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In rem confiscation in EU law after the *Agro in 2001* judgement. The Polish perspective

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Abstract

In the scientific discourse on depriving illicit assets there have been disputes about the admissibility of solutions assuming the possibility of confiscating property without the prior conviction of the owner (so-called *in rem* confiscation) from the European law perspective. This issue was raised in the judgment of the CJEU in the case C-234/18 *Agro in 2001.* In this case, the CJEU found that the Bulgarian provisions on civil confiscation are in line with EU law on confiscation. This paper discusses the circumstances and consequences of the ruling of the CJEU and, in particular, the context of Bulgarian provisions on the confiscation of property, the margin of Member States appreciation in creating a non-penal (i.e. detached from the requirement of conviction) procedure for the confiscation of property in domestic law. The procedural consequences are examined from the Polish perspective, i.e. the impact of the judgment on the interpretation of provisions which govern the execution of confiscation orders issued by courts of other Member States.

Keywords

non-conviction based confiscation, cooperation in criminal matters, EU criminal law, organised crime, forfeiture

INTRODUCTION[1]

One of the most dynamically developing areas of EU criminal law, which is understood as common procedural and material standards in the area of freedom, security and justice, in addition to judicial and police cooperation, is the issue of dealing with assets derived from crime (or those suspected of it), in particular in cross-border cases. The most common and fundamental way to deal with property involved in illicit activity (as the instrumentalities, proceeds or property the value of which corresponds to the instrumentalities or proceeds) is confiscation, ordered in a criminal proceeding, following or simultaneously with the conviction judgement. It is directed against a particular defendant and, as a result, should be considered *actio in personam*, conviction-based. However, a further type of confiscation has emerged in many jurisdictions which is confiscation directed, not against a particular person, but against the property, *actio in rem,* which does not require the formal, criminal conviction of the owner. Given the above, and taking into account EU regulations,[2] three basic types of confiscation can be derived:[3] criminal confiscation of traditional scope, criminal confiscation of extended scope, and non-criminal confiscation of civil or administrative nature.

From the Polish perspective, the instrument that has recently gained the most attention is the last of the three regulations mentioned above: the so-called '*in rem* confiscation', i.e. the confiscation of property derived in connection with a crime but executed without the prior conviction of the perpetrator of the crime in non-criminal proceedings. It became the centre of attention after the announcement that such a legal

1 This research was funded by the Polish Ministry of Science and Higher Education budget for science in 2019–2023 as a research project under the 'Diamentowy Grant' ['Diamond Grant'] programme (Decision No 0125/DIA/2019/48).

2 The three main acts establishing the framework for the confiscation and introducing different types of confiscation in the EU are: Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [2005] OJ L 68/49 (hereinafter Framework Decision 2005/212/JHA); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39 (hereinafter Directive 2014/42/EU); Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1 (hereinafter Regulation 2018/1805).

3 For the overview of state of the art regarding the confiscation see Michaël Fernandez-Bertier, 'The confiscation and recovery of criminal property: a European Union state of the art' (2016) 17 ERA Forum 323, 328; Michele Simonato, 'Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery?' (2015) 6 New Journal of European Criminal Law 213. For the deep down analysis of extended confiscation see Ariadna H. Ochnio, 'The problematic scope of extended confiscation in comparative perspective' (2019) 52 Nowa Kodyfikacja Prawa Karnego 119; Johan Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing 2017) 27-93.

solution is currently under legislative work at the governmental level.[4] However, there has been a scientific debate about the admissibility of, and the minimum standards required by European law, for this mechanism.[5] The answer to this was provided by the judgment of the CJEU of 19 March 2020 in the Case C-234/18 *Agro in 2001*.[6] Although this seems to have resolved the question of *in rem* confiscation in EU law (for the time being at least), the arguments raised by the CJEU are debatable and the consequences for the Member States, especially in respecting and executing confiscation orders from the other Member States that were issued in non-conviction based proceedings, remain unclear. Therefore, it should be analysed how the CJEU handled the case and how the judgment may influence the cooperation of Member States in criminal matters.

1. THE BACKGROUND OF THE CASE

In July 2014, the prosecutor of Sofia city informed the Commission for the combatting of corruption and for the confiscation of illegally obtained assets (Bulgaria) (hereinafter the Commission for confiscation) that criminal proceedings had been initiated against the chairman of the supervisory board of a Bulgarian bank for deliberately inducing other persons into misappropriating funds belonging to that bank with a total value exceeding 205 million Bulgarian leva (approximately 105 million Euros).

