely formal approach, providing that jurisdictions would not recognize a confiscation order that was issued outside the framework of criminal proceedings.[4] Thus, in many European jurisdictions, orders issued in the proceedings that are labelled as "civil confiscation" proceedings may be rejected even though the civil confiscation framework in question provided procedural safeguards adequate to the requirements of the Human Rights Convention and those provided in criminal proceedings frameworks.

On the other hand, asset recovery orders issued in the framework of criminal proceedings, which may provide even lower guarantees for defendants than some civil confiscation regimes, would be immediately accepted and executed under Regulation 2018/1805 in every EU member state. Thus, on a purely formal basis, some progressive legal instruments may be stripped of international support both at the EU level and, in many cases, at the national (bilateral) level. This paradox is further demonstrated in the paper by comparing the fresh Lithuanian civil confiscation

[4] Personal communication with National Member for Lithuania at Eurojust Margarita Šniutytė-Daugėlienė (January 2022). For the purposes of crime prevention, the states that do not recognise civil confiscation orders shall not be identified in this paper.

legal framework with the legal frameworks that enjoy full and immediate recognition within the EU: provisions on extended confiscation and also independent confiscation (*selbständige Einziehung*) provided in the German criminal proceedings framework.

1. THE CASE OF LITHUANIAN CIVIL CONFISCATION FRAMEWORK

The analysis and comparison of confiscation regimes in criminal and "hybrid" legal frameworks are based on the following three criteria: 1) proportionality of the interference with the right to property (grounds for confiscation), 2) standard of proof and applicable presumptions, and 3) access to justice and the right to a fair trial.

1.1. GROUNDS FOR CONFISCATION OF THE RECOVERABLE ASSETS

The Lithuanian Law on Civil Confiscation (hereinafter referred to as the "LLCC") defines the aim of the law as the prevention of organised crime, corruption, and profit-oriented crime. This aim clearly indicates that the target of the law is the proceeds of crime, similarly to the confiscation regimes in the criminal law framework. It is argued in the present paper that this aim is the key reference point for interpreting and understanding the LLCC. The law defines recoverable assets as those that the court reasonably believes cannot derive from the legal income. The original definition in the law (approved by the Parliament and vetoed by the President of the Republic) provided slightly different wording, which was similar to the one that defines recoverable assets in the criminal law provisions for extended confiscation ("court reasonably believes they derive from criminal conduct"). The initial intention of the lawmaker was to emphasise the similarity of the standard of proof with the extended confiscation in criminal proceedings, as well as to reflect the aim of the LLCC. However, the President of the Republic vetoed the law and returned it to the Parliament with some propositions included (which were quickly approved by the Parliament), one of which was to change the definition of the recoverable assets they so they "could not derive from legal income". The motive was not to broaden the scope of the confiscation beyond the proceeds of crime, but rather to avoid a conflict with the presumption of innocence. Even though the amended wording appears to go beyond the scope of the proceeds of crime at first glance, reading the amended definition together with the aim of the law and keeping the principle of proportionality in mind compels one to interpret it in the same way as the preceding wording, namely as "assets deriving from the criminal conduct".[5] Such linguistic adjustment should

[5] The ECHR jurisprudence indicates that asset recovery measures in civil confiscation proceedings may be in line with the principle of proportionality only when proceeds from crime are concerned (ECHR Dimitrovi v. Bulgaria).

not surprise. In its civil confiscation-related cases, the ECHR also employs some subtle efforts to balance between emphasising the requirement of the proportionality principle that civil confiscation would only cover profits of crime and the presumption of innocence that forces it to avoid labelling recoverable assets directly as "crime proceeds" but rather as "illicit gains", "wrongfully acquired", "linked to serious crimes" assets.[6]

Asset recovery frameworks provide preconditions for confiscation proceedings that contribute to the requirements of the proportionality principle. In the LLCC, they are no less (or even more) restrictive than those provided in the criminal law framework, namely the minimum value of the recoverable assets and the triggers of confiscation proceedings—the status of the defendant in the criminal proceedings regarding certain serious (with few exceptions) and organised crimes.

