

Legal Opinion:

Compatibility of the proposed EU legislation on asset confiscation with the European human rights law framework

Introduction

PURPOSE

The purpose of this legal opinion is to examine whether asset confiscation, as set out in the proposed EU Directive on Asset Recovery and Confiscation, complies with the human rights of affected persons. More specifically, it analyses the compliance with fair trial rights of asset confiscation orders which are issued following a violation of restrictive measures (commonly known as targeted sanctions).

Using the case law of the European Court of Human Rights (ECtHR or the Court) and the Court of Justice of the European Union (CJEU), this legal opinion argues that the proposed Directive, through its purpose of establishing *'rules to facilitate the effective implementation of Union restrictive measures and the subsequent recovery of related property where necessary to prevent, detect, or investigate criminal offences related to the violation of Union restrictive measures'*, does not raise any significant challenges with regard to the affected person's fair trial rights.

Following an introduction presenting the European Commission's proposal to add the violation of EU restrictive measures as an EU crime and the proposal for a new Directive on Asset Recovery and Confiscation, the legal opinion dissects each type of confiscation measure and their compliance with fair trial rights. The legal opinion then analyses how the preventive function of a confiscation order - a criminal law measure - enables a legitimate balance between achieving EU policy objectives of general interest and protecting the fair trial rights of affected persons. The legal opinion then reaches the conclusion that the proposed Directive is generally compliant with fair trial rights.

Violation of Restrictive Measures as an EU Crime and Asset Confiscation

On 25 May 2022, the European Commission proposed **to add the violation of EU restrictive measures to the areas of crimes defined in Article 83(1) of the Treaty on the Functioning of the European Union (TFEU)**.¹ By making the violation of restrictive measures an EU crime, the underlying aim of the proposal is to ensure the effective implementation of the EU's policy with relation to restrictive measures. It furthermore strengthens the Union's Common Foreign and Security Policy,

¹ Proposal for a Council Decision on addition of the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the TFEU, COM/2022/247, 25 May 2022, Brussels, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:0247:FIN>.

set out in Article 21 of the Treaty on European Union (TEU). In addition to the proposal, on the same day, the European Commission issued a complementary Communication to the European Council and the European Parliament entitled **'Towards a directive on criminal penalties for the violation of Union law on restrictive measures'**.² It describes the main elements that would be contained in a potential Directive on Criminal Penalties for the Violation of EU Restrictive Measures were the latter to be added to the list of EU crimes.

On 25 May 2022, the European Commission also adopted a proposal for a Directive on Asset Recovery and Confiscation.³ The proposed Directive seeks to improve the competent authorities' ability to **identify, freeze, and manage assets, to extend confiscation capabilities, and to strengthen the instruments to confiscate the instruments and proceeds of crime**. Together, these measures are designed to enhance the overall efficiency of the EU's asset recovery regime. If adopted by Parliament and the Council, reinforced asset recovery and confiscation rules would contribute to the implementation and enforcement of EU restrictive measures in the context of the unprecedented imposition of targeted sanctions against Russian individuals and entities. As of July 2022, the EU had indeed frozen **24 billion EUR** worth of assets from the Russian Central Bank and **13.8 billion EUR** worth of assets held by Russian oligarchs, as well as other individuals and entities sanctioned since the start of the full-scale invasion of Ukraine on 24 February 2022.⁴

The (1) initiatives to add the violation of EU restrictive measures to the list of EU crimes and (2) the Directive proposing new reinforced rules on asset recovery and confiscation are thus intrinsically linked; they create a **legal interplay between restrictive measures and criminal law measures**. Indeed, the Directive on asset recovery and confiscation would only enable the confiscation of property belonging to individuals and entities which have violated restrictive measures they are subject to **insofar as the violation of restrictive measures is recognised as a criminal offence under the EU law**. **The proposed Directive is thus criminal in nature**. In fact, Article 1(1) stipulates that the Directive *'establishes minimum rules on the tracing and identification, freezing, confiscation, and management of property within the framework of proceedings in criminal matters'*.

