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## THE ZERO-GAIN FROM CRIME POLICY IN ACTION: A REVIEW OF NON-CONVICTION BASED CONFISCATION THROUGH THE FAIR TRIAL STANDARD

*Abstract: The issue of recovering property obtained through a criminal act has always been one of the essential elements of justice. It is not just about performing its function of providing justice, but also its preventive function. In turn, returning elements of the property to the victim is supposed to serve a restorative function. An efficient system is one that performs all of these functions to the maximum possible extent, resulting in the full deprivation of illegally obtained property from the perpetrator and returning it to the victim or the state treasury. The text in question will discuss and evaluate the standards for forfeiture without trial, particularly in light of due process standards. In addition, an assessment will be made of the scope of the regulation in question and how it may be reflected in the systems of European Union member states. The question arises as to whether Directive 2024/1260, together with other pieces of EU law, constitute a sufficient standard to ensure the effectiveness of the proceedings and maintain the guarantees under the European Convention on Human Rights. In this context, these regulations can serve as an exemplary model also for those countries that do not belong to the EU. Namely, the challenges of creating a domestic form of forfeiture proceedings, also in terms of international crime, will become the subject of the study.*

**Keywords: non-conviction based confiscation; forfeiture without trial; human rights; fair trial.**

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## 1. INTRODUCTION

The issue of recovering property obtained through a criminal act has always been one of the essential elements of justice.<sup>1</sup> It is not just about performing its function of providing justice, but also its preventive function. This is because the idea is that the failure to keep the benefit obtained from a crime is supposed to deter people from committing it. In turn, returning elements of the property to the victim is supposed to serve a restorative function. An efficient system is one that performs all of these functions to the maximum possible extent, resulting in the full deprivation of illegally obtained property from the perpetrator and returning it to the victim or the state treasury.

Given the challenges of not only proving, but also securing and enforcing the court's decision to collect and return criminal property, a number of different criminal law solutions have been sought.<sup>2</sup> More importantly, the question arises of what should happen in case the perpetrator cannot be held criminally responsible or before a final conviction could be secured. Should the profits of crime be inheritable, or another type of proceedings – confiscation without a final conviction – be established? What should happen to the property in case a crime is detected, but the perpetrator is not? Should it be possible to restore ownership for rightful owners or state treasury? The answer to this question lies as a foundation for as many non-conviction based confiscation systems across Europe, as many states are there. In this paper, we will review the essentials to the fair trial requirements for this type of the proceedings. It must be noted, that not only Europe implements such a mechanism – these are well-known all over the world.<sup>3</sup>

1 For reference, see: C.-C. Cîrlig, *Common Rules for Non-Conviction Based Confiscation*, Members' Research Service, Legislative Train, 2025, 1, <https://www.europarl.europa.eu/legislative-train/carriage/common-rules-for-non-conviction-based-confiscation/report?sid=9001>, 7.05.2025.

2 For an extensive reference to the NBNC mechanisms (and lack of those) before 2012, see: Eurojust, *Report on non-conviction based confiscation*, General Case 751/NMSK-2012, 02 April 2013, [https://www.procuracassazione.it/resources/cms/documents/EUROJUST\\_20130402\\_NCBC\\_Report.pdf](https://www.procuracassazione.it/resources/cms/documents/EUROJUST_20130402_NCBC_Report.pdf).

3 See e.g. S. D. Casella, "Civil Asset Recovery. The American Experience", *Non-Conviction Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (eds. J. P. Rui, U. Sieber), Duncker & Humblot, Berlin, 2015, 13–30 and the sources cited therein, [https://pure.mpg.de/rest/items/item\\_2499325\\_7/component/file\\_3081806/content](https://pure.mpg.de/rest/items/item_2499325_7/component/file_3081806/content), 7.05.2025; I. Smith, "Civil Asset Recovery. The English Experience", *Non-Conviction Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (eds. J. P. Rui, U. Sieber), Duncker & Humblot, Berlin, 2015, 31–68 and the sources cited therein, [https://pure.mpg.de/rest/items/item\\_2499325\\_7/component/file\\_3081806/content](https://pure.mpg.de/rest/items/item_2499325_7/component/file_3081806/content), 7.05.2025; J.P. Brun et al., *Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery*, Stolen Asset Recovery Initiative, 2023, 123, <https://star.worldbank.org/sites/default/files/2023-06/StAR-wealth-report-08.pdf>, 7.05.2025.

