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Confiscation Beyond the All-Crime Approach and the Proportionality Principle—A Case of the Lithuanian Illicit Enrichment Offence Concept

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Abstract: The article discusses the ultimate limits of crime proceeds control measures from the perspective of the proportionality principle. The concept of the general illicit enrichment offence (GIEO) is explored as it is considered one of the most radical illicit asset control measures. It is based on two extreme elements: first, it reaches broadly beyond the all-crime proceeds approach and targets any unexplained assets. Secondly, it provides highly intrusive measures, involving both the confiscation of assets and, in addition, criminal sanctions. The advantages and risks of the concept are examined from both practical and basic legal principle perspectives. The author presents recent results from the Lithuanian penal justice system, where the GIEO has been introduced into penal law and practice since the end of 2010. A rich body of case law from the European Court of Human Rights (ECtHR) and European Union Court of Justice (EUCJ) serves as the background of the analysis. The author concludes that the concept of GEIO is in conflict with the proportionality principle. Although the Lithuanian Constitutional Court did not find proportionality issues with the GIEO, the prospects of successful challenges with respect to the proportionality principle in the ECtHR and the EUCJ appear promising.

Keywords: illicit enrichment; proportionality principle; crime proceeds; confiscation; corruption

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1. Introduction

The pursuit of efficient strategies for enabling the confiscation of proceeds from predatory offences like organised crime, corruption, drug crimes, fraud, and tax evasion is a distinctive vector in contemporary penal policies (UN 2005; Commission of The European Communities 2008; European Commission 2020). 'Classic' confiscation measures target assets directly linked to established offences where the offender is successfully convicted. However, modern strategies aim to reach farther—to suspicious assets where neither is direct evidence of their connection to a predicate offence available nor has the predicate offence been resolved and successfully indicted.

Modern confiscation strategies are split into two major concepts: criminal-offence-based and confiscation-focused approaches. The confiscation-focused trend drops the ambition to punish those in possession of illicit gains and instead focuses on the confiscation of ill-gotten assets. This shift alleviates justice authorities from the burden of presuming innocence, allows for a lower standard of proof, and even shifts the burden of proving the illicit (criminal) origin of the assets onto the defendant (ECtHR Phillips 2001; ECtHR Gogitidze 2015; ECtHR Telbis 2018). In the murky realm of suspicious assets, where direct evidence of their origin is unavailable, these alleviations significantly enhance the

potential efficiency of confiscation proceedings. This concept is reflected in civil confiscation proceedings (Ireland, Italy, Lithuania, Bulgaria, Slovenia, etc.), autonomous confiscation (Germany, Latvia), the forfeiture of ownerless property and tax fines for unexplained income (both in Lithuania), unexplained wealth orders in connection with civil confiscation (the UK), and extended powers of confiscation (across the EU).

The punishment-based concept places emphasis on deterrence and relies on the constructed offences of money laundering and illicit enrichment. These constructs provide a self-executing trigger to start proceedings, allowing for both the punishment of those handling suspicious assets with criminal sanctions and the confiscation of the assets. Remaining within the realm of criminal proceedings brings some advantages in terms of international mutual cooperation and the recognition of confiscation orders, as well as providing more investigative powers. However, in order to overcome efficacy issues, these concepts often bend the principles of criminal proceedings or lower the bar for criminal liability as much as possible. The illicit enrichment offence is a particularly specific construct. It could be deemed an advanced version of money laundering as it extends the scope of criminal liability. In its proposal for a directive on combating corruption, the European Commission proposed the criminalisation of illicit enrichment from corruption offences, noting that this construct would cover some areas (such as the possession of proceeds from offences committed by the defendants themselves) that are not addressed by anti-money-laundering regulations (European Commission 2023).[1]

In this article, the offence-based approach is in focus. The main issue discussed is as follows: how far can jurisdictions go down the offence-based road in seeking maximum reach for suspicious (criminal) gains without unacceptably infringing the principle of proportionality? What are the limits of the state's margin of appreciation in constructing modern asset confiscation measures, particularly those of a criminal nature? In 2010, the Lithuanian legislature adopted arguably the farthest-reaching construct of illicit enrichment offence in Europe. It criminalised any unexplained enrichment of any person, including enrichment without any links to criminal offences. In other words, it adopted an *any-person* and *any-enrichment* approach. The case analysis of Lithuanian regulation and practice will serve as the basis for the discussion on the central issue of this article. The author argues that the Lithuanian legislator has reached, and even crossed, the farthest legitimate boundaries of the confiscation measures. Since the Lithuanian legislator's choice of an ultimately broad construct of the illicit enrichment offence is unique in Europe and rare worldwide, there are very few academic discussions concerning proportionality issues regarding the extent of the illicit enrichment offence. In the Lithuanian academic field, illicit enrichment issues regarding legal principles have been discussed in the works of Namavičius (2016), Pakštaitis (2013), Fedosiuk (2012a, 2012b), and Bikelis (2017, 2020, 2021). Dornbierer has also briefly touched on this issue in his recent reports (Dornbierer 2021, 2024). In a more general context, proportionality issues of different confiscation measures have been discussed by Panzavolta (2017), Simonato (2017), Boucht (2021), and Summers (2022).

[1] Article 13: Enrichment from corruption offences—Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law establishes ground rules for the criminalisation of money laundering and sets out that corruption should be considered a predicate offence to money laundering. However, that directive does not oblige Member States to criminalise the acquisition, possession, or use of property derived from corruption if a person was involved in the offence from which the property was derived (this is referred to as 'self-laundering'). This proposal for a directive introduces such a targeted requirement, thereby creating the offence of 'en-richment from corruption' (European Commission 2023).

2. Methods

Hulsroj noted the ultimate importance of the proportionality principle in democratic society when he wrote 'we might not have explicitly labelled proportionality as a basic principle, yet we assume intuitively that it is a key ingredient when we construct society' (Hulsroj 2013). It is also true when it comes to developing and evaluating justice policies. The proportionality principle is the primary method for assessing legal confiscation measures (constructs), both of criminal (punitive) and non-criminal (preventive and restitutive) natures. It involves finding the right balance between maximising the efficacy of confiscation measures (necessary to ensure some level of societal security) and maintaining acceptable levels of risk for false asset confiscation decisions. It works with other basic legal safeguards such as the principle of legality (including the foreseeability of the legal requirements), fair proceedings, the presumption of innocence, and protection against self-incrimination. In the European context, insights from the case law of the European Union Court of Justice (EUCJ) and the European Court of the Human Rights (ECtHR) play an important role for the assessment.

The practical layer of the analysis rests on a case analysis of Lithuania, covering the outcomes of illicit enrichment prosecutions in Lithuania between 2018 and 2022. Using the LITEKO and INFOLEX databases, all available court decisions from all instances were collected in cases where charges were brought under Article 189[1] 'Illicit Enrichment' of the Criminal Code of the Republic of Lithuania (hereinafter referred to as the CC) and where first-instance court judgments were issued during the specified period. The study included only those cases in which the court decisions had become final by the time the analysis was conducted (May 2024). A total of 20 cases were examined. In addition, 36 decisions to terminate pre-trial investigations on illicit enrichment, issued between 2018 and 2022, were analysed. These were randomly selected from a list provided by the Prosecutor General's Office, pooling 21 from 2021 to 2022 and 15 from 2018 to 2020.

The analysis of Lithuanian practice in prosecuting illicit enrichment is qualitative and focuses on examples that illustrate key points for the general assessment of the illicit prosecution legal framework, particularly its efficacy, risks of false decisions, and adherence to legal principles.

3. Findings

Lithuanian Model of Illicit Enrichment

Internationally, the construct of the money laundering (ML) offence was first introduced by anti-drug-trafficking and anti-organised-crime conventions; thus, predicate offences for ML were first defined as drug-trafficking- and organised-crime-related. Gradually, the scope of ML offences evolved into an all-crime approach (Stessens 2000). Cases of a similar expanding trend can be observed in the legislation providing for the offense of illicit enrichment (IEO). The offence of illicit enrichment was recommended by the United Nations, the Organization of American States, and the African Union anti-corruption treaties (UN 2005; Organization of American States 1996; African Union 2003), and at the time of writing in 2024, it has also been proposed in the EU Anti-Corruption Directive (European Commission 2023). Thus, the majority of laws around the world providing IEO restrict the predicate offence to corruption-related offences. In Europe, where the concept of IEO has been accepted by very few jurisdictions (France, Lithuania, Moldova, and Ukraine), France and Lithuania extended the scope beyond corruption offences. France adopted the concept of IEO in 2000, even before the adoption of relevant international treaties. Article 321-6 of the French Penal Code provides that the predicate offences of IEO are any offences punishable by at least 5 years of imprisonment (France 1992). In 2010, Article 189[1] of the Lithuanian Penal Code established a definition of IEO with an exceptionally

broad scope, providing that any person was criminally liable for enrichment from any unexplained income, even if the income had no links to a criminal context (Table 1). The only limitation was that the IEO did not cover unaccounted income from otherwise legal business activities (Seimas 2010). Additionally, the law set a relatively low threshold for the value of unexplained assets—500 minimum standards of living (MSL), equivalent to 18,500 (until 2018) and 25,000 EUR (from 2018), which was raised to 900 MSL (45,000 EUR) as of 1 June 2023 (Seimas 2023).

Table 1. Liability for Illicit Enrichment, Lithuanian Penal Code.

Article	Provision
Article 189[1], Sec. 1	A person who owns property worth more than 900 MGL, knowing that the property could not have been acquired with legitimate income, is punishable by a fine, arrest, or imprisonment for up to four years.
Article 190, Sec. 3	Legitimate income referred to in Article 189[1] of this chapter is income received from activities not prohibited by legislation, regardless of whether they were recorded in accounts in accordance with the procedure established by legislation or not.

Thus, in constructing criminal liability for IEO, Lithuania went even beyond the *all-crime* approach. The definition of IEO does not require the prosecution to demonstrate any criminal context for the unexplained assets.[2] This interpretation of the law was reaffirmed by the Supreme Court in a recent case where a defendant was convicted of illicit enrichment even though the court found no evidence of links between the assets and any criminal conduct:

> "There is no evidence in the case file that D could be involved in the commission of any criminal offences of a financial or other nature, but his testimony on the specifics of his work abroad (evasion of his employment relationship and income) suggests that certain tax or civil law violations may have been committed". (Kaunas District Court 2021; Supreme Court of Lithuania 2022).

In this case, the prosecution argued that data from the State Tax Inspectorate and Social Security Fund databases did not confirm that D could have earned 200,000 EUR from business or labour income. D argued that he earned the assets from various businesses and labour in different European countries. However, the court established that D had not provided any business documents or bank statements to support his claims, and no person could corroborate his story. D was also unable to explain to the court the details of his businesses and provided only abstract comments. The court also took into consideration that D's enrichment had occurred over a short period of time. In addition, D was of a young age (20 years old) at the time of the enrichment, and the court doubted his capacity to have obtained the initial capital for starting the alleged businesses.

The appellate instance court ordered the confiscation of nearly 150,000 EUR of unexplained assets and imposed a 2635.54 EUR fine on D (Kaunas District Court 2021).

Overall, between 2018 and 2023, Lithuanian courts passed 20 final judgements on illicit enrichment criminal charges—10 were convictions and 10 were acquittals. In no case were the defendants public officials. Thirteen charges were combined with charges

[2] Another example of legislation that went beyond the all-crime approach in Europe was Slovak civil confiscation legislation that allowed the confiscation of any unexplained assets worth more than 1500 times the minimum wage (over 0.5 million EUR) (Slovakia 2010). For an analysis of this civil confiscation model in the light of legal principles, see Bikelis (2020, pp. 30–35). For more examples of the 'beyond all-crime' approach around the world (Western Australia, Bolivia, Tanzania etc.), see Dornbierer (2021, p. 48 ff.).

for other profitable offences (trafficking of illicit cigarettes, alcohol, drugs, and illegal business activities).[3] Seven charges concerned illicit enrichment without any references to the criminal origins of the assets, and three out of these seven cases resulted in convictions.

In contrast to the case presented above, the scale of confiscation in the other two cases that resulted in conviction was less significant. In one case, a prisoner's girlfriend received cash from various people worth 69,000 EUR over four years. She told the investigators that the money had been given to her on behalf of her boyfriend, who was serving a prison sentence. She also testified that some of the money was her salary from illegal work in Germany. She had deposited the money into her bank account and made transfers upon her boyfriend's instructions. She refused to name people who gave her the money ('they would not like to be involved', she testified) and pleaded guilty to illicit enrichment. No assets were seized and confiscated in this case and the defendant was fined less than 2900 EUR (Kaunas County Court 2018). In another case, the aunt of a high-profile fraudster (who was sentenced to imprisonment for large-scale fraud in separate proceedings) was charged with illicit enrichment. After lengthy proceedings, during which the case was heard by the Supreme Court twice, the defendant was convicted and sentenced to a fine of 11,300 EUR, and two plots of land worth 26,000 EUR were confiscated (Vilnius District Court 2020).

4. Discussion

4.1. Pros and Cons of the Broad Lithuanian IEO Model

The Lithuanian illicit enrichment offence (IEO) model allows for the conviction of defendants and confiscation of their suspicious (unexplained) assets in some situations where other legal measures would not permit such action. In fact, it covers most situations where the assets are suspicious (they cannot be explained by the legal income of the person possessing them) but there is no direct or indirect evidence linking them to any offence or to other people who might be suspected of an offence. Such situations may occur where suspicion falls on cash couriers, asset managers acting on the behalf of others, or the owners of assets received from sources they wish to remain unknown. If there is no evidence that would show beyond reasonable doubt, would satisfy, or at least allow one to believe on the balance of probabilities (the standard depends on the particular measure) that the assets are proceeds of crime, no alternative legal measure—such as extended powers of confiscation, civil confiscation, or liability for money laundering—can be applied. Thus, the concept of illicit enrichment significantly relieves the prosecution's burden in asset investigations. This makes the concept more efficient than other confiscation frameworks but also highly prone to erroneous decisions.

The Lithuanian Supreme Court justice Olegas Fedosiuk has shared his concerns about the IEO model that the model allows for the prosecution of people who do not wish to disclose the sources of their incomes, even if the income is not criminal. Fedosiuk provided a theoretical example of a woman who receives assets from her married lover. If she chooses to protect her lover's reputation by not revealing the source of her wealth, she could be convicted of owning unexplained property—a crime designed to control proceeds from organised crime and corruption (Fedosiuk 2024). General IEO also indirectly criminalises prostitution, which is not itself a crime in Lithuania. Even if the legislator decides to abolish administrative fines, individuals who earn a living from prostitution could still be charged with owning assets that cannot be explained by legitimate income as prostitution is not recognised as a legitimate form of labour or service. Defendants

[3] In these cases, prosecutors opted to pursue illicit enrichment charges instead of employing an alternative, more promising measure against suspicious assets—extended powers of confiscation, which would have allowed for a lower standard of proof and, to some extent, even reversed the burden of proof.

in such cases would face limited defence options since documentary evidence would be unavailable and former clients would not be likely to testify, fearing self-incrimination. Another questionable scenario may arise when defendants possess cash savings from business activities in countries (Eastern European, Middle Asian, etc.) where it is common to conduct business in cash, where accounting requirements are lax, and where state registers (especially personal income and property registers) are underdeveloped. There might be no credible documentary evidence to explain the origins of their savings.[4] If they choose to remain silent or the court is critical of their oral testimony and requires documentary evidence, there is a risk that the defendants could be convicted of illicit enrichment, even though their income has had no links to criminal activity. On the other hand, in the Lithuanian context, defendants could potentially benefit from the exception provided in Article 190, Section 3 of the CC, which excludes undocumented business earnings from being classified as illicit enrichment.[5]

The right to silence and the presumption of innocence are supposed to protect defendants from being convicted solely upon their silence, especially when the prosecution lacks compelling evidence of a crime. In their case law, both the ECJ and the ECtHR have reaffirmed that the right to silence is a fundamental international standard that lies at the heart of a fair trial. By providing the accused with protection from improper coercion by authorities, this right helps prevent miscarriages of justice. Since the protection of the right to silence is intended to ensure that in criminal proceedings, the prosecution establishes its case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused, this right is infringed, inter alia, where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify (EUCJ C-481/19: 38-41, ECtHR 2021 Heaney and McGuinness v. Ireland: 47).[6]

On the other hand, in a 2017 money laundering case (Zschuschen v. Belgium), the ECtHR ruled that it is not incompatible with the notion of a fair hearing to require individuals to provide credible accounts of their financial situations. According to this ruling, the ECtHR does not prohibit the accused's silence from being taken into account in order to find him or her guilty, provided their silence is not the sole or primary basis for their conviction (Advocate General 2024, En. 90).[7] In contrast to money laundering cases, where the criminal origins of assets must be established, the general construct of the Lithuanian IEO criminalises the possession of unexplained wealth itself without requiring the prosecution to link the assets to any crime. In practice, this means that if the prosecution cannot provide evidence of the criminal origins of assets, it can still secure a conviction by showing that the property could not have been acquired through legal means based on data from tax

[4] Such facts were established in pre-trial investigation No. 02-6-00055-17, where a lawyer was accused of possessing 1.1 mln. EUR imported from Ukraine to Lithuania. The lawyer explained that the money had been imported in many trips from Ukraine to Lithuania and that it belonged to his client, who had earned it from her business several years ago. The Ukrainian authorities informed the Lithuanian authorities that a uniform state register of residents' income did not exist and the existing registers did not keep their records for an extended period.

[5] This clause was contested by the Supreme Court in the Constitutional Court case (2017). The SC argued that the clause makes the rules of IEO contradictory and unclear, thus in-fringing the requirement for the law to be clear and predictable for the public. Indeed, the SC made a reasonable point. For example, profits from undocumented (undeclared) business income are undeniably illegal and could even be considered criminal income. How, then, could a law criminalising any illicit enrichment (without even requiring the assets to be criminal proceeds) deem profiting from undocumented business to be legal enrichment? The CC dismissed the SC's claim by merely reciting the contested text of the law and con-cluding, without substantial argument, that the law was clear (Constitutional Court 2017, 40.3).

[6] See also the opinion of the Advocate General of the ECJ in the cases C-767/22, C-49/23, and C-161/23: 83 (Advocate General 2024).

[7] Namavičius considers such ECtHR practice as opening the gate for a substantial watering down of the presumption of innocence (Namavičius 2016, pp. 20–22).

authorities, social security records, or any other sources known to the prosecution. This means that in cases where the assets have been received from sources not documented in the records of state agencies and there is no other credible evidence available to the prosecution (for example, due to the inefficiency of international cooperation), conviction is nevertheless possible based on a defendant's silence or their inability to provide evidence explaining their wealth.[8] While this approach may allow for effective convictions in cases involving criminal proceeds, it also carries a significant risk of erroneous convictions. The Lithuanian Constitutional Court has downplayed concerns, concluding that the Lithuanian IEO model does not threaten the principles of a fair trial. The Court has reasoned that if prosecutors exhaust all available means to investigate a defendant's legal sources of income, the illegality of the defendant's assets can be reliably inferred (on the standard of proof beyond reasonable doubt) from the absence of evidence supporting a lawful origin and the relevant context of the case (Constitutional Court 2017). The Constitutional Court appears to assume that it is nearly impossible to have a situation whereby a legal source of the defendant's assets may not be known to the prosecution.

Alternative confiscation measures often establish formal preconditions related to criminal proceedings, which play a role in building the belief that assets have criminal origins. Laws on extended powers of confiscation require the asset owner to be convicted of a predatory offence. Civil confiscation laws, on the other hand, have broader formal prerequisites, which do not specifically require a conviction but require at least suspicion or accusation of a specific predatory offence or, alternatively, links to dangerous criminal groups. In contrast, prosecution for illicit enrichment (as well as for money laundering) is self-executing and requires no additional formal 'trigger'. This makes the concept applicable in a broader range of situations but potentially lacks a clear indicator of the criminal origins of the assets in question.

As the provided examples show, the prosecution of illicit enrichment works rather efficiently where the defendant chooses to remain silent and does not present a well-prepared defence. However, this raises concerns about the potential conflict between the Lithuanian concept of the illicit enrichment offence with the right to remain silent in criminal proceedings, as well as the presumption of innocence.

On the other hand, the high number of acquittals in illicit enrichment proceedings suggests that an active defence—where defendants provide explanations of the legal origin of assets (such as loans, business, savings, or gifts)—might be difficult to disprove to the criminal standard of proof where no evidence of a criminal context is present (see also Bikelis 2017, 2021).

4.2. The Lithuanian Concept of the Illicit Enrichment Offence in the Context of the Proportionality Principle

The Lithuanian concept of IEO goes beyond the all-crime approach. It does not require that the assets are criminal proceeds. On the other hand, the legislation provides for extremely intrusive measures—both the confiscation of all unexplained assets and criminal sanctions. Going beyond the concept of criminal proceeds while at the same time providing for severe measures raises serious concerns regarding the principle of proportionality (see also Namavičius 2016, pp. 15–20).

The top European courts—the European Court of Human Rights (ECtHR) and the European Union Court of Justice (EUCJ)—approach the principle of proportionality from different perspectives. The ECtHR decides on what J. Boucht names 'retrospective propor-

[8] If the defence is not silent but active and provides the court with versions that are difficult to verify, the defence may gain the advantage of the penal proceedings' standard of proof beyond reasonable doubt (Bikelis 2021). This is a disadvantage of the penal IEO concept compared against other non-penal measures that use a lower standard of proof.

tionality', which refers to the quantification principle used for sanctioning purposes. The EUCJ decides on 'prospective proportionality', an instrument for determining the validity of a norm (Boucht 2021, pp. 250–52). Their concepts of proportionality share similar criteria and lead to similar conclusions.

In the context of the first Article of the first protocol of the European Human Rights Convention, when assessing the proportionality of the state's interference with the right to the peaceful enjoyment of possessions, the ECtHR examines whether the interference (the means employed by the authorities) in the particular case has struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the applicant's right of property and whether it has imposed a disproportionate and excessive burden on the applicant (ECtHR Arcuri 2001; ECtHR Butler 2002; ECtHR Gabric 2009).

The EUCJ defines the principle of proportionality as a condition that requires measures to be appropriate for ensuring the attainment of the objective legitimately pursued and not to go beyond what is necessary in order for it to be attained (EUCJ Zheng 2018, 37 and the case law cited there).

Table 2 defines different levels of state intervention into the possession of property. The IEO provides the highest level of intervention as it allows for not only the confiscation of unexplained assets but also criminal sanctions. Civil confiscation appears to be a one-step-lower intervention as it does not provide for sanctions in addition to asset confiscation. A fine may constitute any level of intervention, dependent on the level of the fine.

Table 2. The levels of intervention into the right to possession of property.

Level of Intervention	Measures
(1) Less than the value of the assets	A moderate fine without confiscation of the assets
(2) Full value of the assets	Confiscation only (i.e., civil confiscation) A fine equal to the value of the assets without confiscation
(3) More than the full value of the assets	Confiscation combined with a fine (offense of illicit enrichment) Fines exceeding the value of the assets

Neither the ECtHR nor the EUCJ has yet heard a case related to the Lithuanian IEO—whether concerning applications from convicts or requests for preliminary rulings by the courts. However, their well-established case law on the proportionality of other measures (and their combinations) of the same or lower interference levels allows us to assess the Lithuanian IEO model in light of the proportionality principle. It also allows us to assume the potential position of the Courts regarding the Lithuanian IEO model.

In cases where there has been no evidence of the criminal origins of unexplained assets, both the ECtHR and the EUCJ have ruled against measures that exceed the value of unexplained wealth (level 3 intervention), referring to the proportionality principle.

In multiple cases, the EUCJ has ruled on the legitimacy of regulations imposing measures (fines and confiscation) for importing undeclared cash in breach of customs regulations.

In NL against Direcţia Generală Regională a Finanţelor Publice Bucureşti (EUCJ NL 2019), the EUCJ noted that the principle of proportionality applies not only to the determination of the constituent elements of an infringement but also to the determination of the rules relating to the intensity of fines and the assessment of the factors that may be taken into account in setting them. (. . .) In that regard, the Court already held that the fact that a measure aimed at financially penalising the failure to comply with the obligation to

declare large sums of cash entering or leaving the territory of a Member State was likely to reach an amount corresponding to almost 100% of the sum of undeclared cash, going beyond the limits of what was necessary to ensure compliance with such an obligation (see, to that effect, the judgment of 31 May 2018, Zheng, C 190/17, EU:C:2018:357, paragraph 45). The Court ruled that Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State that, in order to penalise the failure to comply with the obligation to declare large sums of cash entering or leaving the territory of that State, provides, in addition to the imposition of an administrative fine, for the confiscation for the benefit of the State of the undeclared sum in excess of EUR 10 000 (EUCJ NL 2019).[9] In Gabric v. Croatia (ECtHR Gabric 2009), the ECtHR noted that the Government did not contest the legality of the undeclared cash. The Court ruled that *in the instant case, the applicant had already been fined for the administrative offence of failing to declare the money at customs. It had not been convincingly shown or indeed argued by the Government that that sanction alone was not sufficient to achieve the desired deterrent and punitive effect and prevent future breaches of the declaration requirement. In these circumstances, the confiscation of the entire amount of the money that should have been declared, as an additional sanction to the fine, was, in the Court's view, disproportionate in that it imposed an excessive burden on the applicant*. The Lithuanian Supreme Court has also followed this approach since 2015 (Supreme Court of Lithuania 2015).

Even where the assets are proceeds of criminalised acts (like illegal stay and illegal labour in the UK), the ECtHR still requires scrutiny of the proportionality between the seriousness of the predicate act and the severity of intervention, especially when third-level intervention is imposed. In Paulet v. the United Kingdom, the applicant illegally stayed in the UK using a false passport and worked there for four years. The English courts acknowledged that he had carried out the necessary work to the satisfaction of his various employers. So, I would note there, the dangerousness of the applicant's illegal activity was relatively low. However, in addition to the custodial sentence and the recommendation for deportation, the prosecution sought a confiscation order under Section 6 of the Proceeds of Crime Act 2002 in respect of the applicant's earnings. The court ordered the confiscation of the applicant's savings (more than 20,000 GBP) while the applicant's gross salary during the four years of employment was over 70,000 GBP. The ECtHR found a violation of Article 1 of Protocol No. 1 to the Convention, noting that the domestic courts had failed to even consider whether the confiscation of the applicant's savings would meet the requirement of the "fair balance" in respect to the dangerousness of his predicate acts (ECtHR Paulet 2014). The motivation of the ECtHR stopped with the said procedural argument, but it implies that, as in cases with the failed declaration of imported cash, the Court holds that imposed criminal and administrative measures may be seen as sufficient in response to the failure to comply with formal obligations that play a preventive role in ensuring public security. Additional confiscation measures against the proceeds from further activities, which could be seen as socially plausible rather than dangerous, fail to meet the requirements of necessity and proportionality.

The rich case law on the proportionality of the full assets' confiscation alone (the second level of interference) provides that even this level of interference would conflict with the proportionality principle if the targeted assets were not the proceeds of crime. It casts even more doubt on the proportionality of the Lithuanian IEO concept, which is a third-level interference measure. In civil confiscation cases, the ECtHR deemed the confiscation of assets to be proportional where there was firm ground to believe that the assets were the proceeds of organised-mafia-type crime (ECtHR Arcuri 2001), proceeds

[9] See also similar rulings on such regulations by the EUCJ in the 2018 cases of Lu Zheng (EUCJ Zheng 2018) and Pinzaru and Cirstinoiu (EUCJ Pinzaru 2018).

of corruption (ECtHR Gogitidze 2015), or intended to be used in drug trafficking (ECtHR Butler 2002). In contrast, the ECtHR found a breach of the proportionality principle in a case where civil confiscation was imposed against the unexplained assets without any claim or evidence of their criminal origin (ECtHR Dimitrovi 2015).

In the Dimitrovi case, the appellant contested the confiscation of his unexplained assets under the 1973 (Soviet-era) Bulgarian law that allowed the confiscation of any "non-work-related income received by citizens". The law specifically provided that it did not apply to criminal proceeds. The ECtHR noted that even in view of the wide margin of appreciation enjoyed by States in implementing social and economic policies and thus in determining the general interest, it could not be satisfied that the confiscation measure could be deemed proportional and in fair balance with the very general and vague aim "to protect justice and equality and to guarantee just conditions for economic activity", especially when crime control was explicitly excluded from the scope of the provisions for confiscation. The Court also emphasised that there was no evidence in the Dimitrovi case that would allow the belief that the confiscated assets were the proceeds of crime (ECtHR Dimitrovi 2015).

In the explanatory memorandum to the Lithuanian legislation on IEO, the aim of the law was defined clearly and specifically as the control of organised crime, corruption, and other greedy crimes (Office of the President 2010). However, the legislative provision on IEO went far beyond that aim. The case-law analysis shows that the IEO is applied not only against alleged proceeds of crime but also against any unexplained assets, save for the explicit exception of earnings from undocumented business. The analysis of the European Courts' case law allows the conclusion that the application of IEO beyond its declared aim is very likely to be in conflict with the principle of proportionality.

In the constitutional case on IEO regulation, concern over the conflict with the proportionality principle was among the key points in the applicants' claim (Constitutional Court 2017). However, the Court focused on the declared aims of the legislation rather than on the actual text of the contested legislation and its implications. The applicants—the Supreme Court of Lithuania and a few lower courts—argued that the Lithuanian legislator had criminalised the possession of unexplained wealth that might not be the proceeds of any crime. Thus, it might happen that the mere possession of profit from non-criminal acts would attract more serious (criminal) consequences than the commission of the predicate act itself (Constitutional Court 2017, 7.1.2). The example of the indirect criminalisation of prostitution serves as an illustration. Indeed, this paradox strongly indicates a possible conflict with the principle of proportionality. The case law of the ECtHR and EUCJ supports the argument made by the Supreme Court of Lithuania. However, the Constitutional Court did not accept their claim. In response, the CC reiterated the statement provided in the explanatory memorandum to the law, asserting that the definition of IEO was intended to protect society from dangerous criminal acts, specifically corruption, economic crimes, financial crimes, and other profit-driven offenses. The CC concluded that having assessed the purpose for which the impugned legal regulation had been introduced and the dangerousness of illicit enrichment, it should be held that there was no ground for stating that, as a legal measure, criminal liability established for illicit enrichment was disproportionate. So, the CC missed the point of the applicant's argument that the Lithuanian concept of the IEO went beyond the declared purpose and, in some situations, may allow both confiscating assets and punishing people who were not related to dangerous criminal acts in any way. This analysis allows the conclusion that even though IEO was approved by the CC as a proportional measure, in order to avoid breaching the principle of proportionality, IEO should be applied only in cases where there is evidence suggesting that the unexplained assets are likely to be proceeds of crime.

4.3. International IEO Concepts in Light of the Proportionality Principle

The criminalization of IEO, as defined by the UNCAC and continental anti-corruption conventions and supported by the European Commission in the proposal on combating corruption, suggests an anti-corruption-based concept of IEO. How does it address the proportionality challenge?

It is widely accepted that effective corruption control is legitimate and important to the public interest. The confiscation of corruption proceeds is considered a necessary and sharp measure to achieve this goal. This is recognised in anti-corruption conventions and has been emphasised by the European Commission on numerous occasions (Commission of The European Communities 2008; European Commission 2020). The ECtHR also acknowledged this in the case of Gogitidze (ECtHR Gogitidze 2015). However, the declaration of appropriate aims for a measure does not necessarily ensure that the measure will only be used to pursue those aims. The Lithuanian IEO concept is an example of such a case. Besides the declaration of legitimate aims, the regulation of the measure itself should provide safeguards ensuring that the measure is not applied beyond its intended scope.

The international anti-corruption IEO concept sets strong safeguards limiting the scope of the offence to corruption proceeds. Art. 20 of the UNCAC defines IEO as a significant increase in the assets of a public official that cannot reasonably be explained in relation to lawful income (UN 2005). Along with the common obligation for public officials to declare their assets and incomes periodically, and the limited opportunities to engage in other businesses outside their duties, these limitations reasonably narrow the concept of IEO to assets derived from corruption.[10] The European Commission's proposal for a directive on combating corruption explicitly indicates that IEO pertains only to the proceeds of corruption. It even titles the offence as 'enrichment from corruption offences' instead of the more general 'illicit enrichment'. The European Commission specifies that IEO should be defined as the intentional acquisition, possession, or use by a public official of property that that official knows is derived from the commission of any of the corruption offences defined in the proposal.

Thus, international concepts of IEO, in contrast to the Lithuanian IEO concept, eliminate the issue of the proportionality of the state response by focusing solely on corruption-related assets. However, this narrowing of scope has certain costs. The anti-corruption IEO covers a much smaller scope of illicit assets than the general IEO concept, and proving the more specified source of unexplained assets becomes a more difficult task for the prosecution. Nevertheless, a measure that does not comply with the basic legal principles should be abandoned and replaced with better-balanced and more effective alternatives. Civil confiscation, extended powers of confiscation, independent confiscation, and similar measures of a mixed legal nature could arguably serve as more balanced alternatives to the general concept of IEO.

5. Conclusions

The general illicit enrichment offence (IEO) concept, which constitutes the highest (third-level) intervention against the property (imposing full confiscation and sanctions), fails to strike a fair balance between the severity of the measure and the public significance of its aim. This constitutes a breach of the proportionality principle. The IEO may only be

[10] It is important to interpret the IEO object in such a way that the period of the income subject to scrutiny covers only the term where a person was in a position to commit corruption offences (and not earlier than from when they became an official candidate for a public position). If the IEO concept would cover any enrichment of an official, even the enrichment before he or she took public office or became an official candidate for the public office, such an interpretation would go beyond the aim of corruption control and challenge the principle of proportionality.

applied to cases where there is evidence suggesting that the unexplained assets are likely to be proceeds of crime.

The general IEO concept, which goes beyond the all-crime approach and covers any unexplained enrichment, indirectly criminalises activities that the legislator has chosen not to criminalise, resulting in a conflict with the proportionality principle.

The Lithuanian Constitutional Court has failed to address the proportionality issues of the general IEO concept adequately. Nevertheless, in cases where there is no evidence of the criminal origins of assets, the prospects of successful challenges with respect to the proportionality principle in the ECtHR and EUCJ appear promising.

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