Against this background, the question of human rights compliance is a challenge to the application of confiscation measures. Several rights may be engaged as a result of confiscation, including the right to property, fair trial rights and the presumption of innocence, and the right to private and family life, as well as the principle of legality. Complaints frequently arise when confiscation procedures go beyond standard confiscation and do not necessarily rest on a final conviction. Such types of confiscation without a final conviction are based on the assumption that the assets of an affected person are derived from criminal activity, thereby losing the link between the offence and the confiscation order. In such cases, the confiscation order can, for example, be challenged for failing to protect the **presumption of innocence**. It might also be targeted for **causing a reversal of the burden of proof** whereby the affected person has a responsibility for producing the evidence which demonstrates that they have not committed a criminal offence, that their assets are not linked to criminal activity, and they should not be

2 Communication from the Commission to the European Parliament and the Council: Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM/2022/249, 25 May 2022, Brussels, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022DC0249>

3 Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM/2022/245 final, 25 May 2022, Brussels, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0245&qid=1653986198511>

4 Reuters, 'Gabriel Baczyńska, "EU has frozen 13,8 billion euros of Russian assets", official says' 12 July 2022, available at: <https://www.reuters.com/world/europe/eu-has-frozen-138-bln-euros-russian-assets-over-ukraine-war-official-says-2022-07-12/>

targeted. It is through a dissection of the Directive's provisions on various types of confiscation that the human rights question may be answered.

TYPES OF CONFISCATION MEASURES AND FAIR TRIAL RIGHTS

a. Confiscation following a final conviction

Confiscation measures need to be assessed against the requirement to comply with fair trial rights and the presumption of innocence. It must also be noted that the Court 'considers that *"in addition to being specifically mentioned in Article 6.2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of fair hearing under Article 6.1"*.⁵ Thus, the presumption of innocence is explicitly guaranteed in Article 6.2, the criminal limb, but is also part of the general fair trial guarantee contained in Article 6.1, which applies throughout the proceedings, including the sentencing stage.

The proposed Directive allows for standard **'confiscation'** of assets **following a final conviction**. In *Geering v. The Netherlands*, the ECtHR found that *'whilst it is clear that Article 6.2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge, the right to be presumed innocent under Article 6.2 arises only in connection with the particular offence with which a person has been "charged"*. **Once an accused has properly been proved guilty of that offence, Article 6.2 can have no application in relation to the allegation 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" within the autonomous Convention meaning referred to in Paragraph 32 above.**⁶ Article 12.1 stipulates that *"Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of instrumentalities and proceeds **stemming from a criminal offence following a final conviction**".* Since standard confiscation as set out in Article 12 of the Directive is contingent on a final conviction by a national court and, thus, on the recognition that the affected person is guilty of a criminal offence, the confiscation measure (ordered only after the determination of guilt and in response to the determined offence) does not seem to be an arbitrary measure. This type of confiscation therefore does not seem to raise issues in relation to the presumption of innocence as a general fair trial guarantee articulated under Article 6.

In the case of extended confiscation (Article 14), assets are confiscated even when they are **not the direct proceeds of the crime for which the affected person has been convicted**. The order applies to **'property belonging to a person convicted of a criminal offence where this offence is liable to give rise, directly or indirectly, to economic benefit'**. The CJEU established two steps to determine whether a criminal offence is liable to give rise to economic benefit.⁷ First, Member States may take into account the *modus operandi*, such as whether the offence was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. Second, the national court must be satisfied, based on the circumstances of the case, including the specific facts and available evidence, that the property was derived from criminal conduct. The Directive itself stipulates that the extended confiscation order can only take place **'where the national court is**

5 ECtHR, *Philippis v. the United Kingdom*, Application № 41087/98, 12 December 2001, Paragraph 40, available at: <https://rm.coe.int/09000016806ebe19>; with a reference to ECtHR, *Saunders vs United Kingdom*, 17 December 1996, Paragraph 68.

6 ECtHR, *Geerings v the Netherlands*, Application № 30810/03, 2007, Paragraph 43.

7 CJEU, Judgement of the Court (Third Chamber), 21 October 2021, Case C-845/19 and C-863/19, Paragraph 20, available at: <https://bit.ly/3CHVTSZ>.

satisfied that the property is derived from criminal conduct', in addition to the affected person having been convicted of a criminal offence. Thus, although there is no final conviction in relation to the targeted assets, there is not only conviction for another criminal offence, but also the satisfaction of the court that the assets are instruments of crime. Most importantly, ECtHR case law has established that extended confiscation does not amount to the bringing of an additional 'criminal charge' or 'offence' within the meaning of Article 6.2.⁸ The aforementioned conditions, therefore, provide a sufficient basis for arguing that extended confiscation does not raise significant issues with regards to the presumption of innocence under Article 6.2 and as a general fair trial standard under Article 6.

