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Evidence in a Non-Conviction-Based Confiscation Procedure

General Remarks

Confiscation, as a legal tool that allows the State to acquire assets that are linked to the perpetration of a crime, can be considered as a polymorphous legal concept depending on its object and function (Milone 2017, p.151). Legal measures to seize illegal property may depend, *inter alia*, on the origins of the property. In this respect, the State may provide for such measures of controlling unlawful property as: those targeting property derived from criminal offenses – e.g., the criminalization of money laundering and the confiscation and extended confiscation of property; the civil confiscation of property, which is directed at property with an origin which is, in principle, unclear; the seizure of homeless property; and tax measures directed at property of unknown origin. These can be assets of "neutral" origin or, in fact, assets of criminal origin (Bikelis and Mikšys 2018, p.17). Thus, there are various legal measures by which the proceeds of criminal offenses, property of an unlawful origin or even property of a neutral origin may be seized and confiscated. These measures are usually broken down into: those of a criminal nature (such as criminal liability for money laundering and criminal liability for illicit enrichment); those of a mixed nature (ordinary, extended, and civil confiscation); the civil institute of the seizure of homeless property; and tax measures – tax rates, default money, and tax penalties imposed on income the sources of which the taxpayer cannot justify (Bikelis and Mikšys 2018, p.17). With regard to the confiscation of property only in the context of criminal proceedings, a distinction is made between the generations of confiscation regimes covering 1) regular;2) extended criminal confiscation; 3) non-conviction-based confiscation; and 4) the unexplained wealth mechanism (Boucht 2019, pp.529–534).

The system of national legal instruments of controlling unlawful property is not well established, and their regulatory principles differ: the "plurality of models of confiscation, very different in terms of qualification, discipline, function, object and degree of cogency, has been further accentuated almost everywhere" (Bernardi 2019, p.IX). Partly as a result of the recent increase in EU regulation on asset confiscation, States are also reviewing or adjusting asset confiscation mechanisms in addition to traditional asset confiscation (i.e., conviction-based confiscation) and other options for confiscation (non-conviction-based confiscation,

hereinafter NCB confiscation, and NCB forfeiture). Directive 2014/42/EU of the European Parliament and of the Council of April 3, 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (hereinafter Directive 2014/42/EU) and Regulation (EU) 2018/1805 of the European Parliament and of the Council of November 14, 2018 on the mutual recognition of freezing orders and confiscation orders (hereinafter the Regulation) established legal bases for the freezing and confiscation of criminal assets in European Union (EU) law. Accordingly, the Court of Justice of the European Union (CJEU) has started to formulate case law on the extended confiscation of assets (CJEU C-845/19 and C-863/19).

In 2018, 26 Member States of the EU had an extended asset confiscation model that allows for the confiscation, in the context of criminal proceedings, of assets not related to the criminal offense of which the person is accused (Analysis of non-conviction-based confiscation measures in the European Union, 2019). Despite this, Member States' asset recovery systems are not well equipped to effectively address the complex *modus operandi* of criminal organizations. In May 2022, the European Commission presented a proposal for a new Confiscation Directive within the EU Strategy to tackle organized Crime 2021–2025, covering additional criminal offenses and including "a new generation of confiscation regimes": the confiscation of unexplained wealth linked to criminal activities (Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, 2022).

According to studies, beyond the borders of the EU, several pieces of legislation provide for NCB confiscation around the world: in the United States, the UK, South Africa, Albania, Colombia, Liechtenstein, Switzerland, Thailand, etc. (Greenberg *et al.* 2009, p.17; Bullock 2014; Cassella 2019). Numerous international acts and conventions call for States to include alternative forms of confiscation, including NCB measures, in their legislation (Alagna 2015, p.451). It is generally accepted that NCB asset recovery has become a crucial tool in the fight against organized crime over the years, especially against mafia-type issues.

On the other hand, international acts and constitutions generally establish the presumption of innocence, according to which a person is presumed innocent until proven guilty in accordance with the procedure laid down by law. At the same time, one of the most important presumptions in criminal proceedings is applicable to the procedure of proof, which obliges the State to assume onus probandi. Thus, in the context of the present issue, the question arises as to whether the presumption of innocence as a means of proof in criminal proceedings is absolute. That is to say, must the allocation of the burden of proof in relation to the seizure (confiscation) of property which is not directly linked to the criminal

offense which is the subject of the criminal proceedings remain the same as when proving the guilt of the person concerned?

The regulation of the EU, the Council of Europe, the jurisprudence of supranational courts and the criminal laws of some states make it clear that the answer to this question is no. The case law has held that the right to the presumption of innocence and the consequent imperative that the burden of proof lies with the public prosecutor are, like other rights, not absolute (*Salabiaku v. France* 1988, § 28; *Krumpholz v. Austria* 2010, § 34).

Despite this trend in legal regulation, research analysis suggests that some issues of proof of the extended confiscation of assets, as well as other types of confiscation not based on a conviction, such as confiscation from third parties, remain relevant. Views on this mechanism, including the applicable standard of proof, range from harsh criticism, arguing that NCB forfeiture represents a step too far (Hendry and King 2015), to the need to further expand NCB confiscation possibilities – in particular civil confiscation, which has thus far been legalized in only a few EU countries (Bikelis 2022).

The persistence of the problems of proof in NCB confiscation proceedings is also reflected in the constitutional jurisprudence of States. Of course, as stated above, NCB confiscation in accordance with international legal standards is not illegitimate in itself. NCB confiscation *per se* has repeatedly been considered consistent with the provisions of European Convention on Human Rights (hereinafter ECHR) Article 6 (the right to a fair trial) and those of Article 1 of the First Protocol to the ECHR (the protection of property), from the European Court of Human Rights (hereinafter ECtHR). Such ECtHR case law has also been criticized as being too uncritical of the development of restrictions on the right to property (Hryniewicz-Lach 2023), or as not being fully coherent (Simonato 2017).