The Commission for confiscation carried out an investigation, which showed that the chairman and his family members held large-value bank deposits that did not correspond to their legal income, had carried out banking transactions using means of undetermined origin, and had acquired movable and immovable goods of significant value. In addition, the chairman received remuneration based on various fictitious contracts. Therefore, in the decision of 14 May 2015, the Commission for confiscation initiated proceedings before the Sofia City Court, which is the referring court in *Agro in 2001*, to confiscate property belonging to the chairman and his family members, in addition to third parties related to or controlled by the chairman.

In the proceedings brought before the Sofia City Court, the defendants argued that the request for confiscation of the property, made by the Commission for confiscation, was contrary to Directive 2014/42/EU. This directive requires that the confiscation of property be based solely on a final judgment, which did not occur in their criminal case. Moreover, in the opinion of the defendants, no provisions govern civil confiscation at

4 See Governmental information, Serwis Rzeczypospolitej Polskiej, 'Konfiskata in rem – nowoczesna metoda zwalczania przestępczości zorganizowanej' <https://www.gov.pl/web/sprawiedliwosc/konfiskata-in-rem--nowoczesna-metoda-zwalczania-przestepczosci-zorganizowanej> accessed 20 January 2022.

5 See Jon Petter Rui and Ulrich Sieber (eds), *Non-Conviction-Based Confiscation in Europe* (Duncker & Humblot, Max-Planck-Institut für ausländisches und internationales Strafrecht 2015); Frederico Alagna, 'Non-conviction Based Confiscation: Why the EU Directive is a Missed Opportunity' (2015) 21 European Journal on Criminal Policy and Research 447; Michele Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains' (2017) 18 ERA Forum 365.

6 Case C-234/18 *Agro in 2001*, EU:C:2020: 221.

the EU level. Therefore, according to the defendants, confiscation of property can only be carried out based on a conviction. Concurrently, the defendants submitted that they were treated as if they had already been tried and convicted.

Regarding the allegations raised by the defendants, the Sofia City Court specified that the Bulgarian Law on combating corruption and confiscating illegally obtained assets (hereinafter the Law on confiscation)[7] shows that confiscation proceedings initiated before the civil court are independent of the criminal proceedings. The referring court stated as follows:

> *it is expressly stated in the Law on Confiscation that confiscation proceedings brought before the civil court are independent of criminal proceedings brought against the person under investigation and/or the persons associated with or controlled by him or her. The existence of criminal charges in itself suffices for civil proceedings for confiscation to be commenced* (39).

However, the Sofia City Court noted that it was clear, from the wording of Directive 2014/42, that a link between criminal proceedings and civil confiscation proceedings should not be ruled out. Having a number of doubts on the issue in question, the Sofia City Court referred questions to the CJEU for a preliminary ruling, which amounted to answering the question of whether the legal solutions, adopted in a given country, allow for the confiscation of property obtained from illegal sources, regardless of the finding of an offence in a final judgement or conviction.

2. The Bulgarian legal context

In order to properly understand the nature of these confiscation proceedings, it is necessary to place them in the broader context of Bulgarian confiscation regulations. Bulgaria has established a relatively strict confiscation regime within Europe, allowing for civil confiscation mechanisms since 1990.[8] That legal framework established civil proceedings that made it easier for prosecutors to seize a property, especially by redirecting the burden of proof in the procedure onto the owner. It was, however, still considered to be a post-conviction mechanism that was simply an alternative to criminal confiscation.[9] Those mechanisms were under the scrutiny of the ECtHR in *Dimitrovi*

7 Zakon za protivodeystvie na korupsiata i za otnemane na nezakonno pridobitoto imushestvo (2018) [Law on combating corruption and confiscating illegally obtained assets], Darzhaven vestnik: ofitsialno izdanie na Republika Bulgaria [State Gazette – the Official Journal of the Republic of Bulgaria], DV No 7, 19 January 2018.

8 Todor Kolarov, 'Historic analogs of civil confiscation of unexplained wealth – the case of Bulgaria' (2020) 27 Journal of Financial Crime 561, 565.