b. Strict conditions and applicability of non-conviction-based confiscation to ensure fair trial rights compliance

To strengthen the EU's confiscation measures, the Directive also **reinforces the situations where assets can be confiscated without a conviction**, thereby making the question of the preservation of fair trial rights under Article 6 ECHR relevant. Indeed, applying confiscation measures without a final determination of guilt by a national court seems more problematic with regard to the rights and standards enshrined under Article 6 ECHR. Yet, such types of confiscation without prior conviction are ordered in a judicial setting (in court proceedings through the examination by the court of the facts and evidence), only apply in the very specific circumstances where formulating a conviction is impossible, are limited in scope, and are coupled with procedural safeguards. These conditions ensure that neither is the confiscation measure arbitrary nor does it raise significant challenges to the rights enshrined in Article 6. Thus, this section assesses the compliance of these confiscation measures in substance with fair trial rights, as well as the Directive's obligation to ensure these measures' compliance with procedural fair trial guarantees.

Article 15 of the Directive allows for non-conviction-based confiscation (NCBC). NCBC occurs **where criminal proceedings have been initiated and where all the evidence attesting to a criminal offence is present**, but where the proceedings could not be continued. The reason why the initiated criminal proceedings could not continue include illness, absconding, death, amnesty, immunity from prosecution, or when prescribed time limits have expired and are not sufficiently long for effective investigation and prosecution of the suspected or accused person. International law provides guidance on the legality of such measures in these circumstances. Article 54.1 of the United Nations Convention against Corruption (UNCAC) stipulates that each State Party shall, in accordance with its domestic law, *'(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases'*.⁹

In other words, NCBC under the proposed Directive takes place when a final conviction for a criminal offence would have been possible based on the presented evidence if the proceedings had not been discontinued in light of the aforementioned circumstances. Indeed, Article 15 of the proposed Directive allows explicitly for *'confiscation without prior conviction (...)* **only insofar as the national court is satisfied that all the elements of the offence are present'**. Importantly, **this type of confiscation measure is ordered even when the targeted person is not convicted in order to bypass obstacles (illness, death, absconding, etc.) that prevent the court's final determination of a criminal offence**

8 ECtHR, *Phillips v. the United Kingdom*, Application no 41087/98, 12 December 2001, para. 34 and 35, <https://rm.coe.int/09000016806ebe19>.

9 United Nations Convention Against Corruption, available at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

and thus the legitimate application of confiscation measures in a situation which would otherwise call for the application of such measures. While the absence of a final conviction as a basis for issuing a confiscation order remains problematic in light of the presumption of innocence and general fair trial rights enshrined under Article 6 ECHR, the Directive implies that **NCBC takes place where a final conviction for a criminal offence would have been possible if specific circumstances had not prevented the smooth continuation of criminal proceedings.**

Furthermore, the Directive establishes strict limitations on the application of NCBC to ensure that the confiscation measure is not arbitrary. First, as mentioned, in terms of the suspected or accused person's circumstances, NCBC may apply only in case of illness, absconding, death, immunity from prosecution as provided for under national law, amnesty, or when time limits have expired and do not enable effective investigation and prosecution. In terms of the alleged crimes, the article's provisions restrict NCBC **to only those assets derived from crimes of a serious nature.** Indeed, the article stipulates that *'confiscation without a prior conviction shall be limited to criminal offences liable to give rise, directly or indirectly, to substantial economic benefit'*. In addition, the criminal offences included under the scope of Article 15 only include offences covered by the Directive 'when punishable by deprivation of liberty of a maximum of at least four years'. On top of these strict limitations, Member States are required to ensure **procedural safeguards**. The Directive states that the affected person has a right of defence through awarding access to the file and the right to be heard on issues of law and fact (Article 15.3). Importantly, these safeguards are guaranteed **'before a confiscation order (...) is issued by the court'**. This means that despite the presence of evidence and all the elements attesting to the offence, the suspected or affected person may take action to prevent the application of confiscation measures.

c. Similarly strict conditions for confiscation of unexplained wealth to ensure fair trial rights compliance

The human rights question also arises through Article 16 of the Directive, which allows for 'confiscation of unexplained wealth linked to criminal activities'. As implied, this type of confiscation enables the seizure of assets whose lawful origin cannot be explained by the owner and where there is satisfaction that these assets are derived from criminal conduct. Thus, as with NCBC, confiscation of unexplained wealth takes place without the affected person's final conviction for a criminal offence. This is indeed problematic, as the affected person will suffer from a measure without any determination of their guilt. The affected person may also bear the burden of the reversal of proof, having to demonstrate that their property does not constitute an instrument of crime (in other words, that they are innocent) and that they should not be targeted by a confiscation order.