However, States are free to provide higher guarantees in this area. The constitutions of States often provide higher standards for the protection of human rights than international standards. Cases of constitutional justice in different states in recent years show that relatively new types of confiscation of property – usually the extended confiscation of property – raise doubts among legal practitioners as to the constitutionality of such restrictions (Ruling of the German Federal Constitutional Court of February 10, 2021; Ruling of the Constitutional Tribunal of the Portuguese Republic of February 11, 2015; Ruling of the Constitutional Court of the Republic of Romania of June 25, 2014; Ruling of the Constitutional Court of the Republic of Georgia of July 13, 2005; Ruling of the Constitutional Court of the Republic of Italy of May 10, 2019; Ruling of the Constitutional Court of the Republic of Bulgaria of

October 13, 2012) . The most recent relevant constitutional justice case was in Lithuania (Ruling of the Constitutional Court of the Republic of Lithuania of October 12, 2023). In addition to the general question of whether the regulation of extended confiscation of property complies with the substantive and procedural constitutional frameworks for restricting the right to property, the question was also raised as to whether proof in extended confiscation proceedings is compatible with the principle of the presumption of innocence. From this point of view, it is therefore necessary to consider whether and what balance exists between national, including constitutional, standards, and supranational legal practice.

It should be stressed that most scholarly sources, in particular those based on the analysis of the EU legal framework, do not consider extended confiscation as a type of NCB confiscation. For the purposes of this study, given that the object of extended asset confiscation is property that does not derive from the specific offense of which the person is accused, extended asset confiscation is also considered to be a type of confiscation of NCBs in the broadest sense (Panzavolta 2017).

Thus, this study examines, using the systematic analysis method, the problems of proof in NCB confiscation as part of a process of interference with the right to property. In order to achieve this objective, in particular, common requirements for NCB confiscation as a form of interference with the right of the respective person to the peaceful enjoyment of their possessions are laid down. Secondly, considering the different origins of the assets and the different procedural legal status of the person whose assets are confiscated, the question of which evidentiary principles are applicable to NCB confiscation proceedings is examined, and it is then analyzed whether they are consistent with the presumption of innocence inherent in criminal proceedings. Only the issue of the proof of NCB confiscation in criminal proceedings shall be investigated here. Legal measures for the confiscation of property which apply in parallel with or after criminal proceedings, or even with no link to the criminal proceedings against the defendant, are not the subject of this study.

General Requirements for the Process of Proof of NCB Confiscation

Before examining the problems of the standard of proof of NCB confiscation, it is necessary to determine whether a different standard of proof may be applied to different confiscation procedures.

First of all, the common requirements related to the protection of property and its limitation are laid down in constitutions and both international and

national ordinary legal acts. They apply to all restrictions on ownership, including confiscation of assets (all types/regimes). These are, in particular: 1) the requirements under which the right to property may be restricted; 2) the proportionality of confiscation; and 3) the procedural guarantees in confiscation proceedings.

Legal regulation, case law, and research suggest that while these requirements are well established, they acquire new content as the types and scope of confiscation of assets expand. As evidenced by more recent constitutional and supranational court rulings, new questions about the constitutionality of the NCB confiscation of property and human rights doctrine continue to arise. It is therefore necessary to start with the principal grounds for the confiscation of assets before analyzing the problem of evidence raised in the process of NCB confiscation.

Firstly, the constant axiom is that a confiscation procedure represents interference with the respective person's right to the peaceful enjoyment of their possessions.

CE and EU law instruments respect the fundamental rights and observe the principles recognized by the Charter of Fundamental Rights of the European Union and the ECHR, as interpreted in the case law of the ECtHR. Directive 2014/42/EU should also be implemented in accordance with those rights and principles (Preamble, 38). The application of confiscation procedures contributes to the implementation of fundamental principles of law: the rule of law, public safety, the protection of human rights, proportionality, etc. The ECtHR states that Article 1 of Protocol No. 1 to the Convention, which guarantees in substance the right to property, comprises three distinct rules: "The first one lays down the principle of peaceful enjoyment of property in general. The second rule covers deprivation of possessions and makes it subject to certain conditions. The third recognizes that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule" (see *Immobiliare Saffi v. Italy* [GC] 1999, § 44; *Gogitidze and others v. Georgia* 2015, § 92; *Balsamo v. San Marino* 2019, § 80; *Yordanov and others v. Bulgaria* 2023, § 97). Thus, according to ECtHR case law, confiscation measures applied to possessions are considered to represent interference with the respective person's right to the peaceful enjoyment of their possessions normally. Article 1 of Protocol No. 1 is therefore applicable. The same position is taken in constitutional doctrine when assessing the confiscation of property in the context of the constitutional right to property.

Another important premise for the further discussion of the confiscation of assets is the legal principles underlying this restriction of ownership. The applicable principles of the limitation of property rights depend on the nature of that restriction.

As already mentioned, in the common European legal area, there are two main means of confiscation: conviction-based, which is usually conditioned by the conviction of a perpetrator; and NCB. NCB confiscation may be applied both within and outside criminal proceedings (in civil or administrative proceedings). The model of the latter form of NCB confiscation is not based on the perpetrator's guilt, but on the origin of the property.

The ECtHR has also stressed that states have wide discretion to decide on appropriate measures to control the use of property, including confiscating the proceeds of crime of any kind (*Butler v. United Kingdom* 2002; *Balsamo v. San Marino* 2019, § 93). However, confiscation as interference with property rights according to the case law of constitutional and supranational courts must fulfil certain criteria. According to ECtHR case law, depending on the legal framework in Member States, such confiscation may take place in criminal proceedings, which are usually conditioned by a conviction (including extended confiscation, considered as an ancillary and auxiliary form of ordinary confiscation), or outside criminal proceedings when certain conditions are fulfilled (including preventive confiscation measures of an administrative character, in particular to combat organized crime; and a civil-law approach to confiscation, which is not based on the perpetrator's guilt, but on the origin of the property (ECtHR, 2020)).