9 Rositsa Dzhekova 'Civil Forfeiture of Criminal Assets in Bulgaria' in Colin King, Clive Walker (eds), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate 2014) 91, 95-96.

v Bulgaria,[10] where they were assessed as inconsistent with Article 1 of Protocol No 1 to the ECHR. The ECtHR stated that the Bulgarian regulations of civil confiscation, before 2005, failed to comply with the requirements of lawfulness: any interference by a public authority with the peaceful enjoyment of possessions should be lawful, which also means compatible with the rule of law (para 44). Due to that fact, domestic law that deals with private property, such as confiscation regulations, must be sufficiently precise and foreseeable (para 45). As the ECtHR stated, this was not the case with the Bulgarian confiscation regulations (paras 46-50). These regulations referred to a vague, undefined notion of 'unlawfulness', as *conditio sine qua non* to confiscate property, which caused domestic courts to interpret this requirement differently (para 47). The ECtHR also emphasised the fact that Bulgarian law did not provide any reasonable time limitations for the authorities to invoke the confiscation proceedings, which put the owners of the questioned property in a challenging position, given that they had to prove the legality of property acquired decades ago (para 47). A similar outcome, regarding the Bulgarian confiscation regime after 2005, was recently observed in *Todorov and others v Bulgaria*.[11]

In response, to a certain degree, to that judgement but also under pressure from European institutions to introduce robust regulations against organised crime and corruption[12] and the rule of law issues,[13] Bulgaria reformed the confiscation regulation. The non-conviction based confiscation regime, which was the subject of the analysis by the CJEU, was introduced in 2012[14] and then amended in 2018, currently constituting the current legal regime. Under the current Bulgarian Law on confiscation, the mere initiation of criminal proceedings in the *in personam* phase enables the Confiscation Commission, a specialised body established in the Law on confiscation, to initiate confiscation proceedings. According to Article 108 of the Law on confiscation, the Commission for confiscation may initiate proceedings only if the person is charged of the offences listed in the Law on confiscation. Confiscation proceedings cannot be carried out without criminal charges. The Commission for confiscation conducts proceedings in which it checks the origin of the property and submits an application for freezing to a civil court (Article 116 of the Law on confiscation). The Commission then calls on the suspect to provide written explanations as to the origin of the property (Article 136 of the Law on confiscation). Moreover, the act stipulates that the Commission for confiscation cooperates, among others, with the Public Prosecutor's Office and the Police to perform its duties (Article 27 of the Law on confiscation). The Public Prosecutor's Office is obliged to inform the Commission for confiscation of all decisions issued in an investigation

10 *Dimitrovi v Bulgaria* App no 12655/09 (ECtHR, 3 March 2015).

11 *Todorov and others v Bulgaria* Apps nos 50705/11 and others (ECtHR, 13 July 2021).

12 Dzhekova (n 9) 95.

13 See Commission, Commission Staff Working Document. 2020 Rule of Law Report. Country Chapter on the rule of law situation in Bulgaria. Accompanying the document 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', Brussels, 30 September 2020, SWD(2020) 301 final.

14 Zakon za otnemane v polza na darzhavata na nezakono pridobito imushtestvo (2012) [Law on confiscation of illegally obtained assets in favour of the State], DV No 38, 18 May 2012.

concerning property subject to the Commission's investigation (Article 25 of the Law on confiscation). Specifically, the Commission uses material from the criminal investigation for its investigation but the person that the information relates to is deprived of the procedural rights that generally apply in criminal proceedings, such as the burden of proof being placed on the authorities, the presumption of innocence, and the right to a fair trial.

3. The Advocate General's opinion and the CJEU's judgement

In an attempt to fully understand the consequences of the judgment of the CJEU, it is necessary to conduct an in-depth examination of the judgment itself and compare it with the opinion of Advocate General Sharpston. It will then be clear to what extent the CJEU agreed with the Advocate and what consequences for *in rem* confiscation arise from the discussed judgement.