The LLCC sets a minimum value equivalent to EUR 100,000 for the recoverable assets. This requirement goes in line with the aim of the law (targeting proceeds from the major serious profit-oriented crimes) and the principle of proportionality, filtering out smaller-scale cases to be dealt with by other asset recovery measures. It also contributes to the economy in terms of the asset recovery authorities' time and effort, allowing them to focus on large-scale cases. It also allows for the avoidance of some of the excessive costs associated with the administration of low-value recoverable assets[7]. In contrast, provisions of Lithuanian penal law on extended confiscation set a much lower minimum value limit, equivalent to EUR 12,500. Framework decision 2005/212/JHA, Directive 2014/42/EU, and also some countries (i.e., Germany) do not even provide a minimum asset value for extended powers of confiscation in penal law. Neither does Germany in its provisions on the independent confiscation in the criminal procedure framework.

The LLCC provides that the unexplained assets may be targeted only if they were possessed by a person (or their spouse or cohabitant) who was suspected, charged, or convicted for a crime that is enlisted in the catalogue, which closely resembles the one provided in Article 3 of the Regulation 2018/1805 and also the one provided in the German Penal Code as the precondition for independent confiscation (Art. 76a, Sec. 4), with only a few additions of offences that do not fall into the category of serious crime. Both the Lithuanian and German penal frameworks

[6] *European Court of Human Rights (2015), "Judgment in the Case Gogitidze and Others v. Georgia"*, Application No. 36862/05; Skirmantas Bikelis Simonas Mikšys, *Civilinio turto konfiskavimo perspektyvos Lietuvoje (Prospect of Civil Confiscation in Lithuania)* (Vilnius: Lietuvos teisės institutas, 2019), p. 12.

[7] Bullock and Sproat discuss the issues related to the lack of priorities in confiscation policy and the problems with the administration of low value confiscated property (especially cars) in the UK (Karen Bullock, "Criminal benefit, the confiscation order and the post-conviction confiscation regime," *Crime Law and Social Change* Vol. 62(1) (2014): 56 // DOI: 10.1007/s10611-014-9517-7; Peter Sproat, "A critique of the official discourse on drug and sex trafficking by organised crime using data on asset recovery," *Journal of Financial Crime* 19(2) (2012): 152–159 // https://doi.org/10.1108/13590791211220421).

for extended powers of confiscation are more liberal in this aspect. The Lithuanian penal code allows for extended confiscation where conviction for any mid-serious, serious, or very serious offence exists. The German Penal Code allows for extended confiscation where the owner of the unexplained assets is convicted of any criminal offence.

Alternatively, the LLCC allows for confiscation of unexplained property that belongs to a member (or their spouse or cohabitant) of a top category organised criminal group. This ground for civil confiscation proceedings reflects the idea of the Italian civil confiscation grounds provided in the Italian Anti-Mafia Code.

Civil confiscation sets a higher standard for the seriousness of an offence that may trigger the proceedings, but it is less strict regarding the defendant's status in the criminal proceedings concerning that offence. While the decision to impose extended confiscation is only possible where a defendant has been found guilty of the proceedings triggering offence in criminal proceedings, a decision in civil confiscation proceedings may be passed against a defendant whose status in parallel criminal proceedings may be either that of a suspect, an accused, a convicted, or a person against whom criminal proceedings have been discontinued.[8] In other words, since the civil confiscation proceedings are triggered by the status of the defendant in the criminal proceedings, they may become independent of the progress in criminal proceedings and the decisions concerning the guilt of the defendant. This feature of the civil confiscation proceedings is one of the main advantages that may justify having civil confiscation proceedings in parallel to extended confiscation in criminal proceedings. It contributes to the speediness of confiscation, it also allows confiscation after criminal proceedings and allows avoiding delays caused by the criminal proceedings concerning the matters that are irrelevant to the issue of asset recovery. Indeed, civil confiscation may be non-conviction based. The question arises as to whether it should raise concerns for the foreign partners when considering recognition of assets freezing or confiscation orders. The absence of conviction may indeed raise concerns about the increased risk that a confiscation order in civil confiscation proceedings may erroneously target assets that do not derive from criminal conduct. But these concerns should not be overestimated. The "triggering" offence is never the source of recoverable assets in civil confiscation proceedings.[9] The fact that the defendant has been convicted (or suspected, charged with an offence) is just one of many indirect evidences (though an important one) that may support the conclusion that the origin of the unexplained assets in question is very

[8] The LLCC also provides one more alternative ground—civil confiscation proceedings may be conducted against the property of a defendant who is recognized by the police as a member of a top-level organised criminal group. In this case, there may be no criminal proceedings against the defendant.
[9] Johan Boucht, *The Limits of Asset Confiscation* (Oxford: Hart Publishing, 2017), p. 172.