According to the ECtHR, confiscation based on conviction is of a criminal nature: "in cases where the confiscation followed a conviction, and thus constituted a penalty, the Court found that such interference fell within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties" (*Sofia v. San Marino* 2017; *Phillips v. the United Kingdom* 2001, § 51; *Balsamo v. San Marino* 2019, § 81). In the meantime, confiscation which is not linked to a conviction is classified by the ECtHR as the result of a civil dispute concerning the recovery of unlawful property, as evidenced by the statement that "in other cases, where a confiscation measure had been imposed independently of the existence of a criminal conviction but rather as a result of separate 'civil' (within the meaning of Article 6 § 1 of the Convention) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully" (*Gogitidze and Others v. Georgia* 2015, §§ 94 and 97; *Balsamo v. San Marino* 2019, § 81). This form of confiscation must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the

aim sought to be realized (*Beyeler v. Italy* [GC] 2002, §§ 108–114; *Gogitidze and others v. Georgia* 2015, §§ 94 and 97; *Balsamo v. San Marino* 2019, § 81).

Thus, the latter position of the ECtHR merely confirms the distinction between the different types of confiscation of property, which is the subject of legal research. There are scientists who consider such a position to be unjustified, arguing that such an interpretation of NCB forfeiture is an attempt "to avoid inbuilt procedural protections through a semantic mislabeling designating it as 'civil' in character, and at the very real expense of both criminal procedural and legal systemic legitimacy" (Hendry and King 2015, pp.407–408). However, this study supports the position that, depending on whether the confiscation of property is inseparable from the conviction or not directly linked to it, the distinction between confiscation *in personam* (usually conviction-based) and confiscation *in rem* (non-conviction-based) is justified. Thus, depending on the nature of the confiscation and its procedure, the object of confiscation also changes: from the three traditional elements of conviction-based confiscation – the tools and instruments of the criminal offense (*instrumentum sceleris*), the object of the criminal offense (*objectum sceleris*), and the proceeds of the criminal offense (*productum/fructum sceleris*) – to a property that is presumed to be of unlawful origin (Boucht 2019 pp.529–534; Hryniewicz-Lach 2023; Bikelis and Mikšys, 2018, p.17).

Directive 2014/42/EU directly refers to several types of confiscation of criminal assets: 1) NCB confiscation, at least if the accused or suspected person absconds or is ill; 2) extended confiscation for a specific list of criminal offenses; and 3) third-party confiscation (Report, COM(2020) 217 final), which, despite its separation in this regulatory act, is in principle regarded as a type of NCB confiscation (Panzavolta 2017, p.25; Simonato 2017, pp.367–368). For their part, Member States choose an NCB confiscation model, both before and after EU regulation, depending on their legal framework and tradition. Here, when it comes to extended confiscation, the scope of its application was initially linked with serious and organized crime, which justified – and still does, at the EU level – extensive powers in the field of legislation (Hryniewicz-Lach 2023, pp.249–250). Extended confiscation was first perceived as a tool to fight organized crime (Italy, Netherlands, Germany, Austria), terrorism (Germany and Austria), drug trafficking (Spain), serious, complex, and repetitive economic crimes (Finland), corruption (Bulgaria, Croatia), and money laundering and the smuggling of goods (Greece). As can be seen, these are serious crimes, in particular where substantial financial gains were obtained (Hryniewicz-Lach 2023, pp.249–250; also, see Country reports, Extended confiscation and its justification in light of fundamental rights and general principles of EU law). Other States, such as Lithuania, provide that extended confiscation can be applied to all

criminal offenses (Article 72-3 of the Criminal Code of Lithuania), and such a wide list of offenses raises doubts about the legitimacy and proportionality of the law applicable to such a form of confiscation (Ruling of the Constitutional Court of the Republic of Lithuania of October 12, 2023).

Before examining some of the problems of the standard of proof used in confiscation proceedings, it must be said that the doctrinal and legal basis of conviction-based confiscation is well established: convicted criminals should not benefit from crime. The standard of proof for confiscated property is also clear: beyond reasonable doubt. Meanwhile, the standard of proof for the grounds of NCB confiscation (including its subject matter) tends to deviate from the classical standard of proof for criminal proceedings, which raises debate between scientists and legal practitioners.

NCB confiscation shall not be directly linked to a criminal offense which is the subject of criminal proceedings: "in the extended confiscation, some of the confiscated assets derive from crimes for which there has not been any conviction, and the third parties owning the confiscated assets are, by definition, not involved in the criminal proceedings leading to the conviction" (Panzavolta 2017, p.25; Simonato 2017, pp.367–368). Thus, the legal regulation of the grounds for NCB confiscation and proof of the origin of assets is usually based on the fact that this type of confiscation is not a penalty (or a criminal measure), but a civil measure that may be applied in criminal proceedings. Moreover, it is not linked to the guilt for a specific offense of a person whose assets may be confiscated, and is not linked to any charge against a person. On the basis of an analysis of ECtHR cases, it was concluded that "building an understanding that the recovery of illicit assets is a restorative, rather than punitive, measure contributed to the mental shift toward an approach that allowed a lower standard of proof, gave more weight to indirect evidence along with the contextual assessment of the circumstances of the case, and even allowed rebuttable presumptions of the illicit origin of the unexplained assets in some cases" (Bikelis 2022, p.56). The German Federal Constitutional Court has also recognized that the confiscation of property is not an additional punishment to which the principle of individual culpability applies, but a *sui generis* measure with a restitutionary character; it is aimed at preventing the recognition of the proceeds of crime (Ruling of the German Federal Constitutional Court of February 10, 2021, as cited in Ruling of the Constitutional Court of the Republic of Lithuania of October 12, 2023, § 16). Other constitutional courts have invoked essentially the same nature of extended confiscation in examining the constitutional standards of proof applicable in NCB confiscation.

This study takes the position that "the standard of proof, in particular, means the degree of conviction required of the judge when he makes a decision (is it enough

that the judge deems one scenario (the assets stem from crime) more plausible than the other (the assets have a legal origin); secondly, this is a question related to the apportionment of the burden of proof: what should the public prosecutor prove and what can be expected from the defendant in this respect" (Vervaelle and De Zanger 2019, p.524). Although some scientists do not justify such a shift in the standard of proof from criminal to civil proceedings (Hendry and King 2015, pp.407–408), it is *de facto* happening. In such a case, it is the legal practitioners, and in particular the national courts, who are confronted with a complex situation, both theoretically and in practice. Thus, in one set of criminal proceedings, there are two probative proceedings with different objectives: both the guilt of the person and the basis for confiscating the property, the origin of which is illegal, must be proved.