## 2. CONTENT-RELEVANT PROVISIONS CREATING DUE PROCESS STANDARD IN NON-CONVICTION BASED CONFISCATION CASES

When we discuss fair trial standards, of course, the attention focuses on the most important regulations of international law. In the context of European countries, this will primarily be the European Convention on Human Rights,<sup>4</sup> but also the International Covenant on Civil and Political Rights.<sup>5</sup> The regulations providing for the possibility of a seizure without a conviction undoubtedly raised questions on the basis of fundamental rights.<sup>6</sup> Further clarifying the scope of the considerations at hand, the guarantees established under Article 15(1) of the ICCPR and Article 7(1) of the ECHR are the first to come to mind. Both of the cited provisions indicate two key elements: forbidding punishment for an act that did not constitute a crime when it was committed (prohibition of *retroactivity* of the law), and forbidding the application of a harsher penalty than the one foreseen by the time when the crime was committed. Consequently, one must therefore consider what is the nature of non-conviction based confiscation. Does it constitute a punishment, falling within the normative scope of Article 7 of the ECHR and Article 15 of the ICCPR, or is it a separate measure, by which one must look for other normative sources, constituting the standard of due process?

Having the above in mind, in the context of Article 7(1) of the ECHR, it should be pointed out that this provision is not applicable pertaining a considered issue. After all, it constitutes a relevant standard in situations where we are dealing with the protection of a person from the imposition of a punishment not provided for by law or harsher than that existing at the time the act was committed. When NBNC is applied, we cannot speak of a violation of Article 7(1) of the ECHR, because the perpetrator cannot be convicted in given case. First, no punishment can be imposed on a person who is no longer alive. Second, if the perpetrator of the crime is not detected, conviction is impossible by the nature of the case. Third, if it is established that there is a crime for which, however, a person cannot be held criminally responsible (for various reasons foreseen under the national law), there can also be no conviction of such a person, and hence no punishment is imposed. Therefore, both Article 7(1) of the ECHR and Article 15 of the ICCPR are irrelevant for determining the standard of due process for NCBC proceedings.

It should be noted that the institution of asset seizure, adjudicated in situations such as those outlined above, is in fact neither a conviction nor a punishment

4 European Convention on Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

5 International Covenant on Civil and Political Rights adopted on 16 December 1966 by General Assembly resolution 220A (XXI).

6 For an analysis, see: J. Hendry, C. King, "How far is too far? Theorising non-conviction-based asset forfeiture", *International Journal of Law in Context*, 4/2015, 398–411.

imposed against a deceased or undetected perpetrator, or one that cannot be criminally prosecuted. The observation of the European Court of Human Rights, made in the cases of *Raimondo v. Italy*<sup>7</sup> and *Silickiene v. Lithuania*,<sup>8</sup> that confiscation(forfeiture) pursued a legitimate objective in the public interest is fully relevant here, as there is no justification for ensuring the heirs' benefit when inheriting criminal assets to the detriment of the public. Putting the matter more broadly, forfeiture in such a procedural setting is of a restorative rather than punitive nature, i.e., it restores possession in accordance with the law – rather than being an act of repression against heirs or third parties.

The case is similar with regard to extended confiscation. Both of the above issues have been repeatedly analyzed in the ECtHR's jurisprudence, which is unanimous on the admissibility of such solutions. The European Court of Human Rights essentially focuses on two provisions that are relevant to the decision on the compatibility of the adopted national solutions on non-conviction based confiscation(forfeiture) with the Convention provisions. These are Article 1 of Protocol No. 1 to the ECHR<sup>9</sup> and Article 6 of the ECHR.