likely to be some criminal conduct. Be the defendant convicted or only suspected of a "triggering" offence, still, the court in the civil confiscation proceedings needs to make an autonomous conviction based on the whole set of case circumstances showing that unexplained assets most probably derived from criminal conduct. In the light of all the circumstances of the case, it may be possible that the lack of a conviction for the "triggering" offence may be overweighed by other compelling circumstances showing that the assets are indeed of criminal origin. In numerous cases, the ECHR has approved non-conviction-based asset recovery legal frameworks as long as the required balance in light of the principle of proportionality is established, and effective procedural safeguards are respected.[10] It has been repeatedly acknowledged by the European Commission.[11] Consequently, the Regulation 2018/1805 does cover non-conviction based confiscation orders, including German asset recovery orders based on independent confiscation (Art. 76a Sec 4 of the StGB). Thus, the fact that civil confiscation orders may be, in some cases, non-conviction based should not serve as a valid argument against their recognition.

1.2. STANDARD OF PROOF AND PRESUMPTIONS OF ILLEGALITY OF ASSETS

The standard of proof and the possibility of the presumption of illicit (criminal) origin of the unexplained assets may be serious concerns for jurisdictions considering recognition of the civil confiscation orders. In the common traditional understanding, confiscation in the criminal proceedings framework requires a (much) higher standard of proof and is more likely than other proceedings to eliminate judicial errors that disadvantage a defendant. However, this assumption may not be true in all cases and may not serve as a reasonable ground for disapproval of civil confiscation orders. The Directive 2014/42 provides that the standard of proof for extended confiscation in the criminal proceedings framework may be as low as the balance of probabilities. Despite that low standard of proof, Regulation 2018/1805 provides that recognition of the extended confiscation orders is mandatory. Some countries, including Lithuania and Germany, apply higher standards of proof for extended confiscation than the balance of probabilities.[12] However, this fact may not affect their obligations

[10] *European Court of Human Rights (2001), "Judgment in the Case Arcuri and Others v. Italy"*, Application No. 52024/99; *European Court of Human Rights (2002), "Judgment in the Case Butler v. United Kingdom"*, Application No. 41661/98; *European Court of Human Rights (2015), "Judgment in the Case Gogitidze and Others v. Georgia"*, Application No. 36862/05.

[11] *European Commission (2016) 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*, Brussels, 21.12.2016, SWD(2016) 468 final:73; *European Commission (2019) staff working document, Analysis of non-conviction based measures in the EU*, Brussels, 12.4.2019, SWD(2019) 1050 final: 9.

[12] Frank Saliger, "Grundfragen der Vermögensabschöpfung," *Zeitschrift für Wirtschafts- und Steuerstrafrecht* Vol. 129, No. 4 (2018): 1016, 1030; Matthias Korte, *supra* note 3: 8; Frank Meyer,

to recognize extended confiscation orders based on a lower standard of proof. On the other hand, it would not be correct to assume that civil confiscation frameworks require the lowest standard of proof. In the Lithuanian legal system, it requires a similar standard of proof as the extended powers of confiscation. In general, in Lithuanian civil proceedings, there is no single standard of proof. In some categories of cases (illegal construction cases), it may even be as high as "beyond reasonable doubt".[13] Due to the hybrid nature and potential crucial impact on the defendant, it has been proposed to apply at least a qualified (high) probability proof standard in civil confiscation cases.[14] One could not detect any intentions of the Lithuanian legislator to set a lower standard of proof than that provided for extended confiscation. As it has been already explained above, in the draft of the LLCC, the legislator in fact intended to use the same wording for the required standard of proof of the origin of the assets as was provided in penal provisions on extended confiscation. Even though the final wording was altered by the presidential veto, there was no intention to change the interpretation of the standard of proof but only to avoid a possible conflict with the presumption of innocence. So far (in early 2022), no Lithuanian civil confiscation cases have indicated a judicial interpretation of the standard of proof. However, there are no reasonable premises for the assumption that Lithuanian judicial practice in civil confiscation cases would be satisfied with a lower standard of proof than the one applicable for the extended powers of confiscation in criminal proceedings.