The literature stresses that the treatment of NCB confiscation as a civil measure means that the standard of proof based on the "follow the money" principle can be applied to a person (even one who has not been charged, as is the case, for example, with confiscation from a third party) who is dealing with a specified property, the legitimate provenance of which they are not able to justify. Some authors are very critical of this, suggesting that "the standard of proof to be applied in such cases is the civil one, namely the lower threshold of a balance of probabilities, as opposed to the more robust criminal standard of beyond reasonable doubt. The State's hand is strengthened all the more by the lack of any requirement that the individual be convicted of a criminal offense before their property is liable to become the subject of such proceedings" (Hendry and King 2015, p.401).

Such a shift in the burden of proof in criminal proceedings is certainly problematic. Some scholars suggest that "enhanced protections such as the burden of proof and the presumption of innocence admittedly restrict the effective exercise of police power and make the task of prosecutors an onerous one, and that these procedural safeguards are necessary restrictions upon the operations of the legal system" (Hendry and King 2015, pp.407–408). As one international study points out, the scope for NCB confiscation is gradually expanding with the extension of the scope of eligible assets at the EU level, the extensive implementation of relevant EU law into national legal orders and the expansion of the territorial effectiveness of confiscation orders, which "results in the watering down of procedural safeguards (by employing a lower standard and reversed burden of proof)" (Hryniewicz-Lach 2023, p.247; also Boucht 2017, pp.119–121;), "creates tensions with the presumption of innocence (due to alleged prior criminal activity being presumed and not even having to be specified), and poses a challenge to create a firm barrier for the protection of fundamental rights, in particular, the rights to property and privacy" (Hryniewicz-Lach 2023, p.247; also Boucht 2017, pp.7–9). There are even concerns that "progressive changes in this regard have

slowly accustomed the authorities in member states to the concept of confiscation of assets whose origin can neither be confirmed by the court as illicit nor proven by their owner as licit" (Hryniewicz-Lach 2023, p.247).

In order to resolve this doctrinal controversy, the courts have, among other things, invoked the principle of proportionality in the application of NCB confiscation mechanisms, as can be seen from the case law of both supranational and national courts. The State has a wide margin of appreciation with regard to political, economic, or social strategy measures aimed at recovering illegally acquired assets. Despite such discretion, "any interference with property rights should strike a fair balance between the demands of the general interest of the community and the requirements of the protection of individual rights" (*Yordanov and others v. Bulgaria* 2023, § 112). The ECtHR has repeatedly held that extended confiscation is compatible with the provisions of the Convention, *inter alia*, Article 1 of its Protocol 1, provided that the safeguards of Article 6 of the Convention are respected. It is generally accepted that confiscation measures have been proportionate to the objectives pursued, even in the absence of a conviction for a specific offense, in the case of assets presumed to have been acquired wholly or partly from the proceeds of drug trafficking offenses (*Webb v. United Kingdom* 2004; *Butler v. United Kingdom* 2002), from the activities of criminal organizations involved in drug trafficking (*Arcuri and others v. Italy* 2001), or from other illicit activities of a mafia nature (*Raimondo v. Italy* 1994).

A different situation may arise where, under national legislation, NCB confiscation (usually extended confiscation) may be applied in proceedings other than those relating to organized and other serious crimes, the seriousness of which has led to the creation of NCB confiscation mechanisms. In such cases, it is the proportionality of confiscation that may be the only effective means by which the courts can avoid the disproportionate deprivation of property rights. Some authors suggest that the principle of proportionality should be considered as the guiding principle for the application of NCB confiscation (Milone 2017, p.152). Thus, the case law of the Supreme Court of Lithuania emphasizes the importance of the proportionality of the confiscation of property – even in the case of conviction-based confiscation. The Supreme Court of Lithuania indicates that "the confiscation of property radically restricts a person's right to the protection of property, enshrined in Article 23 of the Constitution of the Republic of Lithuania and Article 1 of Protocol No. 1 of the Convention. Therefore, the application of mandatory provisions on confiscation of property has to be harmonized with the constitutional principle of proportionality" (Judgments of the Supreme Court of Lithuania in criminal cases Nos. 2K-7-130-699/2015, 2K-233-895/2019, 2K-39-495/2020, 2K-80-222/2020, 2K-288-788/2020).

In assessing the proportionality of the confiscation of property, the ECtHR and national courts take into account a number of factors, such as: the nature of the offense and its gravity; the status of confiscated property in a criminal offense; the legality of the origin and destination of the confiscated property; the significance to the applicant of the confiscated property of the convicted person from whom the property is confiscated; property damage to the State caused or potentially caused by the criminal act; and other penalties imposed on the person in addition to the confiscation of property, along with their severity and sufficiency in terms of the implementation of the objectives of the punishment in the circumstances of the specific case (Judgments of the Supreme Court of Lithuania in criminal cases Nos 2K-7-130-699/2015, 2K-39-495/2020, 2K-288-788/2020). In particular, the principle of proportionality applies to NCB confiscation, where the standard of proof is lower than that of guilt.

A third important aspect is that the confiscation of assets, as well as the process of proving it, is inseparable from the procedural guarantees in confiscation proceedings.