The opinion of the Advocate General in *Agro in 2001*[15] concentrated on three main legal issues. First, she considered that Directive 2014/42/EU is not applicable *ratione temporis* as its implementation deadline expired on 4 October 2016, and the case was referred to the national court before that date. Advocate Sharpston based her arguments on the case law, stating that the directive had direct effect only after the expiry of transposition.[16] The second issue that was examined was whether the proceedings before the referring court were of a criminal or civil nature.[17] She argued that, although the offence that the chairman was accused of in the criminal proceeding (embezzlement) fell *prima facie* within the scope of the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[18] (hereinafter Framework Decision 2005/212/JHA) , this act could not apply to the case due to the fact that proceedings before the Sofia City Court, regarding the confiscation of property, are not proceedings relating to an offence within the meaning of Article 1 of Framework Decision 2005. The opinion states:

> *Criminal proceedings are those initiated when the person concerned is made aware that he or she is suspected or accused of having committed a criminal offence and continue until final determination of the question whether that person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.* (65)
> *It is apparent that the proceedings in question before the national court are not «criminal proceedings».* (66)

15 Case C-234/18 *Agro in 2001*, EU:C:2019:920, Opinion of AG Sharpston.

16 Ibid, para 54.

17 Ibid, para 67.

18 Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [2005] OJ L 68/49.

Ultimately, Advocate Sharpston argued that proceedings regarding the confiscation of property under the Bulgarian legal regime are civil in nature. As a consequence, the fundamental rights and safeguards derived from the Charter, would not apply as the case failed to comply with the scope of EU law in cases where it was 'civil'. This results from the limitation clause of Article 51 of the Charter.[19] She also stated that 'there is nothing in that framework decision (as distinct from Directive 2014/42) which makes confiscation dependent upon a final criminal conviction'.[20] The main argument of the cited opinion is the definition of confiscation in the Framework Decision 2005/212/JHA. Thus, Advocate General Sharpston concluded that *in rem* confiscation, which is ordered in court in non-criminal proceedings, failed to comply with the scope of EU regulations about standards of confiscation, especially not within the scope of the Framework Decision 2005/212/JHA, which was the applicable law in that particular case.

The judgment of the CJEU is generally consistent with the Advocate's opinion, especially as to the conclusions. Nevertheless, the judgement is, to certain degree, narrower than the Advocate's opinion, especially in the explicit statements about its consequences. In its considerations, the CJEU omitted the intertemporal arguments raised by the Advocate but followed her sidenote arguments regarding the substantive aspect of the potentially applicable laws. In that aspect, the CJEU noted that Directive 2014/42/EU was not applicable *ratione materiae*. The reason for this is the fact that embezzlement, which the defendant was accused of in the domestic procedure, does not constitute one of the offences covered by the legal instruments exhaustively listed in Article 3 of Directive 2014/42/EU.[21] Instead, the CJEU based its assessment on the Framework Decision 2005/212/JHA. The reasoning of the CJEU is based on the fact that Directive 2014/42/EU only amended specific provisions of the Framework Decision2005/212/JHA and, therefore, the remaining parts continue to apply.[22] Furthermore, in the light of Article2 (1) of Framework Decision 2005/212/JHA, national law should allow for the confiscation of instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property of the value of which corresponds to such proceeds. Due to the fact that, under Bulgarian law, embezzlement is punishable by ten to twenty years imprisonment, the offence in question meets the requirements of the scope of this framework decision.[23]

19 Article 51 of the Charter: 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

20 Opinion of AG Sharpston (n 15) para 70.

21 *Agro in 2001* (n 6) para 47.

22 Ibid, para 48.

23 Ibid, para 49.

Having established the proper, applicable law in this case, the CJEU had to make a reservation about Article 2 (2) of Framework Decision 2005/212/JHA, which states that: 'in relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence', for this reason it can be interpreted *a contrario*, that for offences other than tax offences, no confiscation may be carried out based on any proceedings. Therefore, the CJEU held that the adoption of such an interpretation would go beyond the minimum standards stipulated in the Framework Decision 2005/212/JHA.[24] Furthermore, the CJEU noted that, under Bulgarian law, civil confiscation proceedings coexist with a regime for confiscation under criminal law. The former regime is focused on illegally acquired property; independent of any criminal proceedings against the perpetrator of the crime, and most importantly, irrespective of the outcome of these proceedings.[25]

For this reason, the CJEU concluded that the Framework Decision 2005/212/JHA does not preclude legislation of a Member State which:

> *provides that the confiscation of illegally obtained assets is ordered by a national court following proceedings which are not subject either to a finding of a criminal offence or, a fortiori, the conviction of the persons accused of committing such an offence.*