To ensure that the measure is not arbitrary in substance, confiscation of unexplained wealth may only be ordered if specific conditions are fulfilled. As with NCBC, the satisfaction of a national court is necessary. It must be satisfied that the property is indeed derived from criminal offences through the **examination 'of all the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is substantially disproportionate to the lawful income of the owner of the property'**.

This type of confiscation only applies to **frozen property 'in the context of an investigation into criminal offences** committed in the framework of a criminal organisation'. The confiscation order is therefore relatively limited in its impact, in the sense that the affected person is already the target of a freezing order. There is also a progression in the weight of the measures applied to the person, as confiscation necessarily follows a freezing order. Moreover, this type of confiscation exclusively applies to property allegedly derived from **crimes of a serious nature**. The confiscation order can only be

imposed on frozen property derived from **'criminal offences' which are 'punishable by deprivation of liberty of a maximum of at least four years'**. Such criminal offences must be liable to give rise directly or indirectly to substantial economic benefit.

Thus, limiting the confiscation of unexplained wealth to cases that fulfil precise conditions aims to ensure **proportionality, as opposed to arbitrariness, of such confiscation measures** with respect to the **legitimate aim of meeting objectives of general interest and the preservation of fair trial rights**. In addition, procedural safeguards have also been included, in line with the provisions of Article 6 ECHR, to *'ensure that the affected person's rights of defence are respected, including by awarding access to the file and the right to be heard on issues of law and fact'*. Importantly, these safeguards must be ensured **'before a confiscation order (...) is issued by the court'**.¹⁰ As such, the affected person may bring evidence attesting to the legitimate and lawful source of the assets in question. Unavoidably, this raises the question of the reversal of the burden of proof.

The ECtHR's case law indicates that **shifting the burden of proof to the person affected by a confiscation order does not necessarily entail that that person's presumption of innocence is disregarded** during the court proceedings and before the conviction is finalised. Indeed, the ECtHR found that when the reversal of the burden of proof occurs within certain limits and with safeguards the right to presumption of innocence remains intact. In the case of *Phillips v. The United Kingdom of 5 July 2001 on extended confiscation*, the ECtHR *'consider(ed) that, in addition to being specifically mentioned in Article 6§2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him/her forms part of the general notion of a fair hearing under Article 6§1. This right is not, however, absolute since presumptions of fact or of law operate in every criminal law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence'*.^{11,12} The reversal of the burden of proof, as stipulated in the United Kingdom's confiscation regime to verify the relationship between the targeted assets and other offences, does not violate Article 6.1, since the applicant was provided with adequate safeguards.

The reversal of the burden of proof within reasonable limits can thus comply with the ECHR. In Italy, for example, authorities have the power to confiscate the property of persons convicted for mafia-related crimes if these assets are disproportionate to the lawful income of the person and if that person fails to explain the legal source of these assets. In such a case, the burden of proof is shared between the prosecutor, who is required to demonstrate that the affected person owns property that is disproportionate to their legitimate income, and the asset owner, who must demonstrate that their property is derived from legitimate income. **While the burden of proof is reversed to a certain extent and thereby borne by the asset owner, the court must provide sufficient evidence attesting to the disproportion relative to their income.** Recalling the type of illicit activity covered by the Directive, this system of shared burden of proof stems from the frequent impossibility for the judicial apparatus to trace the illicit origins of assets, but provides the affected person with remedies to easily demonstrate the legitimate origin of the property in question and thereby cancel the confiscation.

10 Article 15 of the proposed Directive on Asset Recovery and Confiscation.

11 ECtHR, *Phillips v. The United Kingdom*, Application № 41087/98, 12 December 2001, Paragraph 40, available at: <https://rm.coe.int/09000016806ebe19>.

12 See also the case of *Salabiaku v. France*, the ECtHR argued that Article 6.2 'does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.