The ECtHR and national courts also emphasize the importance of various procedural guarantees available in confiscation proceedings, such as:

> the availability of an effective remedy, including access to courts, by which an applicant can challenge the (continuing) seizure (*Benet Czech, spol. s r.o. v. the Czech Republic*, § 49); their adversarial nature (*Yildirim v. Italy* (dec.); *Perre v. Italy* (dec.)); advance disclosure of the prosecution case (*Grayson and Barnham v. the United Kingdom*, § 45); opportunity for the party to adduce documentary and oral evidence (*Butler v. the United Kingdom (dec.)*; *Perre v. Italy (dec.)*), possibility of being legally represented by a privately hired lawyer (*Butler v. the United Kingdom* (dec.)); assumption of the criminal character of the assets can be rebutted by the party (*Geerings v. Netherlands*, § 44); a judge having the discretion not to apply the assumption if he/she considered that applying it would give rise to a serious risk of injustice (*Phillips v. the United Kingdom*, § 43); whether an individual assessment of which pieces of property should be confiscated in the light of the facts of the case has been carried out (*Rummi v. Estonia*, § 108; *Silickienė v. Lithuania*, § 68); on the whole, whether the applicant was afforded a reasonable opportunity of putting his arguments before the domestic courts (*Veits v. Estonia*, §§ 72 and 74; *Jokela v. Finland*, § 45; *Balsamo v. San Marino*, § 93) (ECtHR 2020).

The Lower Standard of Proof in the Application of NCB Confiscation: A Balance of Probabilities and/or a Reversed Burden of Proof

The desire to recover ill-gotten wealth encourages countries to develop legal mechanisms for: firstly, the confiscation of property linked to serious criminal

offenses, without the prior existence of a criminal conviction; secondly, the confiscation not only of the direct proceeds of crime, but also of property, including any incomes and other indirect benefits obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets; and, thirdly, the confiscation of unexplained wealth linked to unlawful activities. Thus, the requirements for proving these three forms of confiscation will be analyzed below.

According to ECtHR case law, firstly, proceedings for confiscation which do not stem from a criminal conviction or sentencing proceedings, such as civil proceedings *in rem*, should be examined under the civil head of that provision (*Gogitidze and others v. Georgia* 2015, § 121). Secondly, proof on the balance of probabilities, or a high probability of illicit origins combined with the inability of the owner to prove the contrary, was found to suffice as a standard of proof for the purposes of the proportionality test under Article 1 of Protocol No. 1 (*Balsamo v. San Marino* 2019, § 91). Thirdly, the applicants themselves may choose to waive their procedural right to take part in the proceedings (*Gogitidze and others v. Georgia* 2015, § 122). Fourthly, there can be nothing arbitrary in the reversal of the burden of proof onto the respondents in forfeiture proceedings *in rem* after the public prosecutor has submitted a substantiated claim (*Gogitidze and others v. Georgia* 2015, § 122). Finally, the forfeiture of property ordered as a result of civil proceedings *in rem* cannot give rise to the application of the provision on Article 6 § 2 (the presumption of innocence) (*Gogitidze and others v. Georgia* 2015, § 126).

However, the academic literature identifies a number of problems related to the regulation and application of NCB confiscation. It has already been mentioned that some authors take the position that such a hybrid mechanism is fundamentally inconsistent with a due process-based model of criminal procedure (Hendry and King 2015). This study takes the position that NCB confiscation *per se* can be a legitimate tool for the recovery of ill-gotten wealth, but that there are a number of challenges in its regulation and application. Here, researchers point out that the following issues are relevant when considering the legitimacy of NCB confiscation: "civil-criminal classification of law (criminal classification would lead to additional protections and criminal burden of proof); double punishment; retrospective application of NCB asset recovery laws; reversal of the onus of proof violates presumption of innocence; right against self-incrimination vis-à-vis the criminal case; interference with property rights; proportionality of confiscation to the gravity of the offence; entitlement of claimant to legal expenses" (Greenberg *et al.* 2009, p.21; Alagna 2015, p.452). The authors of this paper agree with the view that "the wide majority of these points concern specifically the way

NCB measures are established in the national legislation" (Alagna 2015, p.452), and must be decided by the national legislator. Hryniewicz-Lach (2023) also points to a number of problems related to extensions in the field of confiscation and in the EU regulation, including the EU's legislative competence in the field of confiscation.

The right to the presumption of innocence and the imperatives it implies – the right not to incriminate oneself, the rule that the burden of proof lies with the prosecutor, and the principle of *in dubio pro reo* – form the basis of evidence in criminal proceedings. "The presumption of innocence, the burden of proof resting with the prosecution, and the heightened standard of proof beyond reasonable doubt […] are traditionally justified by reference to, *inter alia*, the relationship between the State and the individual, the imbalance of the State's and the defendant's respective resources, the potential consequences of a guilty verdict, the avoidance of wrongful convictions, and respect for individual dignity and autonomy" (Hendry and King 2015, p.398; also, see Jackson and Summers 2012, pp.199–240).

As mentioned above, a confiscation order following a conviction is normally considered as part of a sentencing procedure; thus (as far as the offender is concerned), Paragraph 1 of Article 6 of the Convention applies to confiscation proceedings under the criminal limb (e.g., *Phillips v. the United Kingdom* 2001, § 39), and this issue is therefore beyond the scope of Paragraph 2 of Article 6 (the presumption of innocence) (e.g., *Phillips v. the United Kingdom* 2001, § 34; *Van Offeren v. the Netherlands* (dec.) 2005; *Grayson and Barnham v. the United Kingdom* 2008, § 37; *Sofia v. San Marino* (dec.) 2017, § 55–56; a contrario, *Geerings v. the Netherlands* 2007, § 47).

Researchers rightly point out that "many confiscation regimes today include elements of either a lower standard of proof (a balance of probabilities rather than one that approaches the criminal standard) and/or a reversed burden of proof as regards the origin of the assets in question" (Boucht 2019). Thus, only one problematic issue related to NCB confiscation has been chosen for examination here: how the civil standard of proof applied in NCB confiscation proceedings complies with the principles governing criminal proceedings.

To begin with, the presumptions of fact and law operating in every national criminal law are not in themselves prohibited by law, but States must in all cases set reasonable limits on such presumptions, taking into account the importance of the issue at stake and the effective safeguarding of the individual's rights of defense (*Salabiaku v. France* 1988, § 28; *Krumpholz v. Austria* 2010, § 34). As already analyzed above, in the case of NCB confiscation, as in other cases of confiscation, the general guarantees of due process limiting the right to property

apply. Only the consistency of the reversal of the burden of proof with the requirements of the presumption of innocence is examined below.