The possibility of some reversal of the burden of proof or, in other words, certain presumptions of the illegality of unexplained assets might be another concern regarding the trustworthiness of civil confiscation orders. The presumption of illegality of unexplained assets, on the other hand, is known in criminal proceedings, namely in the extended confiscation framework (which is covered by the Regulation 2018/1805). *Reasonable* presumption of the criminal origin of unexplained assets is mentioned in the Preamble (21) of the Directive 2014/42. It is also provided in the Lithuanian and Norwegian penal codes in the regulations on extended confiscation.[15] If the state recognises orders based on the extended confiscation framework (which may include some presumption of illegality), it would not be consistent to object to a civil confiscation order for this particular reason. Shifts in the burden of proof concerning the legitimacy of unexplained assets have not been found by the ECHR to be in violation of fundamental rights, as long as they were applied in the particular

"'Reformiert die Rückgewinnungshilfe!' – Denkanstöße für eine Generalüberholung der Vermögensabschöpfung," *Zeitschrift für Wirtschafts- und Steuerstrafrecht* Vol. 127, (2015): 257.
[13] *Supreme Court of Lithuania, case no. e3K-3-201-695/2018*.
[14] Skirmantas Bikelis Simonas Mikšys, *supra* note 6, p. 16.
[15] Art. 72^3 of the Lithuanian Penal Code; Johan Boucht, *supra* note 9, p. 194.

cases (related to serious organised crime) with adequate safeguards in place to allow the affected person to challenge these rebuttable presumptions.[16] Arguably, not every presumption of asset illegality may be acceptable from the point of view of the principle of proportionality and the right to fair proceedings. Boucht distinguishes between automatic and shared (semi-automatic) shift in the burden of proof, where shared shift of burden of proof means that the state first needs to present a good and arguable case that the assets derived from the unlawful conduct.[17] The burden would shift only when the state has successfully discharged this initial burden.[18] Evidently, the semi-automatic shift represents advanced procedural standards in the proceedings. The LLCC, which also provides a semi-automatic presumption of the illegality of assets, requires that the authorities which conduct a pre-trial investigation of the origin of the assets of the defendant establish a substantial discrepancy between the legal income and actual assets in possession. In addition, it requires some status for the defendant in the criminal proceedings, which mostly relate to serious organised crime. Advanced safeguards concerning the presumption of illegality, together with an advanced standard of proof for the criminal origin of the unexplained assets, could offer substantial protection to a defendant from erroneous confiscation orders, assumingly adequate to the level of protection provided in the frameworks of extended powers of confiscation and non-conviction based confiscation instruments in criminal proceedings.

1.3. THE RIGHT TO A FAIR TRIAL

Meeting high standards for fair proceedings may be seen as another concern considering the recognition of civil confiscation orders. Standard civil proceedings might be seen as providing weaker safeguards than criminal proceedings. However, it would not be true to assume that civil confiscation proceedings are standard civil proceedings. They might be "hybrid" proceedings that include elements of criminal proceedings and provide advanced safeguards for defendants.

In the ECHR case Phillips vs. the UK, where proceedings of extended powers of confiscation were challenged, the Court specified some criteria for fair confiscation proceedings. It examined if the confiscation order had been carried out by a court following a judicial procedure including a public hearing, if advance disclosure of the prosecution case had taken place, and if the defendant had had the opportunity to

[16] *European Commission (2016) staff working document*, *supra* note 11; *European Court of Human Rights (2015), "Judgment in the Case Gogitidze and Others v. Georgia"*, Application No. 36862/05; *European Court of Human Rights (2019), "Judgment in the Case Balsamo v. San Marino"*, Applications nos. 20319/17 and 21414/17.
[17] Johan Boucht, *supra* note 9, p. 195.
[18] *Ibid*.

adduce documentary and oral evidence. Also, the Court sought the opportunity for the defendant to rebut the assumption foreseen in the national legislation as an important safeguard.[19]

It has been already discussed that the latter safeguard is provided in the LLCC. So are the other safeguards required by the principle of fair proceedings. Chapter 2 of the LLCC provides for the pre-trial assets investigation, and Article 8 requires that before the assets investigation is completed, the defendant be notified about the possible confiscation claim in civil proceedings, indicating the assets subject to confiscation, their estimated value, and the grounds for possible confiscation. Then the defendant is given 30 days to provide explanations and evidence of the legal sources of the assets and to provide their estimation of the value of the assets. After the prosecutor considers the information provided by the defendant, they make the decision to either declare the pre-trial investigation of the assets completed or discontinue the investigation. After the pre-trial investigation of the assets is completed and the civil action is filed and referred to the court, the court refers the claim to the defendant and gives them (again) 30 days to respond. A specific safeguard that protects a defendant from self-incrimination is also provided in the law. Article 3 Section 4 provides that evidence and explanations provided by a defendant may be used in criminal proceedings as evidence only with their consent. The case is heard by the higher court in an oral hearing. Both at the end of the pre-trial investigation and in court hearings, the right to interpretation and translation is guaranteed, as is the right to be represented by a lawyer.