Other sources of international law are also informative as to the legality of the reversal of the burden of proof. The Conference of the Parties of the Council of Europe's Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism has itself called on the 34 State Parties to effectively apply the reversal of the burden of proof regarding the lawful origin of alleged proceeds or other property liable to confiscation for serious offences.¹³ The Convention itself argues in Article 3.4 that *'Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law'*.¹⁴ Along similar lines, Article 12, Paragraph 8 of the United Nations Convention against Organised Crimes (UNTOC) explicitly stipulates that *'States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings'*.¹⁵

d. Third-party confiscation: The third party's right to an effective defence?

Going beyond a person convicted of a criminal offence, the confiscation measures may apply to property possessed by persons other than the offender. Importantly, the Directive must ensure that third parties whose property rights are affected by a confiscation order are provided with the right to an effective remedy and can challenge the legality of the order. The CJEU stressed that ***'the right to an effective remedy means that a third party whose property has been confiscated must be entitled to challenge the legality of that measure in order to recover that property where the confiscation is not justified'***.¹⁶ In fact, the **CJEU's case law has already established that EU law protects individuals' human rights in the context of third-party confiscation allowed by national law.**

The CJEU's judgement of 14 January 2021 clarified EU Member States' obligations with regards to EU legislation on confiscation (which dates from before the currently proposed Directive), namely Framework Decision 2005/212/JHA, and the rights of third parties acting in good faith in confiscation processes. The CJEU was asked whether Framework Decision 2005/212 - read in light of Article 47 CFR (right to an effective remedy and to a fair trial) - must be interpreted as precluding a national law which allows for the confiscation, in the context of criminal proceedings, of property belonging to a person other than the person who committed the criminal offence, without the former being afforded an effective remedy. **The CJEU concluded that EU law (Framework Decision 2005/212 and Article 47 CFR) provides for the obligation that a third party whose property rights have been affected by a confiscation measure must be entitled to challenge the legality of the measure.** Bulgarian law did not provide this remedy to persons other than the criminal offender, thereby violating EU law.

13 Conference of the Parties, 'Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No 198), Thematic Monitoring Review of the Conference of Parties to CETS no 198 on Article 3(4) ("Confiscation measures")', 12 May 2021, available at: <https://rm.coe.int/c198-cop-2021-2prov2-hr-art3-4-en/1680a3019f>.

14 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and the Financing of Terrorism, Warsaw, 2005, available at: <https://rm.coe.int/168008371f>.

15 United Nations Convention against Transnational Organised Crime, GA Resolution 55/25 of 15 November 2000, available at: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.

16 CJEU, Judgement of the Court (First Chamber), 14 January 2021, Case C-393/19, Paragraph 66, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=236424&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2061180>

Similarly, in its judgement of 21 October 2021, the CJEU clarified provisions of Directive 2014/41/EU, demonstrating that the Directive precludes national legislation which allows for the confiscation of assets held by a person other than a criminal offender, without this person being able to take part in the criminal proceedings in his or her own right and having direct access to the courts. It argues that safeguards in EU law under Article 8(1), (7), and (9) of Directive 2014/42 *read in conjunction with Article 47 of the Charter, must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings*.¹⁷

Article 23.7 of the Directive on Asset Recovery and Confiscation states that *'third parties shall be entitled to claim the title of ownership or other property rights including in the cases referred to in Article 13 (on third-party confiscation)'*. In Directive 2014/42/EU, freezing orders were to be communicated to the affected persons *'as soon as possible'* (Article 8.2), while the safeguard provisions on confiscation orders only stipulated that the measure should be communicated, without mentioning that it should be done *'as soon as possible'*. The order may therefore be communicated in such a way that threatens the third party's capacity to exercise their right to a defence, as they are not part of the initial criminal proceedings which have led to the application of the confiscation measure. Importantly, the Directive on Asset Recovery and Confiscation erases this difference, thereby harmonising the safeguards for freezing and confiscation measures. However, the provision to communicate orders *'as soon as possible'* has been deleted altogether. Thus, the Directive must ensure that third parties whose assets are affected by a confiscation order are informed early enough that they are provided with the right to an effective remedy and can challenge the legality of the order in a timely manner.