It is therefore apparent, from the CJEU judgment *in Agro in 2001,* that EU law does not prevent domestic legislation from providing for civil confiscation proceedings that do not depend on the finding of a criminal offence or a conviction.[26]

4. COMMENTARY ON THE JUDGEMENT

The analysis conducted by the CJEU in *Agro in 2001* shows that the nature of the confiscation proceedings is decisive in determining whether EU law impacts a given regulation. Traditional confiscation is closely related to criminal proceedings; it is a criminal measure or a *sui generis* criminal law institution directed against a particular defendant and so inevitably related at least to the *in personam* phase of the criminal proceedings. Conversely, civil confiscation is focused on property, not person, so it can potentially take place even in the *in rem* phase of criminal proceedings. The need for a final conviction is therefore not, in itself, required. More precisely, civil confiscation, even if linked to a prohibited act, is not understood to be a criminal law institution.

However, it should be noted that the reasoning of the CJEU, presented in the discussed case, is reductive. It ignored the well-established and extensive jurisprudence

24 Ibid, paras 58-59.
25 Ibid, para 60.
26 Ibid, paras 61-62.

of the ECtHR that could have clarified the interpretation of national confiscation laws on confiscation in the context of a criminal penalty and the requirements for confiscation without a conviction. In this regard, one of the most important ECtHR rulings is the judgment in the *Engel* case.[27] The ECtHR introduced three principal criteria for distinguishing the nature of given domestic proceedings: as a starting point, it is essential to verify how the state classifies the proceedings. This is not a determinative factor and a simple classification of the proceedings as civil proceedings in the domestic legal system is not sufficient. There is always a need to examine the true nature of the proceedings, to ensure that the proceeding is then examined objectively, regardless of the domestic classification, given its factual nature and purpose; and in conclusion, the severity of any possible penalty that results from given proceedings is considered.[28]

This case law was developed and continued, among others, in *Philips*[29] and *Walsh*,[30] which related to the confiscation regime in the United Kingdom (respectively, criminal extended confiscation and non-conviction confiscation) and in which the confiscation regulations of the UK were found to be compliant with the ECHR. In addition, the ECtHR had, on a number of occasions, dealt with the nature of confiscation proceedings regarding Italian anti-mafia regulations, which include non-criminal confiscation related measures that can be applied to persons suspected of belonging to a mafia-type organisation without formal conviction, finding them compliant with the ECHR.[31] There were also crucial cases in which the ECtHR found the confiscation regulations in breach of the convention. For example, in *Varvara*,[32] the ECtHR addressed the administrative confiscation order, which was executed despite the discontinuation of the criminal proceedings, in this case the ECtHR found that situation in breach of Article 7 of the ECHR, since the confiscation, despite being ordered in separate administrative proceedings, was closely linked to a crime and consisted of a penalty that when applied to the person that was not sentenced, shall be considered illegal and arbitrary.[33] Similarly, in *G.I.E.M.*, in which Italian confiscation of land instruments applied even if the criminal proceedings had been discontinued or there were no charges against the owners, breached Articles 6 and 7 of the ECHR and Article 1 of its Protocol No 1.[34]

As previously mentioned, the ECtHR assesses each situation *a casu ad casum* and often finds that the non-conviction confiscation procedure is in line with the ECHR. Nevertheless, regardless of the final outcome in such cases, the ECtHR does not limit itself

27 *Engel and others v the Netherlands* Apps nos 5100/71 and others (ECtHR, 8 June 1976).
28 Ibid, paras 80-83.
29 *Phillips v The United Kingdom* App no 41087/98 (ECtHR, 5 July 2001).
30 *Walsh v The United Kingdom* App no 43384/05 (ECtHR, 21 November 2006).
31 *Arcuri and others v Italy* App no 52024/99 (ECtHR, 5 July 2001); *Riela and others v Italy* App no 52439/99, (ECtHR, 4 September 2001). See also a judgement on Lithaunian non-conviction regualtions *Silickienė v Lithuania* App no 20496/02 (ECtHR, 10 April 2012).
32 *Varvara v Italy* App no 17475/09 (ECtHR, 29 October 2013).
33 Ibid, paras 65-73.
34 *G.I.E.M. S.R.L. and others v. Italy* Apps nos 1828/06 and others (ECtHR, 28 June 2018).

simply to citing national provisions. It considers the entire legal situation and circumstances regarding the confiscation. This is done both from an institutional perspective, which includes the purpose of the confiscation regulations in the legal system and the interplay between the confiscation provisions and penal ones in the domestic system. This is in addition to the perspective from that of the individual, including especially the severity and the predictability of confiscation and the procedural situation of the property owner.