2. EMPOWERING CIVIL CONFISCATION ORDERS IN EUROPE

In a brief analysis of the main properties of Lithuanian civil confiscation proceedings above, it is argued that civil confiscation proceedings may provide substantial and adequate human rights safeguards compared to the guarantees and standards recognised in the framework of criminal proceedings for unexplained assets confiscation. It is true that there are a variety of civil confiscation frameworks with different approaches to the principle of proportionality and different levels of safeguards provided.[20] In some cases, the protection of fundamental rights may be weaker outside the realm of criminal law, as Simonato observes, which is also true.[21]

[19] *European Court of Human Rights (2001), "Judgment in the Case Phillips v. the United Kingdom"*, Application no. 41087/98.
[20] See the analysis of different legislation models in Skirmantas Bikelis, "Modeling the Patterns of Civil Confiscation: Balancing Effectiveness, Proportionality and the Right to Be Presumed Innocent," *Baltic Journal of Law & Politics* 13:2 (2020) // https://doi.org/10.2478/bjlp-2020-0010.
[21] Michele Simonato, "Confiscation and fundamental rights across criminal and non-criminal domains," *ERA Forum* Vol. 18 (2017): 373.

Indeed, this has already been established in the ECHR case Dimitrovi v. Bulgaria.[22] Nevertheless, it is arguable that there is no reasonable ground for the general objection against civil confiscation orders. The ECHR has already built a substantial practice that has approved some civil confiscation cases in the light of fundamental human rights.[23] The European Commission also noted that confiscation proceedings outside the framework of criminal proceedings might provide a strong set of procedural rights and adequate safeguards.[24] The civil confiscation legal frameworks should be evaluated on an individual basis. The Commission suggested that proceedings that would not meet these requirements could be eliminated from the international collaboration network on the basis of a ground for refusal based on a likely violation of fundamental rights.[25] However, member states did not reach a political agreement to cover confiscation orders issued outside the framework of criminal proceedings as outlined in the Regulation 2018/1805. Even though the Commission acknowledged that the benefits to society would be highest under this option.[26]

While the formal approach to civil confiscation orders still dominates in Europe, the jurisdictions that have already enacted civil confiscation frameworks face the dilemma of whether they should keep the civil confiscation framework despite the limited potential of executing it abroad or convert it into the criminal law framework. In 2019, the Commission praised the jurisdictions that anchor modern civil-confiscation-like mechanisms within the criminal proceedings network, namely independent confiscation provided in Article 76a Section 4 of the German Penal Code since the reform of 2017 and confiscation measures in the Italian Anti-Mafia Code.[27] In the light of the current dominant formal approach among European jurisdictions and the provisions of the Regulation 2018/1805, a technical shift of civil confiscation to criminal proceedings (with necessary adjustments) might be seen as the quickest solution for the issue of international recognition of the civil confiscation orders. However, the disadvantages of such a move should not be overlooked. First, conceptually, it is arguable if the member states should be compelled to re-designate the non-punitive (rather than restorative) measure of illicit asset confiscation into the criminal proceedings that are mainly designed for considering questions of guilt and

[22] *European Court of Human Rights (2015), "Judgment in the Case Dimitrovi v. Bulgaria"*, Application no. 12655/09.
[23] *European Court of Human Rights (2001), "Judgment in the Case Arcuri and Others v. Italy"*, Application No. 52024/99; *European Court of Human Rights (2002), "Judgment in the Case Butler v. United Kingdom"*, Application No. 41661/98; European Court of Human Rights (2015), "Judgment in the Case *Gogitidze and Others v. Georgia"*, Application No. 36862/05.
[24] *European Commission (2016) staff working document*, *supra* note 11.
[25] *Ibid*: 48.
[26] *Ibid*: 45.
[27] *European Commission (2019) staff working document*, *supra* note 11.