Article 6 of the ECHR generally does not prevent States from having recourse to presumptions. Similarly, in proceedings concerning various forms of confiscation or fiscal repression, public authorities may act on the presumption that the assets were acquired unlawfully (*Salabiaku v. France* 1988, § 28). The same approach has been used in the context of complaints about presumptions made in this context either under Article 1 of Protocol No. 1 (*Cacucci and Sabatelli v. Italy (dec.)*, § 43; *Yildrim v. Italy (dec.)*) or under Article 6 (shifting the burden of proof onto the applicant to show that their assets had been lawfully acquired (*Grayson and Barnham v. the United Kingdom* 2008, § 45; *Phillips v. the United Kingdom* 2001, § 43)). Thus, according the ECtHR, if the party has been given an opportunity to rebut the presumptions, then the use of presumptions is compatible with the presumption of innocence. At the same time, it must be emphasized that according to the case law of the ECtHR, a violation of Article 6 § 2 was found in a case where a confiscation order was given in respect of goods despite the owner having been acquitted in criminal proceedings of the crime from which the proceeds had allegedly originated (*Geerings v. Netherlands* 2007, §§ 43–51). There are further cases that illustrate this scenario.

The ECtHR, while reiterating that "every legal system recognizes presumptions of fact or of law, and that the Convention does not prohibit such presumptions in principle (*Arcuri v. Italy* 2001), cannot ignore the fact that such presumption in the particular case operated in combination with the difficulties for the applicants, namely those stemming from the wide scope of the confiscation legislation" (*Yordanov and others v. Bulgaria* 2023, § 118).

In practice, national courts are essentially confronted with two procedural situations in the context of the presumption of innocence, which requires criminal proceedings to follow the "beyond reasonable doubt" principle of proof when applying NCB confiscation mechanisms in criminal proceedings: extended confiscation and NCB confiscation from a third party. Due to the scope of this study, we do not consider the cases in which NCB confiscation is also available alongside those cases in which a person cannot be prosecuted because of procedural obstacles.

According to ECtHR case law, whenever a confiscation order was the result of proceedings related to the proceeds of crime derived from serious offenses, the Court does not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, is found to suffice for the purposes of the proportionality test

under Article 1 of Protocol No. 1. […] it was legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence suggesting that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. (*Gogitidze and others v. Georgia* 2015, § 107; *Telbis and Viziteu v. Romania* 2018, § 68)

According to Directive 2014/42/EU, Member States may also provide that it could be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. As outlined in the report of the European Commission:

> Extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct (Directive, Preamble, 21; Report, COM (2020) 217 final).

CJEU case law also states that, in order to apply extended confiscation, the court must be satisfied, on the basis of the circumstances of the case and the evidence available, that the property in question belonging to the offender is derived from another offense; the court may also take into account the disproportionality of the value of the property to the legitimate income of the convicted person or a third person. The perpetrator or third party must be given an effective opportunity to challenge the attribution of the assets to the proceeds of crime (CJEU, C-845/19 and C-863/19).

The European Commission's analysis suggests that there are varying standards of evidence in the Member States. Thus, a degree of caution is necessary when comparing the formulations of the various national standards as there are different domestic interpretations. In Latvia and Lithuania, for example, the courts must reasonably believe that the property is derived from illicit activity. In Estonia, the court can presume that the assets are derived from illegal activities. In other Member States, the courts can: act when it would "be reasonable to assume"; "consider"; or "decide, based on well-founded objective evidence." Moreover, there must be "serious and concrete indications," and they can consider it "clearly more likely that it constitutes proceeds from a criminal activity than that not being the case" or "be convinced" that the property is derived from criminal conduct (Report, COM (2020) 217 final).

Thus, the new hybrid approach to the standard of proof (with some elements of civil proceedings) has become mandatory at the EU level in the form of extended confiscation in criminal proceedings (Bikelis 2022, p.56). However, the proposed EU regulation goes even further in terms of the standard of proof:

> The 2022 Proposal allows observing reduced evidentiary requirements and loosening of the link between the offence and eligible proceeds: in the 2005 Framework Decision, a court, when deciding on the confiscation of property other than instrumentalities or proceeds of criminal offences, should be fully convinced, in the 2014 Confiscation Directive – simply satisfied, that the property in question derived from (specified or similar) criminal activities of a convicted party during the period prior to their conviction (but not prior to the proven criminal offence) or that property, which value was disproportionate to the convicted party's lawful income, derived from criminal activity. Confiscation was also possible with regard to property acquired by the closest relations of the person concerned or transferred to a legal person in respect of which the person concerned had a controlling influence or received a significant part of this income. Currently, linking these assets to criminal activity is largely within the court's discretion (Hryniewicz-Lach 2023, pp.246–247).

Despite the favorable supranational legal framework and the attitudes of supranational courts toward a lower standard of proof in criminal proceedings, there have been recent constitutional disputes between countries regarding the non-application of the standard of proof guaranteed by the presumption of innocence in NCB confiscation (mostly cases of extended confiscation). An analysis of constitutional cases shows that they usually deal with the question of whether the right to property can be restricted on the basis of the presumption of the illegality of assets. The Constitutional Court of the Republic of Lithuania has analyzed the jurisprudence of some foreign constitutional courts and has concluded that the extended confiscation of property, in spite of the different constitutional provisions of foreign countries and the peculiarities of the legal regulation of the extended confiscation of property, is generally recognized as being in line with the constitutional provisions on the protection of property rights and the presumption of innocence principle. The extended confiscation of property is considered constitutionally justified, taking into account, firstly, the purpose of such confiscation and, secondly, the subjects of the burden of proving that the property has been acquired unlawfully (or by criminal means) and the distribution of the burden of proof between them (Ruling of the Constitutional Court of Republic of Lithuania of October 12, 2023).

The Romanian Constitutional Court has ruled that extended confiscation of assets is not contrary to Article 44(8) of the Romanian Constitution, which presumes the legality of the acquisition of assets. The Romanian Constitutional

Court stated, *inter alia*, that if the presumption of the lawful acquisition of property were absolute, then the judicial authorities would be subject to a legal requirement to find impossible evidence (*probatio diabolica*). At the same time, it noted that the presumption of the lawful acquisition of property is rebuttable, the burden of proof is not reversed and the principle of *actori incumbit probatio (onus probandi)* remains applicable in its entirety (Ruling of the Constitutional Court of Republic of Romania of June 25, 2014, as cited in Ruling of the Constitutional Court of the Republic of Lithuania of October 12, 2023, § 13).

The Constitutional Tribunal of the Portuguese Republic has held that the special confiscation provision, which, *inter alia*, presumes that the difference between the assets held by the convicted person and the assets that could have been acquired by legitimate means is the proceeds of crime, is not contrary to the Constitution. The Constitutional Tribunal has held that this presumption is without prejudice to the presumption of innocence, since the accused remains able to rebut it (Ruling of the Constitutional Tribunal of the Portuguese Republic of February 11, 2015, as cited in Ruling of the Constitutional Court of the Republic of Lithuania of October 12, 2023, § 14).

The Constitutional Court of the Republic of Bulgaria held that confiscation would also be applicable without a conviction for a criminal offense, "where the evidence shows explicitly that certain assets are of unlawful origin, but is at the same time insufficient for a conviction for an offence proven beyond reasonable doubt […]" (Ruling of the Constitutional Court of Republic of Bulgaria of October 13, 2012, as cited in *Yordanov and others v. Bulgaria* 2023, § 34).

The Constitutional Court of the Republic of Lithuania, also referring to the case law of the Supreme Court of Lithuania, has stated that such a legal regulation – according to which, in order to deny the origin of illegally (unlawfully) acquired property a person has to provide evidence confirming this fact – is constitutionally justified (Ruling of the Constitutional Court of the Republic of Lithuania of October 12, 2023).

Despite the change in the standard of proof, the courts remain obliged to give reasons as to why property in the case of NCB confiscation within criminal proceedings fulfils the characteristics of the property to be confiscated: "it is essential, that the domestic courts provided some particulars as to the offences, criminal, or administrative, in which the assets subject to forfeiture were alleged to have originated, and showed in a reasoned manner that there could be a link between such offences and the assets in question" (*Yordanov and others v. Bulgaria* 2023, §§ 123–124). The detailed reasoning of this judgment also relates to the fact that the national courts have to give adequate and sufficient reasons when rejecting a person's claim that they had received lawful income from various sources.

In cases where the national courts failed to discuss any criminal activity or an administrative offense which could have been the source of the assets subject to the forfeiture claim, or to establish a link between those assets and any such activity, it can be concluded that the interference with the person's possessions was not shown to be proportionate to any legitimate aim that the interference might have pursued. Thus, notwithstanding the lower standard of proof, property cannot be confiscated as unlawfully acquired only because the person has failed to prove any lawful income to justify their acquisition (*Yordanov and others v. Bulgaria* 2023, §§ 123–124).

According to the case law of the Supreme Court of Lithuania, the extended confiscation of property applies if convincing data has been collected which suggests that the property was obtained by criminal means (but not from other illegal acts or unidentified sources). In addition, it is not sufficient to establish the fact that the person did not have sufficient legal income to acquire the property, but it is necessary to establish and substantiate with convincing data that the funds were obtained in a criminal manner (Judgment of the Supreme Court in criminal case No. 2K-245-1073/2018). Moreover, data that would substantiate the criminal origin of the funds could include data on the continuity of the crime, its duration and nature, the nature of the property benefit derived from it, its adequacy to the property held by the perpetrator, the convict's repeated or long-term contacts with the perpetrators, etc. (Judgment of the Supreme Court in criminal cases Nos. 2K-245-1073/2018; 2K-295-222/2019).

Another prerequisite for the confiscation of extended property is the inability of the perpetrator to justify the legality of the acquisition of the property in their possession. According to the case law of national courts, the transfer of the burden of proving that the property has been legally acquired complies with constitutional and international standards. It is interesting to note that the Supreme Court of Lithuania also sees this transfer as a kind of procedural safeguard, observing that: "this gives the offender the opportunity to substantiate the legality of the property. Such a safeguard is necessary for persons who acquired property with essentially legal income, but these were not properly accounted for due to personal fault or other reasons (e.g., persons who received unaccounted wages, did business without a business license, etc.)" (Judgment of the Supreme Court in criminal case No 2K-245-1073/2018). However, it must be noted that the lawfulness of the source of income is not an easy matter to prove, and depends heavily on case law. For example, the domestic courts' refusal to accept witness testimony alone as proof of certain transactions increases the burden on the applicants in a situation where they had already been faced with the task of establishing their financial situation many years in the past (*Todorov and others*

v. Bulgaria 2021, § 208). Evidence of the legality of the property must therefore be scrutinized in court.

Finally, where confiscation was imposed independently of a criminal charge against third parties, the authorities may apply confiscation measures not only to persons directly accused of offenses, but also to their family members and other close relatives who were presumed to possess and manage the ill-gotten property informally on behalf of the suspected offenders, or who otherwise lacked the necessary *bona fide* status (*Silickienė v. Lithuania* 2012, § 65). Such a procedure is also treated as a civil procedure, with all corresponding requirements: "in cases involving confiscation of property from applicants in the framework of criminal proceedings against third parties Article 6 § 1 of the Convention is applicable under its civil head" (*Telbis and Viziteu v. Romania* 2018).

As regards the balance between that aim and the third person's fundamental rights, where possessions are confiscated, the fair balance depends on many factors, including the owner's behavior – in particular, their degree of fault or care or, at least, the relationship between their conduct and the offenses which were committed (*Silickienė v. Lithuania* 2012, § 66; *Telbis and Viziteu v. Romania 2018*). Accordingly, the domestic procedure shall afford these persons an adequate opportunity to put their case to the courts, pleading, as the case might be, that the measure was illegal or arbitrary and that the courts had acted unreasonably (*Telbis and Viziteu v. Romania* 2018, §§ 50–51). Persons whose property is confiscated should be formally granted the status of parties to the proceedings in which the confiscation is ordered (*Silickienė v. Lithuania* 2012).