THE PREVENTIVE FUNCTION OF CONFISCATION MEASURES UNDER EU CRIMINAL LAW: BALANCING BETWEEN GENERAL INTEREST OBJECTIVES AND THE PRESERVATION OF FAIR TRIAL RIGHTS

When confiscation takes place without a final conviction, the assessment of whether the presumption of innocence and fair trial rights are respected appears less straightforward, as discussed in sub-section (c). An important question in this context is **whether the confiscation measures introduced by the Directive have a preventive rather than punitive aim**. On the one hand, the Directive is of a criminal law nature so as to respond to the violation of EU restrictive measures as an area of particularly serious crime and to enable confiscation of the instruments and proceeds of this crime. On the other hand, the proposed confiscation measures are an instrument to ensure the targeted person's compliance with the initial restrictive measure (targeted sanctions), which is to say the asset freezes they are subject to, and thus prevent the person from further using the frozen assets in the detrimental behaviour which originally motivated the imposition of targeted sanctions, rather than punishing them for the violation of targeted sanctions.

a. Engel Criteria

The ECtHR has developed criteria to determine whether the confiscation measure amounts to a punitive sanction / penalty, and should therefore benefit from the procedural safeguards of Article 6.2, or whether the confiscation measure is preventive and does not allow for the

¹⁷ CJEU, Judgement of the Court (Third Chamber), 21 October 2021, Cases C-845/19 and C-863/19, Paragraph 85, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=247864&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=26488434>

application of Article 6.2. This criterion dates back to *Engel and Others v. The Netherlands*, during which the ECtHR asked whether proceedings against soldiers in a military court for disciplinary offences involved criminal charges. It set out the following criteria: **(1) the charge’s classification in domestic law, (2) the very nature of the offence, and (3) the degree of severity of the penalty that the person concerned risks incurring.**¹⁸ Through this interpretation, the ECtHR goes beyond the formal categorisation of the charge in domestic law and can, for example, find that confiscation proceedings, classified as civil under national law, are in fact criminal in nature. **In other words, the domestic classification of confiscation measures by itself is not decisive in determining whether the measure amounts to a criminal penalty or not.** The nature and purpose of such orders as well as their severity are also important in the assessment. The ECtHR has thus adopted an **autonomous understanding** of the concept of a criminal penalty, independent of how the confiscation measure is formally characterised under the law in question. Yet, judgements by the Court on this issue have varied and therefore do not provide a consistent basis.

These criteria were specifically applied to confiscation measures in the case of *Philipps v. The United Kingdom*. The ECtHR sought to establish whether the prosecutor’s application for an extended confiscation order (on assets deriving from other potential criminal conduct for which there had been no conviction), following the applicant’s conviction in court for drug trafficking, amounted to bringing a new ‘charge’ within the meaning of Article 6.2 (as regards the assets deriving from unproven criminal behaviour). The Court noted that *“in order to determine whether in the course of the confiscation proceedings, the applicant was “charged with a criminal offence”, within the meaning of Article 6.2, the Court must have regard to three criteria, namely, the classification of the proceedings under national law, their essential nature, and the type and severity of the penalty that the applicant risked incurring.”*¹⁹ The Court determined that the purpose of the procedure was not the conviction or acquittal of the applicant for any other drug-related offence. Although the Crown Court assumed that he had benefited from drug trafficking in the past, this was not reflected in his criminal record. Therefore, **in these circumstances, the applicant was not ‘charged with a criminal offence’ in terms of criminal law.**

b. The criminal nature of confiscation measures

Yet, it is important to recognise that both EU preventive measures and confiscation measures that follow the violation of initial preventive measures (targeted sanctions) **have a criminal dimension.** In many national jurisdictions in Europe, confiscation regimes are based on the use of civil powers instead of criminal powers to confiscate the proceeds of crime, such as the UK’s unexplained wealth orders. Therefore, classifying the confiscation measure as preventive or punitive in nature is not straightforward and must be analysed according to the Engel criteria. By contrast, in the context of the proposed EU Directive, **it is hard to ignore the fact that, based on the proposal to add the violation of restrictive measures as an EU crime, the Directive adopts a criminal law nature.** Initially, confiscation measures are indeed applied following the violation of EU restrictive measures. These targeted sanctions are initially ordered on a person committing international crimes or serious human rights violations. Confiscation measures thus form part of criminal proceedings against a person who is suspected of continuing the criminal behaviour addressed by the targeted sanction.

c. The preventive function of a criminal law measure

¹⁸ *Engel and Others v. The Netherlands*, 8 June 1976, Paragraphs 82 and 83.

¹⁹ ECtHR, *Philipps v. the United Kingdom*, Application № 41087/98, 12 December 2001, Paragraph 31, available at: <https://rm.coe.int/09000016806ebe19>.