As is demonstrated in *Agro in 2001*, the CJEU did not apply a similar standard. The procedural situation of the property owner in the Bulgarian regime was not appropriately considered. Although the Bulgarian Commission for confiscation closely cooperates with the public prosecutor and has a number of powers they can use to be severe concerning the property owner, regarding the submission of a security application, conducting proceedings to determine the size and origin of the property and call upon the owner of the property to submit written explanations, the CJEU did not even address tackle those issues. Another issue, not considered by the CJEU, is the position of the state in non-criminal confiscation proceedings. For example, if the state is considered a party in such proceedings (as in the Bulgarian Law on confiscation)[35] regarding the enforcement of a public power over the individual and his property, the nature of these proceedings is more complex than simply a civil one and becomes more analogous to a criminal or administrative one. The CJEU did not consider that factor at all and, moreover, this fact is needed to indicate that the argument of the CJEU that Article 2 (2) of Framework Decision 2005/212/JHA, which allows the utilisation of non-criminal confiscation in regards to tax offences, cannot be interpreted *a contrario* makes this provision futile, a *nudum ius.* In such an interpretation as this, there is no normative value due to the fact that Member States would be entitled to establish non-criminal confiscation, even without such a regulation, with the result that interpretation of this provision, as a prohibition on using such procedures outside tax crimes, should not be as easily rejected as in the judgement of the CJEU. As clarified earlier, the CJEU presented very reductive argumentation regarding the nature of the Bulgarian confiscation regime and raised some questionable arguments as to the provisions of the Framework Decision 2005/212/JHA.

The interim arguments should also briefly be referred to, those raised by Advocate Sharpston (paras 43-46), of which the CJEU did not follow. As a matter of principle, Directives cannot be applied before their implementation date. However, the Bulgarian regulations have already implemented this Directive and the referring court tried to determine whether it was a defective implementation.[36] In this regard, it should also be emphasised that the principle of sincere cooperation implies the obligation not to adopt legal acts or take other actions that would be contrary to the given directive, as stated by the CJEU, for example in *Milev*:

35 See Kolarov (n 8) 566.

36 See Blaga Thavard, 'Bulgaria's Aggressive Confiscation Regime and the Opinion of the Advocate General in Case C-234/18' <https://verfassungsblog.de/carte-blanche-for-political-abuse/> accessed 20 January 2022.

> *The fact remains that the Member States must refrain, during the period prescribed for transposition of a directive, from taking any measures liable seriously to compromise the result prescribed by that directive [...]. In this connection it is immaterial whether or not such provisions of domestic law, adopted after the directive entered into force, are concerned with the transposition of the directive.*[37]

5. Impact on the Member States' law. Poland's example

Taking into consideration the consequences of the *Agro in 2001* judgement, the first, and most obvious conclusion, is that the current EU legal framework does not oppose civil, non-conviction based confiscation regimes. Nevertheless, this leaves unanswered the questions of how orders of non-conviction based confiscation can be addressed in the field of mutual recognition of confiscation orders and how, if at all, they limit the fundamental rights of the EU recognised in the Charter. Unfortunately, the CJEU did not provide straightforward answers to those inquiries, partly as a consequence of the scope of the preliminary questions.

Regarding the latter issue, concerning the protection of the fundamental rights of an individual whose property was confiscated in non-conviction proceedings, the issue may be perplexing. *Prima facie,* since the CJEU ruled that *in rem* confiscation is not covered by EU law and due to the fact that Article 51 of the Charter states that the Charter applies to the Member States only when implementing EU law, the fundamental rights guaranteed in the Charter (like the right to property, and Article 17) would not apply.[38] However, this would mean that European citizens would be deprived of protection in the area of non-criminal confiscation from the perspective of the Charter. Moreover, it would be contrary to the practice of the ECtHR, which is indicated in *Gogitidze and others v Georgia*:

> *where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (...) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No 1.* (94)[39]

It should also be noted that the CJEU did not state that directly, contrary to AG Sharpston (para 74). What is more, in *Plovdiv*,[40] the CJEU found the Bulgarian regula-

37 C-439/16 PPU, *Milev,* EU:C:2016:818, para 31.

38 See also Opinion of AG Sharpston (n 15) paras 69-74.

39 *Gogitidze and others v Georgia* App no 36862/05 (ECtHR, 12 May 2015) para 94.