Article 6 of Directive requires Member States to enable the confiscation of the proceeds of crime transferred to, or directly acquired by, the third party from a suspected or accused person. According to Article 6 of the Directive, third party confiscation should at least be enabled in cases where the third party knew or ought to have known that the purpose of the transfer or acquisition of the property was to avoid confiscation. The requirement that the third person "knew or ought to have known […] that the purpose of the transfer or acquisition was to avoid confiscation" has been reflected in the transposing legislation in most Member States (including Lithuania, Estonia, and Latvia).

Article 6 of the Directive refers only to the confiscation of "proceeds, directly or indirectly transferred to or acquired by a third party." Nevertheless, the transposing legislation in some Member States (including Lithuania, Estonia, and Latvia) also enables the confiscation of instrumentalities transferred to or acquired by the third party.

Article 6(2) of the Directive provides that the rights of *bona fide* third parties should not be prejudiced. According to the case law of the CJEU, it is necessary

to provide for specific safeguards and judicial remedies in order to guarantee the preservation of the fundamental rights of the third parties who are not being prosecuted: "a national law which permits the confiscation […] from the third party acting in good faith, is contrary to EU law. […] a national law which permits the confiscation, in the context of criminal proceedings, of property belonging to a person other than the person who committed the criminal offense, without the former being afforded an effective remedy, is contrary to EU law" (CJEU, C-393/19). The Advocate General has rightly pointed out that the right of third parties to an effective remedy in proceedings for NCB confiscation cannot be lower than that guaranteed by the ECHR (e.g., *Silickienė v. Lithuania* 2012, §§ 47–50; *Veits v. Estonia* 2015, §§ 57–60; *Bokova v. Russia* 2019, §§ 55–59). Thus, the national authorities have *de facto* to afford third parties a reasonable and sufficient opportunity to protect their interests adequately (Opinion of Advocate General Pikamäe, March 24, 2021, joined cases C-845/19 and C-863/19).

Nevertheless, the evidentiary process for third-party confiscation is in practice even more complicated, and is therefore not as common as extended confiscation. In such a case, the arguments for the possible violation of the presumption of innocence against them are even more difficult to rebut. The grounds for a judgment confiscating property from a person who has not been charged with any criminal offense at all must not give the impression that the person has committed an offense.

Interim Findings

The recovery of illegally obtained property within the framework of criminal proceedings, without being linked to a criminal conviction, is based on the origin of such property, which makes the seizure of such property a civil measure rather than a punishment (a criminal measure). Nevertheless, non-conviction forfeiture as a restriction on the right to property must meet all the general requirements for such restriction.

The presumption of innocence, including the allocation of the burden of proof, which determines the proof of a person's guilt and of a conviction-based confiscation in a criminal proceeding (beyond a reasonable doubt), may not apply in a proceeding to prove an NCB confiscation. An analysis of EU law and both ECtHR and constitutional jurisprudence leads to the conclusion that the "follow-the-money" approach allows for the seizure of assets not only in the absence of a criminal conviction, but also by applying the civil standard of proof – the principle of the balance of probabilities and the rebuttable presumption of the illegality of the asset.

The grounds for extended confiscation, despite the fact that the latter is normally applied in criminal proceedings against a convicted person, may not be assessed according to the standard of proof of a criminal charge. This means that the guilt of a person will be proved according to the presumption of innocence, while the grounds for extended confiscation will be proved according to the principle of the balance of probabilities.

NCB confiscation from a third party in criminal proceedings requires not only an effective remedy for the rights of the third party, but also a particularly careful reasoning of NCB confiscation, as the final act (conviction) cannot contain statements that violate the presumption of innocence of the third party, who has not been criminally charged.

In view of the difficulty involved in a person rebutting the presumption of the illegality of assets, in particular if the national legislation provides for a wide range of NCB confiscation possibilities, courts have the duty to:

apply the principle of proportionality, both when deciding on the legitimate aim of NCB confiscation and on the scope of such confiscation;
apply the rule of evidence for NCB confiscation, according to which a person's mere inability to prove that the property was acquired by lawful means is not sufficient for the application of NCB confiscation.

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Towards Coherence in Criminal Justice

Challenges, Discussions And/Or Solutions

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Berlin - Bruxelles - Chennai - Lausanne - New York - Oxford

Library of Congress Cataloging-in-Publication Data

Names: Zajančkauskienė, Jolanta, editor. | Ažubalytė, Rima, editor. | Fedosiuk, Oleg, editor.
Title: Towards coherence in criminal justice : challenges, discussions, and/or solutions / edited by Jolanta Zajančkauskienė, Rima Ažubalytė, and Oleg Fedosiuk.
Description: New York : Peter Lang, 2025. | Includes bibliographical references and index.
Identifiers: LCCN 2025015805 (print) | LCCN 2025015806 (ebook) | ISBN 9783631929445 (hardcover) | ISBN 9783631935323 (ebook) | ISBN 9783631935330 (epub)
Subjects: LCSH: Criminal justice, Administration of. | Criminal jurisdiction. | Criminal law. | Criminal liability. | Evidence, Criminal. | Electronic evidence. | Convention for the Protection of Human Rights and Fundamental Freedoms (1950 November 5) | Fair trial.
Classification: LCC K5001 .T69 2025 (print) | LCC K5001 (ebook) | DDC 345—dc23/eng/20250403
LC record available at https://lccn.loc.gov/2025015805
LC ebook record available at https://lccn.loc.gov/2025015806

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek collects this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at .Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de.



Mykolas Romeris University

Reviewers:
Prof. dr. Edita Gruodytė (Vytautas Magnus University, Lithuania)
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Copy-editor:
MB "Kopis"

Approved by Mykolas Romeris University Law School Council on 11 of June 2024 by resolution No. 1T-14 (1.12 E-20401).

ISBN 978-3-631-92944-5 (Print)
ISBN 978-3-631-93532-3 (E-PDF)
ISBN 978-3-631-93533-0 (E-PUB)
DOI.10.3726/b22750





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Published by Peter Lang GmbH, Berlin, Germany
info@peterlang.com - www.peterlang.com

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