### 3. FAIR TRIAL STANDARDS IN STRASBOURG JURISPRUDENCE WITHIN THE GUARANTEES SET BY ARTICLE 6 OF THE ECHR AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE ECHR

To begin with, it is necessary to make a fundamental categorization of non-conviction based confiscation in order to correctly assess the required standard for its application. The ECtHR has long advocated classifying the institution of forfeiture as “ means of controlling the use of property”, which at the same time implies the application of a lower standard, requiring only the existence of a general interest to justify such confiscation.<sup>10</sup> The more recent case law of the ECtHR also unequivocally upholds treating NCBCs as a means of controlling the use of property, as these proceedings primarily concern the recovery of illegally obtained assets (and therefore the restoration of a state of lawfulness),<sup>11</sup>

7 ECtHR judgement of 22.02.1994, case *Raimondo v. Italy*, App. No 12954/87, § 30.

8 ECtHR judgement of 10.04.2012, case *Silickiene v. Lithuania*, App. No 20496/02, § 65.

9 Protocol No 1 and No 4 to European Convention on Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950 drafted in Paris on 20 March 1952 and drafted in Strasbourg on 16 September 1963.

10 See: G. Wycichowski-Kuchta, “The discretion of the EU Member States in shaping the non-conviction based confiscation regime in the light of the CJEU and ECHR case law”, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 4/2023, 35 and jurisprudence cited therein.

11 ECtHR judgement of 12.05.2015, case *Gogitidze and others v. Georgia*, App. No 36862/05, § 94; and ECtHR judgement of 8.10.2019, case *Balsamo v. San Marino*, Apps. No 20319/17 and 21414/17 § 81.

which lowers the standards applicable to proceedings on this subject in relation to criminal cases. Assessing the compatibility of national NBNC schemes must be done on the basis of a three-part test, evaluating (a) the legality of the interference with the right to property; (b) the legitimate social interest underlying the measure; (c) the balance between the individual's duty and the purpose of the measure.<sup>12</sup> In other words, for an interference to be in accordance with Article 1 of Protocol No. 1 to the ECHR, it must be lawful, be in the general interest and be proportionate, that is, it must strike a "fair balance" between the requirements of the general interest of society and the requirements of protecting the fundamental rights of individuals.<sup>13</sup> The required fair balance is not achieved when a person bears a personal and excessive burden.<sup>14</sup>

The first element relates to another three-part test, requiring clarity, precision and predictability from the legal text.<sup>15</sup> The case of *Gogitidze v. Georgia* concerned the confiscation of assets based on regulations providing for the liability of government officials for the unclear origin of their assets. In the circumstances of that case, only a monetary sanction was introduced into the already existing anti-corruption standards. The ECtHR reaffirmed the position taken earlier that Article 1 of Protocol No. 1 to the Convention does not exclude the competence of the national legislature to adopt solutions aimed at controlling the use of property or property rights by *retrospective* legal solutions newly regulating already established (ongoing) factual situations or legal rationales.<sup>16</sup> In the realities of that case, the Court found no grounds for finding the national legislation incompatible with the provisions of the Convention. The institution of forfeiture had already been introduced into the Georgian Criminal Code at the time when the suspect was alleged to have committed criminal acts – therefore, he could and should have been aware that, in the event of conviction, criminal assets could at the same time become subject to a forfeiture. Thus, no new solution was introduced, but the forfeiture was merely extended also to situations in which it had not been possible to rule on it in a conviction – and thus to situations that had already been found.

The second element of this test requires the existence of a legitimate social aim. In this case, we are dealing with the broad discretion granted to the Convention's contracting parties. The standard of justification for non-conviction based confiscation permitted by the European Court of Human Rights includes such

12 See *Gogitidze and others v. Georgia*, § 96–113.

13 ECtHR judgement of 5.01.2000, case *Beyeler v. Italy* [GC], App. No 33202/96, § 107.

14 ECtHR judgement of 23.09.1982, case *Sporrong and Lönnroth v. Sweden*, Apps. No 7151/75 and 7152/75, § 69–74.

15 ECtHR judgement of 19.06.2012, case *Khoniakina v. Georgia*, App. No 17767/08, § 75; ECtHR judgement of 26.02.2009, case *Grifhorst v. France*, App. No 28336/02, § 91.

16 ECtHR judgement of 24.06.2014, case *Azienda Agricola Silverfunghi S.a.s. and others v. Italy*, Apps. No 48357/07, 52677/07, 52687/07 and 52701/07, § 104; ECtHR judgement of 14.02.2012, case *Arras and others v. Italy*, App. No 17972/07, § 81; ECtHR Decision of 13.01.2015, case *Huitson v. United Kingdom*, App. No §§ 31–35; *Khoniakina v. Georgia*, § 74.

rationales as the component of general prevention policy,<sup>17</sup> combating international drug trafficking,<sup>18</sup> realization of the deterrent element and the guarantee of the unprofitability of crime,<sup>19</sup> removal of illicit funds from the market<sup>20</sup> or realization of international bonds in combating cross-border crime and monitoring the flow of money.<sup>21</sup> As a result, therefore, national legislators must shape their laws on extended confiscation or NBNC in such a way as to meet at least one of the above criteria. Thereafter, national regulations can be regarded as complying with the fair trial standard derived from Article 6 of the ECHR and Article 1(1) of Protocol No. 1 to the ECHR.

Finally, the third element of the test implies a kind of proportionality test. In this regard, the main issue under scrutiny is whether national law imposes excessive obligations on owners and whether it allows them to challenge the decision on forfeiture. The issue here is to determine whether they have the ability to undertake a peculiar “defense” against state interference with property rights.<sup>22</sup> In principle, it is necessary for the prosecuting authorities to demonstrate that there is a sufficient connection between the perpetrator’s property (subject to forfeiture) and the criminal activity, which means not only establishing the question of perpetration of the crime, but, first and foremost, making a fair estimate of the potential profit obtained by undertaking criminal activity.<sup>23</sup> In *Todorov v. Bulgaria*, the Court pointed out that non-conviction based confiscation should primarily apply to such offenses that tend to generate revenue, such as corruption or money laundering.<sup>24</sup>

The fair trial standard set under Article 6 of the ECHR is composed of several key elements. These include the right to a court and public hearing, the adversarial nature of the proceedings and equality of arms, as well as issues related to the lowering of the standard of proof by placing upon the suspect/accused the burden of proving the legitimacy of the origin of the property. In this regard, it is also important to resolve whether the Convention standards for criminal or civil proceedings apply to NCBC proceedings. At the same time, the ECtHR mandates that domestic law should provide for the possibility of contesting the

17 ECtHR Decision of 13.12.1984, case *M. v. Italy*, App. No 8690/79.

18 ECtHR judgement of 5.05.1995, case *Air Canada v. United Kingdom*, App. No 18465/91, § 42; ECHR judgement of 27.06.2002, case *Butler v. United Kingdom*, App. No 41661/98.

19 ECtHR judgement of 1.04.2010, case *Denisova and Moiseyeva v. Russia*, App. No 16903/03, § 58; ECHR judgement of 15.01.2015, case *Rummi v. Estonia*, App. No 63362/09, § 103.

20 *Balsamo v. San Marino*, § 93; ECtHR judgement of 11.05.2023, case *Zaghini v. San Marino*, App. No 3405/21, § 60.

21 ECtHR judgement of 6.11.2008, case *Ismayilov v. Russia*, App. No 30352/03, § 33.

22 See: ECtHR judgement of 28.06.2018, case *G.I.E.M. S.R.L. and others v. Italy*, App. No 1828/06 and others, § 302; *Denisova and Moiseyeva v. Russia*, § 50.

23 E.g. *Rummi v. Estonia*, § 105–109.

24 ECtHR judgement of 13.07.2021, case *Todorov and others v. Bulgaria*, App. No 50705/11 and others, § 200.

legality, proportionality and arbitrariness of forfeiture (confiscation).<sup>25</sup> The Convention imposes an obligation to establish a procedure for challenging forfeiture before an independent court.<sup>26</sup> In order for a national procedure to be considered in compliance with the requirements of Article 6 of the ECHR – the legislator must allow legitimate subjects to assert their rights before an independent court. However, this does not have to be done before a criminal court, but the legislator may transfer the regime of proceedings on contesting the legitimacy of the confiscation of the assets in question to civil or administrative cases – as long as the subject matter of the case is decided by a court.

The principle of equality of arms in this regard is analogous. It is consistently argued that the owner of the confiscated property as (proceeds of) a criminal offence must have the opportunity to demonstrate the legitimacy of its origin.<sup>27</sup> In this regard, it is also necessary to inform the person whose property is subject to forfeiture proceedings of this fact.

Thus, summarizing the considerations of the ECHR standard on non-conviction based confiscation, it is particularly important to emphasize the relevant guarantee benchmarks for legislators. First, one should not look for them in Article 15 of the ICCPR and Article 7 of the ECHR, since these deal with situations in which the offender is punished. Meanwhile, in a situation where a forfeiture is imposed without a conviction, it is not possible to speak of punishing a person (for this person may not be detected at all or may not meet the conditions for criminal prosecution despite having formally committed a crime or be dead, *ergo* – not suitable for punishment). Forfeiture is also not a punitive or repressive measure. The jurisprudence of the European Court of Human Rights has clearly determined the restorative nature of this measure. Since its aim is to restore lawful possession (and not to punish the perpetrator), the guaranteed standard of due process is set by Article 6 of the ECHR and Article 1(1) of Protocol No. 1 to the ECHR, respectively. Indeed, forfeiture, as a retrospective measure, reordering and regulating already established legal situations, is a permissible instrument of general prevention, intended to discourage the commission of crimes. The preventive function, on the other hand, is to be realized by providing an effective instrument of state response and preventing the profiteering of crime. Accordingly, adopted national regulation must meet the three-pronged test under Article 1(1) of Protocol No. 1 to the ECHR, and must therefore be clear and precisely defined in the legislation, be justified by an important social objective, and be proportionate. In addition, the national legislator must also be attentive to the components stemming from Article 6 of the ECHR, related to

25 ECtHR judgement of 24.10.1986, case *AGOSI v. United Kingdom*, App. No 9118/80, § 55; ECtHR judgement of 05.07.2001, case *Arcuri and others v. Italy*, App. No 52024/99; ECtHR judgement of 9.11.2023, case *Riela and others v. Italy*, App. No 17378/20.

26 *Rummi v. Estonia*, § 79.

27 See G. Wycichowski-Kuchta, *op cit.*, 42; Bright Line Law, *The Use of Non-Conviction Based Seizure and Confiscation*, Council of Europe, 2020, 17, <https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3>, 7.05.2025.

the need to ensure that those claiming rights to the items subject to confiscation have access to the right to a court, before which the proceedings must respect the principle of equality of arms, must be adversarial, allow for the possibility of counter-evidence, but also ensure the appropriate (for the type of proceedings) standard of proof as well as the appropriate burden of proof placed on the individual.

Nevertheless, the placement of NCBC proceedings within the type of procedure is also important. If it is placed within the regime of criminal law (which already applies to EU countries, as discussed in more detail below), there is a certain limitation on the applicability of confiscation. This refers primarily to the limitations established by the *Paraponiaris v. Greece* judgment,<sup>28</sup> which held that it is inadmissible to apply confiscation in a case in which there was an acquittal (regardless of the reason). Similar consequences in the context of the presumption of innocence also apply to the confiscation of funds upon conviction, if the confiscation also includes funds derived from acts for which there was a prior acquittal.<sup>29</sup> Different procedures set different standards, with criminal proceedings being the most safeguarding ones.

#### 4. EUROPEAN STANDARDS ON CONTESTED NATIONAL REGULATIONS

The EU legislature has also recognized the need to regulate non-conviction based confiscation. Although for many years there was no proper instrument in this regard, such confiscation is already regulated at the EU law level, which occurred with EU Directive 2024/1260.<sup>30</sup> Nevertheless, despite the lack of EU solutions in this regard, this did not stop some Member States from introducing NCBC mechanisms prior to that Directive.<sup>31</sup> However, these procedures have

28 ECtHR judgment of 25.09.2008, case *Paraponiaris v. Greece*, App. No 42123/06.

29 See: M. Simonato, "Confiscation and fundamental rights across criminal and non-criminal domains", *ERA Forum*, 3/2017, 361 and ECHR judgements cited therein.

30 Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, OJ L, 2024/1260, 2.5.2024, ELI: <http://data.europa.eu/eli/dir/2024/1260/oj>, 7.05.2025.

31 See e.g.: Eurojust, *op. cit.*; V. Konarska-Wrzošek, J. Lachowski, *Instytucja przepadku w polskim prawie karnym*, Wolters Kluwer, Warszawa, 2020, 191–211; Council of Europe, *The Use of Non-Conviction Based Seizure and Confiscation*, 2020, <https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3>, 7.05.2025; V. L. Manes, "L'ultimo imperativo della politica criminale: nullum crimen sine confiscatione", *Rivista italiana di diritto e procedura penale*, 2015, 1259; OECD, *Reforming Bulgaria's Anti-corruption Authorities: Towards Effective Strategic Planning and Asset Recovery*, OECD Public Governance Reviews, OECD Publishing, Paris, 2025, 34 ff., <https://doi.org/10.1787/11ef33c9-en>, 7.05.2025; R. Esser, "A Civil Asset Recovery Model. The German Perspective and European Human Rights", *Non-Conviction Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (eds. J. P. Rui, U. Sieber), Duncker & Humblot, Berlin, 2015, 69–109, <https://>



been subjected to jurisprudential review by the Court of Justice. Already at this point, however, an important observation should be made. By adopting and ordering the implementation of the cited Directive, the EU legislator has unequivocally determined that non-conviction based confiscation mechanisms, as well as extended forfeiture and asset seizure against third parties, belongs solely to the criminal law regime, and may no longer constitute civil or administrative procedures. Significantly, until then Member States have had very broad discretion over both the scope of regulation of criminal asset forfeiture and the regime of proceedings under which it is carried out. This competence of the Member States stemmed from Article 1(1) of Directive 2014/42/EU,<sup>32</sup> which *explicitly* indicated that the Directive only introduces *minimum* rules for securing possible confiscation of illicit property, while Article 1(2) clearly indicated that Member States may apply other procedures on the subject, as long as those comply with the Directive 2014/42/EU. At the same time, the Directive 2014/42/EU went beyond the previous legislative pattern of fighting organized crime through incorporating in Article 10(3) the possibility to use of confiscated property for social purposes.<sup>33</sup> Thus, the evolution of the institution of confiscation in the EU criminal law is perceptible, which has also been discussed in the literature.<sup>34</sup> For the sake of clarity, it should only be pointed out that the admission by the EU legislator of the application of forfeiture of criminal property also within the scope of Articles 12–15 of EU Directive 2024/1260 prejudices the admissibility of the application of such regulations in national legal orders.

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*pure.mpg.de/rest/items/item\_2499325\_7/component/file\_3081806/content*, 7.05.2025; M. Panzavolta, R. Flor, “A Necessary Evil? The Italian “Non-Criminal System” of Asset Forfeiture Rights”, *Non-Conviction Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (eds. J. P. Rui, U. Sieber), Duncker & Humblot, Berlin, 2015, 111–149, [https://pure.mpg.de/rest/items/item\\_2499325\\_7/component/file\\_3081806/content](https://pure.mpg.de/rest/items/item_2499325_7/component/file_3081806/content), 7.05.2025. An analysis of pre-Directive 2024/1260 Non-Conviction Based Confiscation mechanisms can be found also in: J. P. Rui, U. Sieber, “Non-Conviction Based Confiscation in Europe. Bringing the Picture Together”, *Non-Conviction Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (eds. J. P. Rui, U. Sieber), Duncker & Humblot, Berlin, 2015, 245–304, [https://pure.mpg.de/rest/items/item\\_2499325\\_7/component/file\\_3081806/content](https://pure.mpg.de/rest/items/item_2499325_7/component/file_3081806/content), 7.05.2025.

32 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, 39–50.

33 For an extensive analysis of the matter, see: S. Montaldo, “The Directive 2014/42/EU and Social Re-use of Confiscated Assets in the EU: Advancing a Culture of Legality”, *New Journal of European Criminal Law*, 2015, 195–212 and sources cited therein.

34 See e.g. E. Hryniewicz-Lach, “Expanding Confiscation and its Dimensions in EU Criminal Law”, *European Journal of Crime, Criminal Law and Criminal Justice*, 3–4/2023, 243–267; E. Hryniewicz-Lach, “Improving asset confiscation: in the quest for effective and just solutions”, *ERA Forum*, 25/2024, 231–247; E. Hryniewicz-Lach, “Confiscation of Assets in the EU – Legal or (Just) Effective?”, *Archiwum Kryminologii*, 45/2023, 43–66.

Another consequence of the adoption of EU Directive 2024/1260 is a certain modification of the standard of non-conviction confiscation proceedings for European Union countries. Previously, as noted earlier, it was permissible to regulate forfeiture proceedings at the discretion of the state concerned. It could place these proceedings within the regime of criminal, civil or administrative law, as long as it met the standards set by Article 6 of the ECHR and Article 1(1) of Protocol No. 1 to the ECHR, which were described above. However, the EU legislator, while prejudging the fact that forfeiture proceedings belonged to the criminal law regime, at the same time enforced the need to adapt procedures in those EU Member States where confiscation was not regulated as part of the criminal proceedings.

As previously indicated, the prejudicial admissibility of non-conviction-based confiscation has already been the subject of CJEU jurisprudence. In the judgment in *Agro in 2001*, the CJEU indicated that the provisions of EU law do not exclude the possibility of foreseeing such an institution in the legal orders of the EU Member States, such as this was already the case on the grounds of Framework Decision 2005/212/JHA.<sup>35</sup> The CJEU took a similar position in the *ZV and AX* judgment, in which it indicated that not only Directive 2014/42/EU does not apply to Member State procedures on confiscation, in which it is not required to establish criminal responsibility for one or more crimes, but also the Charter of Fundamental Rights is not applicable.<sup>36</sup> In the *Plovdiv* case, the CJEU held that it is impermissible to confiscate property used for the commission of a crime belonging to a *bona fide* holder,<sup>37</sup> while in the *DR and CJ* case it determined the right of such a holder to participate in forfeiture proceedings before the court.<sup>38</sup>

Other only issue is the question of a possible extension of the scope of application of the forfeiture also to defendants who already were found guilty or cases in which the judgements were passed (without the conviction). In such a situation, we are dealing with *retrospectivity* rather than *retroactivity* of the law. This issue has not been the subject of the CJEU's jurisprudence. However, the ECtHR's findings on the admissibility of this institution are binding in this regard. It must be reiterated that through incorporating the institution of forfeiture into the domestic law in such a way that it is extended to already existing legal situations with respect to defendants who died before the final conclusion of the proceedings – in particular, when under national law the forfeiture was already included in the catalog of criminal measures and could have been ordered if the perpetrator had lived, and the court had recognized his guilt and issued a conviction – is characterized by retrospectivity, not retroactivity of the law, and is therefore permissible. We are dealing with such situations, for example, on the grounds of Polish legislation, where not only was the issue of non-conviction forfeiture

35 CJEU judgement of 19.03.2020, case C-234/18 *Agro in 2001*, § 62, EU:C:2020:221.

36 CJEU judgement of 28.11.2021, case C-319/19 *ZV i AX*, § 41, 43–46, EU:C:2021:883.

37 CJEU judgement of 14.01.2021, case C-393/19 *Plovdiv*, ECLI:EU:C:2021:8.

38 CJEU judgement of 21.10.2021, joined cases C-845/19 and C-863/19, *DR and TS*, § 81–85, ECLI:EU:C:2021:864.

ordered by law (even before the entry into force of EU Directive 2024/1260), but also the *lex retro non agit* clause was excluded in relation to the acts of sick, absent, undetected or dead perpetrators. Even in the situations, in which the retrospectivity of forfeiture would be introduced into the given legal order (as a new instrument but applicable to already proceeded cases), we could argue that it fulfills the above-discussed standards.

However, an additional issue requiring consideration is the aspect of participation and representation of persons who have a legal interest in the result of forfeiture proceedings. We are essentially analysing two elements here: firstly, the jurisprudence of the CJEU and secondly, Article 15 of EU Directive 2024/1260 on non-conviction forfeiture proceedings. First, let's note that the European standard on the subject essentially refers to the already analyzed ECHR case law. In fact, in the *Plovdiv* case, it refers to ensuring the protection of *bona fide* holders by giving them the right to an effective remedy,<sup>39</sup> which it also confirms in further rulings,<sup>40</sup> including on the grounds of a procedure of an administrative nature.<sup>41</sup> Using Poland as a reference point, not only does the national legislation grant the right to file a complaint against a forfeiture order when it concerns the property of a third party to the perpetrator or a person who has made a claim to it (and this in the context of criminal proceedings), but it also grants the right to pursue their claims through civil proceedings to any person who claims rights to the forfeited property (including heirs), which undoubtedly constitutes a grant of the right to an effective remedy and the right to a court. Such a procedure may serve as an appropriate benchmark for other national legislators.

## 5. CONCLUSIONS

The above considerations show that the issue of non-conviction based confiscation is not a new instrument for implementing preventive policies within European states. Already since the 1980s, the legislatures of European countries have introduced various legal solutions allowing for asset recovery. The rationale for these changes was quite trivial: the idea was to implement a policy of “zero profit from crime”, which was intended not only to serve individual prevention, but above all to realize considerations of general prevention by minimizing the economic profitability of crime.

The solutions of individual member states – Italy, the UK, Russia, Estonia, Lithuania, San Marino or France – were subject to the jurisprudential control of the European Court of Human Rights, which for many years created essentially the only applicable standard for these proceedings. It was set by Article 6 of the

39 C-393/19 *Plovdiv*, § 63.

40 E.g. CJEU judgement of 12.05.2022, case C-505/20 *RR and JG*, § 34–38, ECLI:EU:C:2022:376; CJEU judgement of 21.10.2021, cases C-845/19 and C-863/19 *Okrazhna prokuratura-Varna*, § 77; C-845/19 i C-863/19, *DR and TS*, § 75–77.

41 CJEU judgement of 9.03.2023, case C-752/21 *Otdel*, § 37, ECLI:EU:C:2023:179.

ECHR and Article 1(1) of Protocol No. 1 to the ECHR, constituting the standard of review in the recognized cases. Briefly summarizing these requirements, it should be emphasized that European legislators, in shaping the procedure for non-conviction confiscation proceedings, must meet the three-tiered test of precision of the legal text, legitimate social interest and proportionality, and, moreover, take into account the right to a court and public hearing, the adversarial nature of the proceedings and the standards of equality of arms, including the right to present evidence to the contrary by an interested party.

Parties to the Convention, however, have the right to regulate their procedures more freely than members of the European Union. Indeed, the EU legislator by EU Directive 2024/1260 has sorted out the issue of forfeiture procedures, definitively locating NBNC proceedings in the sphere of criminal law. Consequently, all member states should adapt their national laws to the requirements of Community law. The issue is different for those signatories to the ECHR who are not bound by the EU treaties – for the ECtHR has left them free to decide on the type of procedure. Nevertheless, extended confiscation proceedings are undoubtedly already an important part of the legal system of both European states and countries of the common law tradition.

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## ПОЛИТИКА НЕПРОФИТАБИЛНОСТИ КРИМИНАЛА У ПРАКСИ: ПРЕГЛЕД ОДУЗИМАЊА ИМОВИНЕ БЕЗ ОСУДЕ КРОЗ ПРИЗМУ ПРАВИЧНОГ СУЂЕЊА

### Резиме

*Овај рад бави се питањем одузимања имовине без претходне кривичне осуде, као механизма одузимања непрофитно стечене добити. Посебна пажња посвећена је стандардима правичног суђења у складу са Европском конвенцијом о људским правима, као и законодавним решењима која су усвојена на нивоу Европске уније и у државама чланицама. Анализиран је обим примене ових механизма, уз наглашавање кључних елемената самог поступка одузимања. Циљ ових решења није само превенција у односу на појединце, већ је свега да допринесу општој превенцији, иако што ће криминал учинити неискључивим.*

*У крајњим циљевима, европски законодавци приликом уређења поступка одузимања имовине без осуде морају задовољити три основна услова: правну прецизност, постојање легитимног друштвеног интереса и пропорционалност мере. Такође, морају се поштовати основна процесна права – право на приступ суду и јавно суђење, контрадикторност поступка, равноправност страна у поступку, као и право заинтересованих лица да изнесу доказе у своју корист. У оквиру Европске уније, одузимање имовине мора бити део кривичног поступка. Међутим, како је у раду истакнуто, таква пракса је усвојена тек у новије време, док у државама ван ЕУ одузимање и даље може бити део грађанског или управног поступка.*

**Кључне речи:** одузимање имовине без осуде, одузимање без суђења, људска права, правично суђење.

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