At the same time, although both restrictive and confiscation measures are a response to a specific criminal behaviour, their **aim is to hinder this behaviour rather than punish it**. The fact that the confiscation measures are part of a criminal procedure does not in itself provide them with a punitive function. To better understand the function and objective of confiscation measures, it is important to consider the Directive's interpretation of them. When a targeted individual violates the restrictive measure to which they are subjected, **it is likely that the individual is and will continue to use their asset illicitly, in a way that counters the initial aim of the restrictive measure**. These restrictive measures are intended to bring a **change of policy or of behaviour** by the targeted individual. Targeted sanctions are a **preventive, non-punitive instrument** which should allow the EU to **respond swiftly to political challenges and developments**. Thus, when targeted individuals continue to use their assets, they represent a threat to the effective fulfilment of these objectives.

Confiscation measures should thus be viewed in light of the specific kind of EU policy they are tied to (that of EU targeted sanctions) and in light of the context they are responding to (violation of such targeted sanctions). Confiscation is a tool to **ensure that the targeted individuals do not continue to engage in the type of detrimental behaviour that justified the initial application of targeted sanctions**. Confiscation, therefore, is a means to ensure that EU policy objectives related to targeted sanctions (change in behaviour and swift response to political challenges) are not threatened when these targeted sanctions are not respected. In other words, confiscating assets that continue to be used despite the imposition of restrictive measures seeks to **ensure that the initial aim of this restrictive measure can be fulfilled**.

Furthermore, the EU Directive on Asset Recovery and Confiscation explicitly highlights the preventive character of confiscation proceedings ordered in the event of the violation of restrictive measures; Article 1.2 states that *'this Directive also establishes rules to facilitate the effective implementation of Union restrictive measures and the subsequent **recovery of related property** where necessary **to prevent, detect or investigate criminal offences** related to the violation of Union restrictive measures'*. In this sense, confiscation measures are put in place to avoid the further misuse of the assets of individuals under targeted sanctions to prevent them from committing additional criminal offences. The confiscation of assets thus follows the same policy vein as restrictive measures. The EU Directive preamble indeed stipulates that *'in order to ensure the effective implementation of Union restrictive measures, it is necessary to extend the scope of the Directive to the violation of Union restrictive measures'*.

Finally, confiscation orders, which are limited in scope in the proposed Directive, do not replace or seek to replace the criminal penalty applied to the committed crimes. For example, confiscation of unexplained wealth as a preventive measure can only be applied to frozen property derived from criminal offences which are 'punishable by deprivation of liberty of a maximum of at least four years'. Thus, **confiscation does not substitute the punishment for a criminal offence but prevents further criminal offences that could be financed through illicit assets that are already subject to targeted sanctions**.

d. The balance between meeting general interest objectives and preserving fair trial rights

Considering the causal relationship between targeted sanctions and confiscation orders, confiscation is the next, more effective preventive measure following the initial one – asset freezes linked to targeted sanctions – that failed to reach the objective of altering the targeted person's detrimental behaviour. It is the measure of last resort as it can be applied only in exceptional circumstances; only where criminal proceedings have been initiated and where all the evidence attesting to a criminal offence is present;

and only in the case of criminal offences liable to give rise, directly or indirectly, to substantial economic benefit. In this way, **the Directive limits confiscation measures without a final conviction to exceptional circumstances and to a preventive function as a means to balance the legitimate aim of meeting objectives of general interest and preserving fair trial rights.**

Therefore, taking into account the specific area of crime where confiscation measures are applied – preventing the continued detrimental behaviour that the initial targeted sanctions could not stop – and a limited list of exceptional circumstances in which they can be applied without conviction, it can be concluded that these confiscation measures have more of a preventive than punitive function. Article 1 of the Directive indeed stipulates that confiscation is aimed at facilitating the implementation of EU restrictive measures where necessary ‘to prevent, detect or investigate criminal offences related to the violation of such measures’. At the same time, fair trial guarantees should apply to all parts of criminal proceedings related to the violation of sanctions, including confiscation measures. It was noted above that the Directive sets the basis for such safeguards, including the affected person’s right of defence, the right to access to the file, and the right to be heard on issues of law and fact before a confiscation order is issued by the court.