40 Case C393/19 *Plovdiv*, EU:C:2021:8.

tions on extended criminal confiscation incompatible with Article 17 (1) of the Charter in situations in which confiscated property belongs to a third party, not accused nor convicted of smuggling, and acting in good faith. The CJEU argued as follows:

> *the definitive deprivation of the right of ownership in respect of that property, substantially affects the rights of persons, it must be noted that as regards a third party acting in good faith, who did not know and could not have known that his or her property was used to commit an offence, such confiscation constitutes, in the light of the objective pursued, a disproportionate and intolerable interference impairing the very substance of his or her right to property.* (55)[41]

It should be noted that analogous situations can occur on the grounds of *in rem* confiscation when property obtained in good faith turned out to be, for example, the proceeds of crime. However, it still does not resolve the problem of on what grounds the Charter would be applicable to the *in rem* confiscation regime, unless the CJEU explicitly states that the legal situation of the owner deprived of property in a non-criminal proceeding is covered by the EU law.

The position of the CJEU that EU law does not preclude national provisions allowing for the confiscation of the property after the conclusion of proceedings which are not subject either to a finding of a criminal offence or, *a fortiori*, the conviction of the persons accused of committing such an offence, may be problematic in the light of mutual judicial cooperation when it comes to recognising and executing orders issued by the courts of other Member States in such proceedings *in rem*. In the case of Poland, the *Agro in 2001* judgement relates directly to Article 611fu para 1 of the Polish Code of Criminal Procedure (1997)[42] [*Kodeks postępowania karnego*] (hereinafter the CCP), which indicates that, in the event of a request by a Member State to enforce a final forfeiture (confiscation) judgment, this judgment is enforceable by a district court in the district in which the perpetrator has property or earns income, or has a permanent or temporary residence. Article 611fu was introduced to the CCP as part of the implementation of the Council Framework Decision 2006/783/JHA of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders.[43] If the position of the CJEU in *Agro in 2001* is to be considered decisive, it should be stated that the national regulations on non-criminal confiscation are not only not covered by the provisions of directives, regulations or framework decisions on judicial cooperation but also by the Charter. Therefore, it would appear that, at least in the context of *Agro in 2001*, if the issue of non-criminal confiscation orders is not developed in EU law or case law, there are no grounds to apply Article 611fu para 1 of the CCP to orders of confiscation issued in

41 Ibid, para 55.

42 Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments.

43 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59. See also Regulation 2018/1805.

a non-criminal procedure, such as Bulgarian *in rem* confiscation proceedings. Furthermore, the legal situation of such orders is further complicated as Regulation 2018/1805 is limited to the orders issued by another Member State within the framework of proceedings in criminal matters, which means it excludes civil and administrative confiscation orders from its scope.

Final remarks

As presented above, the judgement in *Agro in 2001* contains a number of flaws. Firstly, the CJEU analysed the nature of the Bulgarian *in rem* confiscation quite cursorily, especially by not considering the property owner's situation and the competencies of the Commission for confiscation, in addition to its strong ties to the public prosecutor's office. Secondly, its interpretation of the Framework Decision 2005/212/JHA, raises a number of doubts for the reasons that it would lead to the interpretation that it contains at least one provision that does not have any normative content. Thirdly, the decision that *in rem* confiscation transgresses the scope of EU law leaves European citizens without the protection of fundamental rights guaranteed by the Charter. Finally, it seems that *in rem* confiscation orders are not in agreement with the system of mutual judicial cooperation, which may cause upheaval when domestic courts start refusing to recognise and execute them.

Conversely, it is indisputable that the Member States have gained a great deal of freedom to shape their domestic non-criminal confiscation regimes, as it would seem that, at least currently, EU law, potentially, does not cover this area in any case. As a result, if domestic legislators decide to utilise non-penal proceedings and not to require prior conviction, there will be no requirement to create regulations in line with the detailed provisions of EU law and the Charter. However, the readiness of Member States to recognise and execute such judgments remains an unanswered question.

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