

FRA Opinion – 03/2012
Confiscation of proceeds of crime

Vienna, 4 December 2012

Opinion
of the
European Union Agency for Fundamental Rights
on the
Confiscation of proceeds of crime

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on the European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in particular Article 2 with the objective of the FRA “to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”,¹

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of the FRA to “formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”,

Having regard also to Recital 13 of Council Regulation 168/2007, according to which “the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned”,

Having regard to the Proposal of the European Commission of 12 March 2012 for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union (the proposal)² as well as to the impact assessment accompanying the proposal (the impact assessment),³ which were submitted to the European Parliament and to the Council on 13 March 2012,

Having regard to the opinion on the proposal by the European Economic and Social Committee (EESC),⁴

¹ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1.

² European Commission (2012), *Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union*, COM(2012) 85 final, Brussels, 12 March 2012.

³ European Commission (2012), *Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union. Impact Assessment*, Commission staff working paper, SWD(2012) 31 final, Brussels, 12 March 2012.

⁴ EESC (2012), *Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union’*, OJ 2012 C 299/128, 4 October 2012, pp. 81–88.

Having regard to the request of the European Parliament of 7 November 2012 for an Opinion of the European Union Agency for Fundamental Rights on fundamental rights issues associated with the proposal,

SUBMITS THE FOLLOWING OPINION:

FRA considerations

Procedural rights: presumption of innocence, right of defence, legality and proportionality of criminal offences and penalties, and *ne bis in idem* (Articles 48 to 50 of the Charter)

Procedural safeguards, as they have been developed in the relevant case law of the ECtHR, could be more prominent in the proposal, in order to enforce the compatibility with relevant fundamental rights standards of the non-conviction based confiscation mechanism. Such detailed safeguards would aim at providing a reasonable opportunity for a person concerned to put facts of the case to the responsible authorities. Moreover, other safeguards include allowing for rebuttal of an assumption that the property at stake derives from criminal activities or judicial discretion whether to order confiscation, in particular where such an order would give rise to a serious risk of injustice. Additionally, the proposal would provide for further clarification of the legitimate aim of the mechanism in relation to the scope of the serious offences such confiscation mechanism covers.

Right to property: justified interference (Article 17 of the Charter)

In the light of the requirement of necessity for any interference with the right to property, consideration could be given to restrict the application of Article 4 of the proposal to cases of particularly serious criminal offences or even to situations where the offender commits similar offences for the sake of recurrent gains. In addition, more detailed guidance for the courts in relation to the level of proof (that is, “substantially more probable”) required by the proposal could be considered, such as the explicit requirement to establish a marked disparity between the lawful income of an offender and the property at his or her disposal before ordering a confiscation.

Access to justice, in particular rights of victims (Article 47 of the Charter)

To effectively safeguard rights of victims of crimes under Article 47 of the Charter, consideration could be given to include in Article 8 of the proposal a clear reference to the need to safeguard fair trial rights of victims of crimes.

Introduction

- (1) The FRA welcomes the request of the European Parliament of 7 November 2012 to provide advice on “the extent to which [confiscation] could go without breaching fundamental rights” in relation to the European Commission proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union (the proposal).
- (2) This FRA Opinion looks into substantive provisions of the proposal, namely Titles I (‘Objective and scope’) and II (‘Freezing and confiscation’). It particularly focuses, as requested, on the introduction of non-conviction based confiscations (Article 5), extended powers of confiscation (Article 4) and confiscation from a third party (Article 6). It assesses these provisions in the light of the Charter and of international human rights standards.
- (3) With the measures stipulated in Articles 4, 5 and 6 of the proposal, the scope of the existing European Union (EU) legislation would be widened in the area of freezing and confiscation, namely the scope of four framework decisions and a Council Decision stemming from 2001 and onwards.⁵ The European Commission’s impact assessment (the impact assessment),⁶ as well as a study contracted by the European Commission during this process, point to major problems with the existing legal framework and its implementation.⁷ The effectiveness of such measures

⁵ Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, 2001/500/JHA, OJ 2001 L 182/1; Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, 2005/212/JHA, OJ 2005 L 68/49; Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, 2003/577/JHA, OJ 2003 L 196/45; Council Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, 2006/783/JHA, OJ 2006 L 328/59; and Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the EU Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ 2007 L 332/103. There are also a number of international treaties governing this area, see, for example, Council of Europe, Convention on laundering, search, seizure and confiscation of the proceeds from crime, 8 November 1990, CETS No. 141, and United Nations Convention against transnational organized crime and the protocols thereto, adopted by General Assembly resolution 55/25 of 15 November 2000, signed in Palermo, Italy, on 12–15 December 2000.

⁶ European Commission (2012), *Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union. Impact Assessment*, Commission staff working paper, SWD(2012) 31 final, Brussels, 12 March 2012. For an overview of confiscation, see pp. 8–12.

⁷ Matrix Insight, *Assessing the effectiveness of EU Member States’ practices in the identification, tracing, freezing and confiscation of criminal assets*, Brussels, European Commission DG Justice, Freedom and Security, June 2009, available at:

across the EU is important for the overall economy as well as for security and crime prevention.

- (4) A report on organised crime in the EU by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs underlines the substantial social costs of organised crime, including the violation of human rights and the undermining of democratic principles. It observes that the purpose and basis of organised crime is to make an economic profit. Consequently, if action to prevent and combat the problem is to be effective, it must focus on identifying, freezing, seizing and confiscating the proceeds of crime. The report criticises the fact that the current legal framework does not appear to provide an adequate basis for serious action in this regard.⁸
- (5) While an enhanced system of confiscation may support fundamental rights, a balancing of rights is needed to avoid that other fundamental rights, such as defence rights, are put at risk when applying confiscation measures.⁹
- (6) On the basis of existing case law under the European Convention on Human Rights (ECHR) and the Charter, the following rights and principles constitute the main focus of this FRA Opinion and are considered being most likely engaged by Articles 4, 5 and 6 of the proposal:
 1. Procedural rights: presumption of innocence, right of defence, legality and proportionality of criminal offences and penalties, and *ne bis in idem*
 2. Right to property: justified interference
 3. Access to justice, in particular rights of victims

http://ec.europa.eu/home-affairs/news/intro/docs/20120312/final_asset_recovery_report_june_2009.pdf.

⁸ European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2011), *Report on organised crime in the European Union, 2010/2309(INI)*, Brussels, 6 October 2011.

⁹ European Commission (2012), *Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union. Impact Assessment*, Commission staff working paper SWD(2012) 31 final, Brussels, 12 March 2012. For an overview of confiscation, see pp. 4, 12-15 and on fundamental rights, see pp. 23-24. On fundamental rights, see also the proposal, p. 9.

1. Procedural rights: presumption of innocence, right of defence, legality and proportionality of criminal offences and penalties, and *ne bis in idem*

1.1. The standards

- (7) The nature of confiscation mechanisms are a central aspect when assessing the proposal's impact on fundamental rights, such as defence rights,¹⁰ presumption of innocence,¹¹ the principle of *ne bis in idem*,¹² as well as the principle of legality and proportionality of criminal offences.¹³ All of these rights are applicable to confiscation mechanisms where the nature of the respective proceedings would be considered to amount to a criminal charge – Articles 48 to 50 of the Charter. Consequently, this has implications for Articles 3, 4, 5 as well as 6 of the proposal.
- (8) In a number of cases, the European Court of Human Rights (ECtHR) has treated conviction-based confiscation as part of the sentencing process and therefore determined that Article 6 (2) of the European Convention on Human Rights (ECHR) – presumption of innocence – did not apply.¹⁴ According to the ECtHR: “[t]he features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation”.¹⁵ In the ECtHR case of *Van Offeren v. the Netherlands*, for example, the applicant asserted a violation of Article 6 (2) of the

¹⁰ Article 48 of the Charter and Article 6 of the ECHR; see European Court of Human Rights (ECtHR), *Imbrioscia v. Switzerland*, No. 13972/88, 24 November 1993.

¹¹ Article 48 of the Charter and Article 6 of the ECHR; see ECtHR, *Saunders v. the United Kingdom*, No. 19187/91, 17 December 1996.

¹² Article 50 of the Charter; see Court of Justice of the European Union (CJEU), C-7/72, *Boehringer Mannheim GmbH v. Commission of the European Communities*, 14 December 1972, or CJEU, C-308/04 P, *SGL Carbon AG v. Commission of the European Communities*, para. 26.

¹³ Article 49 of the Charter and Article 7 of the ECHR; see ECtHR, *Streletz, Kessler and Krenz v. Germany*, Nos. 34044/96, 35532/97 and 44801/98, 22 March 2001.

¹⁴ See in particular, ECtHR, *Phillips v. the United Kingdom*, No. 41087/98, 12 December 2001 and ECtHR, *Van Offeren v. the Netherlands*, No. 19581/04, 5 July 2005.

¹⁵ ECtHR, *Geerings v. the Netherlands*, No. 30810/03, judgment of 1 June 2007, para. 44.

ECHR on the grounds that a confiscation order was based on a judicial finding of guilt for offences of which he had been acquitted. The ECtHR held that subsequent confiscation proceedings did not amount to being “charged with a criminal offence”, but these were rather analogous to a penalty determining stage. Therefore, Article 6 (2) of the ECHR related to presumption of innocence did not apply. There was no “new charge”.

- (9) The case was analogous *mutatis mutandis* to that of *Phillips v. the United Kingdom*,¹⁶ where confiscation was based on “[...] provisions of the 1994 Act, which require a court sentencing a person convicted of a drug-trafficking offence to assume that any property appearing to have been held by him at any time since his conviction, or during the period of six years before the date on which the criminal proceedings were commenced, was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking”.¹⁷ The *Van Offeren* and *Phillips* cases should be distinguished from the *Geerings v. the Netherlands* case. The latter case concerned a confiscation order made in respect of offences for which the defendant had been tried and acquitted. The ECtHR found that a presumption of guilt in contravention of Article 6 (2) of the ECHR did exist because (i) a court had considered and not been satisfied that a crime had been committed and (ii) it had not been established as fact that any advantage had been obtained. All these cases seem to be of particular relevance in relation to Article 4 of the proposal, which allows for extended confiscation where, based on specific facts, a court finds that a person convicted of an offence covered by the proposal is in possession of assets which are substantially more probable to be derived from other criminal activities of similar nature or gravity than from any other activities.
- (10) In the case of *Butler v. the United Kingdom* (2002) and *Webb v. the United Kingdom* (2004), the ECtHR held that cash confiscation (forfeiture) proceedings were not criminal in nature and cash confiscation was “a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs”. The proceedings accordingly did not involve “the determination [...] of a

¹⁶ ECtHR, *Phillips v. the United Kingdom*, No. 41087/98, 12 December 2001.

¹⁷ Compare with ECtHR, *Welch v. the United Kingdom*, No. 17440/90, 9 February 1995, in which a particular issue arose in respect of newly introduced extended confiscation provisions. These provisions allowed for the confiscation of assets acquired through criminal conduct which had occurred prior to the introduction of the extended confiscation regime. The ECtHR held that the following elements provided a strong indication that the confiscation order – despite being considered as essential to the preventive scheme inherent in the relevant national legislation – amounted to a penalty: “the sweeping statutory assumption [...] that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise [...]; the fact that the order is directed to the proceeds and is not limited to actual enrichment or profit [...]; the discretion of the trial judge to have regard to culpability in fixing the amount of the order [...] and the possibility of imprisonment in default of payment [...]”.

criminal charge” and hence they did not attract the full guarantees of Article 6 of the ECHR under its criminal head, such as presumption of innocence. In these two cases, however, no criminal charges were brought against the applicants.

- (11) In cases against Italy, non-conviction based seizure and confiscation is available for alleged proceeds of crime of the presumed offender, who is deemed a member of a Mafia-like organisation. Italian law requires sufficient circumstantial evidence to establish a presumption that the property of a person suspected of belonging to a criminal organisation represents the proceeds from unlawful activities or has been acquired with those proceeds. In this context, circumstantial evidence refers to a considerable discrepancy between a person’s lifestyle and his or her apparent or declared income in order to show that the property concerned forms the proceeds from unlawful activities or their reinvestment. According to the ECtHR, such a confiscation mechanism “sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. It therefore considers that the aim of the resulting interference serves the general interest”.¹⁸ In relation to the use of presumption, the ECtHR confirmed that “[t]he Convention obviously does not prohibit such presumptions in principle. However, the applicants’ right to peaceful enjoyment of their possessions implies the existence of an effective judicial guarantee”.¹⁹
- (12) In all these cases, the ECtHR has attributed importance to the fact that effective procedural safeguards were in place, which accompanied the assumptions that the property had been derived from criminal activities. In the *Phillips v. the United Kingdom* case, for example, the ECtHR highlighted that: “[...] 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 principal safeguard, however, was that the assumption [...] 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 discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice”. Similarly, in the case of *Arcuri v. Italy*, the ECtHR established that “[...] the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities”.²⁰ The ECtHR herewith referred to the opportunity for

¹⁸ See, for example, ECtHR, *Arcuri v. Italy*, No. 52024/99, 5 July 2001, para. 1. See also ECtHR, *Riela v. Italy*, No. 52439/99, 4 September 2001; ECtHR, *Raimondo v. Italy*, No. 12954/87, 22 February 1994.

¹⁹ See, for example, ECtHR, *Arcuri v. Italy*, No. 52024/99, 5 July 2001, para. 1.

²⁰ See also ECtHR, *Silickienė v. Lithuania*, No. 20496/02, 10 April 2012, para. 66. This case concerned the confiscation of property of an accused’s widow. The Court highlighted that although in principle persons whose property was confiscated should have been formally granted the status of a party to the proceedings resulting in such measures, it was acceptable that in the particular circumstances of this case the national authorities had *de facto* afforded an applicant (an accused’s widow) a reasonable and sufficient opportunity to adequately protect her interests. The applicant could have sought judicial review

a contradictory trial, the possibility to appeal as well as to the Italian courts establishing the assumption that assets liable to confiscation are proceeds of crime by objectively assessing the facts.

1.2. Application of the standards

- (13) Article 5 (non-conviction based confiscation) as well as Article 6 (third-party confiscation) include critical points related to procedural rights. Article 5 of the proposal requires that, first, proceedings were conducted against a suspected or accused person – a requirement that excludes cases where no suspect was identified. Second, a court has to assume that the proceedings would have ended with a criminal conviction of the suspected or accused person if only that person had been able to stand trial. Third, confiscation is further premised on the condition that the reason why the defendant was unable to stand trial falls under one of three categories, namely permanent illness, death or flight.
- (14) However, by focusing on the prediction that the proceedings could have ended with the suspect's or accused's conviction, Article 5 of the proposal suggests that, what can justify non-conviction based confiscation is a court's prognosis.
- (15) The same applies to Article 6 of the proposal (in case of a suspect or accused person under Article 5). It stipulates that courts should impose penalties by confiscating the transferred proceeds of crimes in situations where the courts have not convicted the owners of these proceeds for the crimes that have generated the proceeds.
- (16) Although criminality constitutes the key aspect of such confiscation measures, the aforementioned case law (paragraphs 7–12) shows that the ECtHR has treated non-conviction confiscation proceedings as beyond the scope of Article 6 (2) of the ECHR, subject to strong procedural safeguards.
- (17) Any assessment of the confiscation measures introduced by the proposal will be seen in the light of the procedural safeguards in place, such as the degree of judicial discretion whether to order confiscation and the limitation of the scope of provisions to serious offences.²¹ This is in particular relevant in relation to Article 6 of the proposal which extends confiscation to third parties.

proceedings of the initial seizure measure in 2000, and she could also have explained the origin of her property had she chosen to testify in the criminal proceedings; she had, however, not availed of that opportunity. After her husband's death the national court had appointed a lawyer to represent her interests in the criminal proceedings.

²¹ Consideration could be given to framing confiscation as purely *in rem*, that is, as a non-punitive criminal sanction – confiscation reacting to crime without charging a person with a crime. Confiscation *in rem* is a criminal matter and would thus not invoke Articles 48 to 50 of the Charter since only proceedings *in personam* charge a person. If, however, the proceedings are directed against an owner of assets, based on the assumption that these

1.3. Considerations

- (18) Procedural safeguards, as they have been developed in the relevant case law of the ECtHR, could be more prominent in the proposal, in order to enforce the compatibility with relevant fundamental rights standards of the non-conviction based confiscation mechanism. Such detailed safeguards would aim at providing a reasonable opportunity for a person concerned to put facts of the case to the responsible authorities. Moreover, other safeguards include allowing for rebuttal of an assumption that the property at stake derives from criminal activities or judicial discretion whether to order confiscation, in particular where such an order would give rise to a serious risk of injustice. Additionally, the proposal would provide for further clarification of the legitimate aim of the mechanism in relation to the scope of the serious offences such confiscation mechanism covers.

2. Right to property: justified interference

2.1. The standards

- (19) Article 17 of the Charter (right to property) provides that “everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions”.²² The

assets stem from a criminal origin without implying that the owner was involved in the commission of the pertinent crimes, then these proceedings do not amount to the owner being charged with an offence in the sense of Article 48 of the Charter. See ECtHR, *Agosi v. the United Kingdom*, No. 9118/80, 24 October 1986, para. 65 and ECtHR, *Phillips v. the United Kingdom*, No. 41087/98, 12 December 2001, paras. 34–35. The same would hold true for the rights under Article 50 of the Charter: not to be tried or punished twice in criminal proceedings for the same criminal offence depend on the nature and design of a confiscation measure. If confiscation measures are conducted strictly not against an alleged offender (*in personam*) but focus on the possession of certain assets (*in rem*), then the proceedings leading to the confiscation measure cannot be seen as *trying* the owner of the assets for an offence, nor can a confiscation resulting from these proceedings be interpreted as punishment of an offender. See Rees, E., Fisher, R., Thomas, R. (2011), *The proceeds of Crime Act 2002*, Oxford, Oxford University Press, p. 12. Systems aimed solely at confiscation of assets and not against persons exist in a number of EU Member States, including Austria, Bulgaria, Germany, Ireland, Italy, Slovakia, Slovenia and the United Kingdom.

²² The second sentence of Article 17 of the Charter makes any deprivation of property subject to fair compensation. However, to confiscate the proceeds of crime makes only sense if such deprivation of property is implemented without compensating the former owner. It is exactly the enrichment of the owner of the assets that is challenged. The confiscation of

corresponding provision of the ECHR is Article 1 (protection of property) of the first Protocol to the Convention, which states that “every natural or legal person is entitled to the peaceful enjoyment of his possessions”. The notion of ‘possessions’ is not limited to ‘existing possessions’. Other assets, including claims in respect of which an applicant can argue that he or she has at least a ‘legitimate expectation’ (which must be of a nature more concrete than a mere hope) that they will be realised, qualify as ‘possessions’.²³ In both instruments, the right to property is not absolute.

- (20) The current proposal aims to introduce confiscation measures which – when applied – would amount to an interference with the right to property. As a non-absolute right, it is subject to interference. By providing for extended powers of confiscation, Article 4 of the proposal represents such interference. Measures provided for in other articles of the proposal trigger similar concerns. For any interference to be justified, it needs to pursue a legitimate aim which must be necessary and provided for by law (legality).²⁴
- (21) In the case of *Phillips v. the United Kingdom*, which related to the application of statutory presumptions to assess the amount to be confiscated, the ECtHR held that the confiscation action was not disproportionate given “the importance of the aim to be pursued”, that is, the fight against drug trafficking in this case.
- (22) There are, however, other additional procedural guarantees usually needed to justify the necessity of an interference with the right to property. It can again be referred to the case of *Phillips v. the United Kingdom*, in which national law provided for the possibility for the judge not to apply the assumption of the Drug Trafficking Offences Act 1994, if he considered that such an application would give rise to a serious risk of injustice – this aspect is of greatest importance. Further guidance in relation to the proportionality criteria can be found in the case of *Butler v. the United Kingdom*, in which the ECtHR concluded that “as drug trafficking is of serious concern in member states, its policy must be capable of balancing the rights of the individual with the wider community interest. The Act gave clear powers to the officers and there was no unfettered discretion to seize and forfeit. Furthermore, the actions of the officers were subject to judicial scrutiny, and the courts weighed the evidence before ordering seizure. The interference with his property rights was not, therefore, a disproportionate interference bearing in mind the balancing exercise between community and him”. In the case of *Silickienė*

proceeds of crime means interferences with the right to property without compensating the owner.

²³ ECtHR, *Maltzan and Others v. Germany* (dec.) [GC], Nos. 71916/01, 71917/01 and 10260/02, para. 74 (c); ECtHR, *Kopecký v. Slovakia* [GC], No. 44912/98, para. 35 (c).

²⁴ The question of proportionality and relevant safeguards is also particularly important in relation to Article 6 of the proposal which allows for third party confiscation. Where, in the case law of the ECtHR (see, for example, *Arcuri v. Italy*), there is an interference with the property rights of such third parties, a link between the proceeds of crime and the assets in the possession of a third party has to be established. It is therefore recommended to focus on the concept of tainted property in such cases to assure that these third parties could not be seen as *bona fide* purchases for value. The ECtHR speaks about a *de facto* control.

v. Lithuania, the ECtHR reiterated that, “where possessions are confiscated, the fair balance depends on many factors, including the owner’s behaviour. It must therefore determine whether the [...] courts had regard to the applicant’s degree of fault or care”.²⁵

- (23) In relation to the requirement ‘provided by law’, in the case of *Sunday Times v. the United Kingdom*,²⁶ the ECtHR held that ‘provided by law’ requires in particular that the provision: “[...] is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail [...]”.

2.2. Application of the standards

2.2.1. Necessity and legitimate aim of extended powers of confiscation

- (24) Applying the legitimacy requirement of the aim pursued by the measures (see paragraph 21 in particular) as stipulated by Article 4 of the proposal, closer attention should be paid to the question of the legitimate objective of confiscation measures introduced in the proposal. Such legitimate aim should clearly be directed at the seriousness of the threat to justify proposed interference with the right to property.
- (25) In light of the analysed case law (see paragraphs 21–23), further considerations seem to be needed in relation to the necessity of the measures outlined in Article 4 of the current proposal.
- (26) Article 4 of the proposal aims to allow for the confiscation of assets which, although following a conviction of an offender and belonging to this offender, do not relate to the concrete offences for which the offender was convicted – this is labelled as “extended powers”. The confiscation of such assets can, strictly speaking, not rely on a conviction. The underlying assumption is that a person, who has once committed an offence, may be suspected to have also committed other offences, on which basis assets in this person’s possession can be assumed to result from other offences. These combined assumptions require corroboration by real evidence. The text of the proposal admits this by highlighting the necessity that a court should base its decision “on specific facts”. Still, in cases under Article 4 of the proposal, as a rule, the concrete offences from which proceeds presumably derive will not be established.²⁷

²⁵ ECtHR, *Silickienė v. Lithuania*, No. 20496/02, 10 April 2012, para. 66.

²⁶ ECtHR, *Sunday Times v. the United Kingdom*, No. 6538/79, 26 April 1979, para. 49.

²⁷ For the risks arising from such extended confiscation powers, the ECtHR case *Geering v. the Netherlands*, No. 30810/03, 1 March 2007, offers ample evidence. According to the ECtHR, extended powers of confiscation do not imply that the offender is charged for the offences

In addition, as the value of assets, which can be confiscated under Article 4 of the proposal, is not restricted, extended confiscation can amount to considerable interferences with fundamental rights.

- (27) In light of the requirement for any interference to be strictly necessary (see paragraphs 22–23 in particular), the text of Article 4 (1) of the proposal prompts questions of further safeguards needed to ensure the necessity of confiscation measures allowed for under this provision. These safeguards would concern three different aspects.
- (28) First, a restriction of extended powers of confiscation to particularly serious crimes, that is, adopting a more restricted approach than provided for in Article 83 (1) of the Treaty on the Functioning of the European Union (TFEU), would exclude those crimes which *per se* are not particularly serious crimes (such as milder forms of corruption, money laundering, counterfeiting of means of payment or computer crime)²⁸ and with regard to which the powers of extended confiscation envisaged in Article 4 of the proposal could be found disproportionate.
- (29) Second, the introduction of a relationship between the offence for which the offender is convicted and his or her conduct, which could come under deliberation by a court in the context of Article 4 of the proposal. The scope of the provision could be restricted to situations where such a court has sufficient evidence to assume that the offence was not committed as a singular event but only forms an instance in a series of similar offences, which the offender commits for a living or at least for recurrent gains amounting, over a certain period of time, to significant additional income. Such a specific element could help to substantiate and corroborate the assumption that other assets in the possession of the offender stem from similar offences.²⁹
- (30) Third, Article 4 of the proposal requires that the court finds it substantially more probable that the property in question stems from similar criminal activities than from other activities. In this respect, additional safeguard requiring a marked disparity between the lawful income of an offender and the property at his or her disposal

the proceeds of which are confiscated. The Court rather views the extended confiscation – beyond the proceeds deriving from the offences for which the offender is convicted – as a method applied in sentencing. In para. 43, the Court states: “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’”. See also ECtHR, *Phillips v. the United Kingdom*, No. 41087/98, 5 July 2001, as well as the admissibility decision in ECtHR, *Van Offeren v. the Netherlands*, No. 19581/04, 5 July 2005.

²⁸ While Article 83 (1) of the TFEU specifies areas of serious crime, this does not imply that every single crime falling in these areas necessarily forms a particularly serious offence.

²⁹ See E. Rees, R. Fisher, R. Thomas, *The proceeds of Crime Act 2002*, cited above, pp. 22–23.

would seem to be appropriate. Its explicit inclusion in Article 4 of the proposal would contribute to justifying the necessity of the confiscation.³⁰

2.2.2. Legality

- (31) In relation to the question of legality of the measures allowed for in the proposal, the analysed case law (see reference to *Sunday Times v. the United Kingdom* in paragraph 23 in particular) seems to indicate that the proposal must be accessible (published) and its provisions formulated with sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.³¹
- (32) In light of these standards and given the serious consequences of a confiscation measure, the proposal – and a subsequent directive – could benefit from additional clarity in its formulations. Consequently, the definition and the use of the term ‘instrumentalities’ in the current proposal would require further clarification.
- (33) While the title of the proposed directive (as appearing on page 13 of the proposal) relates only to the freezing and confiscation of *proceeds* of crime, at certain instances the text also refers to “instrumentalities” According to the definition in Article 2 of the proposal, the term ‘instrumentality’ is intended to cover not only property *used* to commit a criminal offence but also property *intended to be used* to commit a criminal offence – consequently, also preventive forms of confiscation. The text of the proposal makes use of the term “instrumentalities” in Articles 3 and 5. In both instances, the text refers to situations “following” a conviction or at least proceedings. However, the formulations leave open whether “following” indicates a mere temporal connection or rather that the instrumentalities were related to earlier proceedings. This element of ambiguity in the wording should be addressed to clarify that confiscation measures should not rely solely on the fact that property was *intended* to be used for the commission of crimes.³²
- (34) In addition, further clarification of the term “effective possibility to contest the probability” employed by Article 8 of the proposal in relation to the proceedings provided for in Article 4 could be considered, in order to meet the necessary defence rights standards.
- (35) Finally, Article 5 of the proposal requires that the proceedings “could” have led to a criminal conviction, without further specifying the intended degree of probability. This

³⁰ In this respect, see EESC (2012), *Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union’*, OJ 2012 C 299/128, 4 October 2012.

³¹ See ECtHR, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A No. 98. See also ECtHR, *Sanoma Uitgevers B.V. v. the Netherlands* [GC], No. 38224/03, 14 September 2010; ECtHR, *Rekvényi v. Hungary* [GC], No. 25390/94, 20 May 1999. See also FRA Opinion 1/2012, p. 12.

³² A provision suggesting purely preventive confiscation would also have to be considered in the light of Article 84 of the TFEU, excluding harmonisation of legislation.

can be interpreted as suggesting that confiscation measures could be taken even if it was, on the basis of the available evidence, only barely possible that the proceedings would have led to a conviction. Therefore, the text of Article 5 of the proposal would benefit from clarification as to the level of standards of proof required for confiscation measures taken under Article 5.

2.3. Considerations

- (36) In the light of the requirement of necessity for any interference with the right to property, consideration could be given to restrict the application of Article 4 of the proposal to cases of particularly serious criminal offences or even to situations where the offender commits similar offences for the sake of recurrent gains. In addition, more detailed guidance for the courts in relation to the level of proof (that is, “substantially more probable”) required by the proposal could be considered, such as the explicit requirement to establish a marked disparity between the lawful income of an offender and the property at his or her disposal before ordering a confiscation.

3. Access to justice, in particular rights of victims

3.1. The standards

- (37) Arguably, the most important fundamental right of victims is the right to access justice, as provided for in Article 47 of the Charter. This right has several aspects, including the right to redress. This has a clear implication for Article 8 of the current proposal.
- (38) In its case law, the ECtHR has recognised the applicability of Article 6 guarantees to proceedings in the context of which individuals claim reparation for damage caused by the offence of which they were allegedly the victims.³³
- (39) In relation to the specific context of disposition of the confiscated assets, both the UN Convention against Transnational Organized Crime and the UN Convention

³³ ECtHR, *Perez v. France* [GC], 12 February 2004, paras. 70–72

against Corruption address the disposal of confiscated assets and recommend its use primarily for compensating the victims of crime.³⁴

3.2. Application of the standards

- (40) While some areas of crime listed in Article 83 (1) TFEU relate to offences which do not regularly violate the rights of individual victims, others do – including terrorism, trafficking in human beings and sexual exploitation of women and children. The existing fundamental rights standards defined above (see paragraphs 37–39) provides for these crime victims to experience that authorities take appropriate steps to ensure that the crimes that were committed in violation of their fundamental rights ‘do not pay’; neither for offenders nor for anyone else who should wish to knowingly or carelessly profit from the criminal conduct of offenders.
- (41) As the analysis of the case law shows, the right to participate in proceedings in accordance with the terms under Article 47 of the Charter are not restricted to criminal proceedings against a suspected or accused person. They also cover proceedings conducted for the sole purpose of the confiscation of proceeds of crimes, proceedings concerned with crimes that have violated rights of individual victims.
- (42) In this context, Recital 9 of the Victims Directive³⁵ should be considered, which acknowledges that crime is a wrong against society as well as a violation of the individual rights of victims. According to Recital 13 of the Victims Directive, it applies in relation to criminal proceedings that take place in the European Union. The purposes of the Victims Directive, as defined in its Article 1 (1), include ensuring that victims “are able to participate in criminal proceedings”.
- (43) In order to adopt a balanced approach to the rights of parties to criminal proceedings, a mentioning in Article 8 of the proposal of the rights of defendants could also be reinforced by a provision that highlights – on an equal footing – the fair trial rights of victims of crime under Article 47 of the Charter.
- (44) An additional suggestion in relation to the primary use of assets for compensating the victims of crime in light of the UN instruments (paragraph 39). In order to ensure that EU Member States’ confiscation measures support rather than obstruct compensation claims of victims the European legislator may wish to consider including in the Directive a provision promoting that assets confiscated from offenders are used for

³⁴ In this respect, see also Article 8 of the United Nations, International Convention for the Suppression of the Financing of Terrorism, adopted by General Assembly resolution 54/109 of 9 December 1999. The Convention has been ratified by all EU Member States.

³⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (*EU Victims’ Directive*), replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315/57.

social purposes, including the protection of the rights of crime victims.³⁶ In this context, reference can also be made to Article 7 of the Trafficking Directive, which obliges EU Member States to confiscate proceeds from offences covered by this Directive. Moreover, Recital 13 encourages that confiscated proceeds be used to support victims' assistance and protection, including compensation of victims.³⁷

3.3 Considerations

- (45) To effectively safeguard rights of victims of crimes under Article 47 of the Charter, consideration could be given to include in Article 8 of the proposal a clear reference to the need to safeguard fair trial rights of victims of crimes.

³⁶ In this context, see also the report of the LIBE Committee on organised crime in the EU and the EESC Opinion on the proposal, both calling for a provision safeguarding the re-use of proceeds from crime for social purposes.

³⁷ Directive of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 2011/36/EU, 5 April 2011, OJ 2011 L 101/1, Recital 13: "The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims' assistance and protection, including compensation of victims and Union trans-border law enforcement counter-trafficking activities, should be encouraged".