the application of punitive measures.[28] Secondly, the possibility of conducting confiscation proceedings in parallel with or after the completion of criminal proceedings is an important advantage of civil confiscation proceedings. These options are rather limited for confiscation regimes within the framework of criminal proceedings. Thirdly, it is arguable that the key issues in civil confiscation proceedings have their roots in the civil law: true (factual) assets' ownership in the sophisticated assets concealment schemes, the validity (or fictitiousness and simulation) of the transfers and contracts provided as evidence of the legal origin or true ownership of the assets, the true value of the assets (this question is of ultimate importance in the jurisdictions that provide for the minimum value of the recoverable assets), dealing with the assets that were secured by a mortgage or with the assets of the company that has filed for bankruptcy, and other questions that are of a mainly civil law nature. Therefore, the approach taken by Lithuania and Slovenia that civil confiscation cases should be handled by the civil branch of the courts has substantial advantages in this respect.

Another option is to keep the advantages of the civil confiscation proceedings and work on the issue of recognition of civil confiscation orders by promoting a content-focused and non-formal approach among the international partners. The amendment of the Regulation 2018/1805 would be a rather complicated and distant long-term goal. The efforts to increase number of individual member states that would shift from the formal to the content-focused approach could be more instant goals toward enhanced cooperation in the prevention of organised and serious crime.

The ECHR practice in a closely relevant context—the establishment of legal nature of sanctions and other measures (including asset recovery)—might serve as a plausible example for advocacy for the non-formal approach in recognition of civil confiscation orders. The ECHR does not follow a formal approach. Since the Engel case (1976), the Court has consistently emphasised that definitions in the national law are no more than a starting point, have only a formal and relative value, and must be examined in the light of the common denominators.[29] Regarding the asset recovery legal frameworks, common denominators would be procedural guarantees and the principle of proportionality. Thus, until future amendments to the Regulation,

[28] The question of the nature of confiscation of crime proceeds is still debatable. The ECHR has clearly favoured a restorative approach to the confiscation of crime proceeds (not only civil confiscation but also extended powers of confiscation in criminal proceedings) (ECHR cases Arcuri, Butler, Gogitidze, Balsamo). So did the German Constitutional Court in its decisions in 2004 and 2021. Also in the academic field, there is substantial support for this approach, at least within the scope of the netto confiscation principle. However, regarding the brutto confiscation of crime proceeds, the measure seems to acquire some degree of hybrid, quasi-punitive properties (Johan Boucht, *supra* note 9; Katalin Ligeti and Michele Simonato, eds., *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Bloomsbury Publishing Plc., 2017)).

[29] European Court of Human Rights (1976), "Judgment in the case Engel and others v. The Netherlands, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

the Court's "one-way approach" could be employed in the context of bilateral recognition of the confiscation orders. The designation of confiscation proceedings to the framework of criminal proceedings in the issuing state would activate the application of the Regulation 2018/1805 and force the receiving state to recognise the order. Regarding the confiscation proceedings that were designated outside the criminal proceeding framework, the states should hold a discussion on the aforementioned denominators on a bilateral basis and reach an agreement on whether or under what conditions civil confiscation orders could be recognised as adequate to the confiscation orders in the criminal proceedings framework and treated equally in future mutual legal cooperation.

CONCLUSIONS

The analysis of both provisions on the extended powers of confiscation in the criminal law domain in European, specifically in Lithuanian and German legal contexts, and the Lithuanian Law on Civil Confiscation in the light of principles of proportionality and fair proceedings allows assuming that civil confiscation regimes outside the framework of criminal proceedings may provide adequate safeguards compared to those in the confiscation regimes within criminal proceedings. Also with regard to the ECHR jurisprudence, where a number of civil confiscation regimes have already been examined and approved in the light of the standards of the Convention, the results of the analysis offer substantial background for the acknowledgment that civil confiscation orders have the potential for common recognition among members of the European Union.

The fact that civil confiscation has a number of advantages over confiscation regimes in the criminal law domain supports the idea that the concept of civil confiscation should not be abandoned. Despite the current situation where civil confiscation orders receive little recognition among European countries and confiscation orders in criminal proceedings are being recognized in a direct and unobstructed manner, it is still worth making further efforts to promote a wider recognition of civil confiscation orders in Europe.

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