Conclusion

While Article 29 TEU and Article 215 TFEU serve as the legal basis for the adoption of restrictive measures and for the obligation to apply penalties when such measures are violated, these articles do not specify the form and scope of such penalties. They do not permit the approximation of criminal law definitions and penalties across the EU. As a result, Member States, which are individually responsible for the implementation and enforcement of restrictive measures, have developed national systems which differ in terms of the criminalisation of the violation of restrictive measures and of the related criminal penalties. Most importantly, this absence of Union-level harmonisation entails that there is a disparate and fragmented methodology in cross-border cases of violation of targeted sanctions.

The proposed Directive thus seeks to replace and strengthen dispersed EU legislation on the Union’s asset recovery system. It aims to **modernise previous legislation** and, at the same time, **combine asset recovery rules under a single piece of legislation**, from tracing and identification, freezing and seizure of assets, management of frozen and seized assets, to confiscation and disposal of assets. The current framework has **only fulfilled the EU’s policy objective of combating organised crime through recovering its profits to a limited extent**. According to Europol, **only 2.2% of the proceeds of crime within the EU are frozen and only 1.1% are confiscated**.²⁰

Against this backdrop, EU and national authorities must find an **adequate tradeoff between ensuring that ‘crime does not pay’ and that confiscation measures respect individual human rights**. It cannot be ignored that confiscation measures operate under a criminal law system and are aimed at addressing criminal conduct. At the same time, confiscation measures must not threaten the affected person’s presumption of innocence or disproportionately reverse the burden of proof, as part of general fair trial rights. The answer to the human rights challenge is thus not straightforward, especially when confiscation orders are not contingent on a final conviction.

The ECtHR has frequently examined the human rights compliance of various national confiscation regimes. Yet, its case law on asset confiscation, taken as a whole, does not provide a coherent and consistent position on the human rights question with regards to each type of confiscation regime,

²⁰ Revision of Directive 2014/42/EU on the freezing and confiscation of the proceeds of crime, p. 5.

especially considering the diverse forms of confiscation from one jurisdiction to another. Judge Pinto de Albuquerque argues that *'under the nomen juris of confiscation, the States have introduced ante delictum criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures in rem. Confronted with this enormous range of responses available to the State, the Court has not yet developed any consistent case-law based on principled reasoning'*.²¹ This legal opinion thus relied upon complaints to and judgements by the ECtHR on national confiscation systems which, thanks to similar features or circumstances, can shed light on the Directive's own human rights compliance. While the CJEU's case law is less developed on the tradeoff between asset confiscation and the protection of human rights, it already provides a valuable insight into the compliance with human rights of Member States' national confiscation regimes, as well as of existing EU legislation on asset confiscation.

To ensure compliance with human rights, the legal opinion has raised the following important points. For proportionality purposes, confiscating assets without a prior conviction must remain limited to cases of serious crimes liable to give rise to substantial economic benefits and to cases where the court is satisfied that the frozen property is derived from criminal activities. An analysis of the Directive shows that **NCBC should take place where a final conviction for a criminal offence would have been possible** if specific circumstances had not prevented the smooth continuation of criminal proceedings. With regards to the confiscation of unexplained wealth, the **reversal of the burden of proof is not problematic, as long as it occurs within certain limits and with safeguards** in order to ensure that the right to presumption of innocence remains intact. While the burden of proof is reversed to a certain extent and thereby borne by the asset owner, it is important that the court must provide sufficient evidence attesting to the disproportion between the asset and the person's income. In terms of third-party confiscation, it is key that the Directive ensures that **third parties whose assets are affected by a confiscation order are informed early enough** that these third parties have the sufficient and necessary time to exercise their right to an effective remedy and can challenge the legality of the order in a timely manner. More generally, while it is hard to ignore that **confiscation orders are criminal in nature, they have a preventive function and are limited in scope**, and are intrinsically linked to the objectives of the initial imposition of EU targeted sanctions. The proposed Directive does not and should **not seek to articulate confiscation measures in a way that would equate these measures to a penalty or a criminal charge in and of themselves**.

Despite these important aforementioned points, this legal opinion argues that the proposed Directive on Asset Recovery and Confiscation, through its purpose of establishing *'rules to facilitate the effective implementation of Union restrictive measures and the subsequent recovery of related property where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures'* does not raise any significant challenges with regards to the preservation of the affected person's human rights.

21 ECtHR, *Varvara v. Italy*, Application № 17475/09, 29 October 2013, Partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque.