2026 ACTA UNIVERSITATIS CAROLINAE – IURIDICA 3 PAG. 45–60

CONFISCATION OF UNEXPLAINED WEALTH IN EU CONTEXT – CONCEPTUAL CONSIDERATIONS

JAN PROVAZNÍK*

Abstract: This article examines the concept of confiscation of unexplained wealth (CUW) as introduced into EU law by Art. 16 of Directive (EU) 2024/1260 on asset recovery and confiscation. CUW enables the confiscation of assets suspected of deriving from organised crime without any prior criminal conviction, representing a significant departure from the conviction-based paradigm dominant in continental legal systems. The article first maps the necessary theoretical background, legal texts and case-law. After that, it analyses the relevant case-law, mapping the permissible boundaries of CUW under EU primary law and the Convention for the Protection of Human Rights and Fundamental Freedoms. The subsequent critical analysis evaluates the principal objections to CUW – including its selectivity relative to other domains of criminal law – and engages with the pragmatic arguments advanced in its defence. The article concludes that, while the transposition of Art. 16 is legally obligatory and consistent with existing supranational case-law, the preferable conceptual solution would be to frame CUW explicitly as a civil law instrument and develops theoretical grounding for this position alongside proposals for addressing the pragmatic obstacles to such an approach.

Keywords: confiscation of unexplained wealth; non-conviction-based confiscation; asset recovery; Directive 2024/1260; presumption of innocence; organised crime; *in rem* proceedings; EU criminal law

DOI: 10.14712/23366478.2026.104

1. INTRODUCTION

By 23 November 2026, Member States of the European Union (MS) must transpose the newest addition to the European Union's (EU) legal portfolio in the fight against proceeds of crime and, in the broader context, money laundering,[1] the Directive

---

* JUDr. Jan Provazník, Ph.D., LL.M., is assistant professor at the Department of Criminal Law, Faculty of Law, Masaryk University (Brno) and director of Department of Review Proceedings at the Supreme Public Prosecutor's Office (Czech Republic). The thoughts and proposition made in this article are solely the author's and under no circumstances may they be attributed to the aforementioned institutions as their official opinions.

1 The connection between unexplained wealth and money laundering is quite ostensible. See, e.g., PRASETYO, W. The Nominee Scheme Through the Lens of Neutral Self-Mentality and Unexplained Wealth. *Jurnal Studi Akuntansi dan Keuangan* [Journal of Accounting and Finance Studies]. 2025, Vol. 8, No. 3, p. 313.

(EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation. Its Art. 16[2] represents a significant legal novelty for many MS. It obliges MS to introduce a legal avenue for confiscation of unexplained wealth (CUW) which targets assets that are not proven, but merely suspected to be linked to organized crime, even though no criminal conviction whatsoever has been reached in relation to such conduct. While this sort of legal instrument is quite common in the states of common law legal culture, it stands in direct contradiction to the basic principles of criminal law (both substantive and procedural) of many states of the civil (continental) one.

This paper analyses and critically discusses CUW. It provides an overview of the theoretical background, including the historical development and requirements of the case-law of the Court of Justice of the European Union (together with its predecessor the European Court of Justice, CJEU) and of the European Court of Human Rights (ECtHR), followed by criticism of and arguments in defence of this instrument, with a recommendation for the future.

2. THEORETICAL BACKGROUND

Traditionally, criminal law allows confiscation of proceeds of crime or its substitutive assets through criminal sanctions. This approach is followed by most, if not all, states around the globe. In some jurisdictions, additional options that extend the applicability of confiscation of crime-related assets exist alongside these, relaxing the required nexus of the assets to the crime or lowering the burden of proof necessary to establish the link to an individually specified crime. Typically, the following categories of such measures may be distinguished:

---

[2] 1. Member States shall take the necessary measures to enable, where, in accordance with national law, the confiscation measures of Articles 12 to 15 may not be applied, the confiscation of property identified in the context of an investigation in relation to a criminal offence, provided that a national court is satisfied that the identified property is derived from criminal conduct committed within the framework of a criminal organisation and that conduct is liable to give rise, directly or indirectly, to substantial economic benefit.

2. When determining whether the property referred to in paragraph 1 should be confiscated, account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which may include:
   (a) that the value of the property is substantially disproportionate to the lawful income of the affected person;
   (b) that there is no plausible licit source of the property;
   (c) that the affected person is connected to people linked to a criminal organisation.
3. Paragraph 1 shall not prejudice the rights of bona fide third parties.
4. For the purposes of this Article, the notion of *criminal offence* shall include offences referred to in Article 2(1) to (3), where such offences are punishable by deprivation of liberty of a maximum of at least four years.
5. Member States may provide that the confiscation of unexplained wealth in accordance with this Article shall be pursued only where the property to be confiscated has been previously frozen in the context of an investigation in relation to a criminal offence committed within the framework of a criminal organisation.

1. Conviction-based confiscation following final criminal convictions;
2. Confiscation of assets transferred to a third party in effort to thwart the conviction – based confiscation;
3. Extended confiscation based on criminal convictions but covering additional assets not necessarily immediately linked to the convicted crime;
4. Non-conviction-based confiscation within criminal proceedings where conviction is impossible due to procedural obstacles (death, illness, flight of suspect).

This is the logic underlying most EU-law predecessors of the CUW provided for in Art. 16, and it is also the logic of Arts. 12–15 of Directive 2024/1260.[3] However, Art. 16 constitutes an altogether different novelty.

HISTORY OF CUW

CUW has a rich tradition in common law jurisdictions. Its origins are commonly traced back to the United States of America of the 1970s, where similar confiscation measures unrelated to conviction for a particular crime were introduced in the fight against narco-mafias and other distinctive forms of organised crime, given that the classical criminal procedural burden of proof of *"beyond reasonable doubt"* was very often impossible or at least very complicated to reach to confiscate the assets originating in organized crime directly in criminal proceedings.[4] From there, it gradually spread to other common law jurisdictions. In 2016 this instrument was still called *relatively new* in the Australian context,[5] which is considered the first jurisdiction to introduce the most typical form of CUW in common law countries – the unexplained wealth order – doing so in the state of Western Australia in 2000.[6] Ireland had established a similar measure one year earlier.[7] In the United Kingdom, whose unexplained wealth order is probably the most extensively discussed in academic literature, such an order was introduced with effect from 2018.[8]

The defining characteristic of CUW in the common law milieu is that it is regarded as a purely civil instrument,[9] or at least as something outside of the rigorous confines of

---

3 DORNBIERER, A. *Targeting Unexplained Wealth: Implications of the EU's 2024 Directiveon Asset Recovery*. Policy Brief 14. International Centre for Asset Recovery, 2025, p. 2.

4 KOLAROV, T. Challenges in Settling Non Conviction Based Civil Confiscation of Unexplained Wealth. *Journal of Money Laundering Control*. 2021, Vol. 24, No. 3, p. 484.

5 SMITH, M. – SMITH, R. G. Procedural Impediments to Effective Unexplained Wealth Legislation in Australia. *Trends & Issues in Crime and Criminal Justice*. 2016, No. 523, p. 1.

6 MOISEIENKO, A. The Limitations of Unexplained Wealth Orders. *Criminal Law Review*. 2022, No. 3, p. 243.

7 MCINTYRE, J. L. – ASLETT, D. – BUITENDAG, N. *Journal of Money Laundering Control*. 2023, Vol. 26, No. 7, p. 87.

8 CLANCY, Á. *Unexplained Wealth Orders and the UK's Anti-Corruption Regime*. Oxford: Oxford University Press, 2025, p. 97.

9 See, e.g., THOMAS, J. D. Unexplained Wealth Orders in the Criminal Finances Bill: A Suitable Measure to Tackle Unaccountable Wealth in the UK? *Journal of Financial Crime*. 2017, Vol. 24, No. 2, p. 178.

criminal law.[10] The burden of proof is civil,[11] thus much lower, the nature of this measure is deemed to be not punitive, but rather reparatory, deterrent, and preventive,[12] the proceedings are supposed to be aimed *in rem*, not *in personam*.[13] Another characteristic trait of CUW measures is that no specific link to the criminal origin of the assets needs to be proven,[14] though this element varies – Art. 16, for example, has not abandoned the requirement of a connection between the asset and criminal conduct. The details naturally differ, and the nature of this instrument may be hybrid on the civil/criminal spectrum. For example, in some jurisdictions, CUW proceedings are civil, but the addressee risks criminal liability for giving false or misleading statements, and even failure to comply with the court's order to explain the origin of the wealth may constitute the criminal offence of contempt of court.[15]

In the EU context, the evolution of the legal basis for CUW can be traced from Council Framework Decision 2005/212/JHA of 24 February 2005, on Confiscation of Crime – Related Proceeds, Instrumentalities and Property (FD 2005/212) on to the recent Directive 2024/1260. This historical development reveals a significant transformation of both the CJEU's and the EU legislature's approach to competence for the confiscation of unexplained wealth. The original FD 2005/212 worked with the wording *"confiscation of crime-related proceeds, instrumentalities and property"*, without explicitly defining the corresponding applicable procedural framework, thereby generating the interpretative challenges addressed in case *AGRO IN 2001* (see below). FD 2005/212 made no explicit provision for confiscation of unexplained wealth, leaving such measures to Member State discretion.

The next step was 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. Its language in Art. 1 tied its scope to confiscation of property *"in criminal matters"*, while Art. 2 stated that the Directive was without prejudice to the procedures that Member States may use to this end. One of the most important novelties that the Directive 2014/42 introduced was the concept of extended confiscation (Art. 5). Its logic lies in allowing MS, once a person has been finally convicted of certain non-trivial offences, to – under certain conditions – confiscate that person's property of suspected criminal origin, even where MS law enforcement agencies failed to secure a conviction for the suspected source criminal activity.

---

10 See, e.g., CAMPBELL, L. – CLANCY, Á. The Principled and Practical Limits to Unexplained Wealth Orders. *University of Western Australia Law Review*. 2024, Vol. 52, No. 1, p. 35.

11 See, e.g., BOGGESS, K. – ZAGARIS, B. Money Laundering, Bank Secrecy, and Transparency. *International Enforcement Law Reporter*. 2024, Vol. 40, No. 4, p. 149.

12 See, e.g., RAOF, N. A. – AIMAN SULAIMAN, N. M. Show Me the Money! Unexplained Wealth and Civil Forfeiture in Malaysia. *IIUM Law Journal*. 2023, Vol. 31, No. 2, p. 136.

13 See, e.g., SALWA, A. M. The Future of Asset Confiscation in Indonesia Through the Unexplained Wealth Order (UWO): A Comparative Study with the United Kingdom. *Jurist Diction*. 2026, Vol. 9, No. 1, p. 11.

14 MCINTYRE – ASLETT – BUITENDAG, *c. d.*, p. 87.

15 See in the English context, e.g., LOVEJOY, M. Unexplained Wealth Orders and the Right Not to Self-Incriminate [Pre-Print Chapter for Book]. *Analysing Organised Crime, Financial Crime and Criminal Justice: Theoretical Concepts and Challenges* [online]. Routledge Spring, 2021, p. 3 [cit. 2026-04-10]. Available at: https://osf.io/preprints/lawarxiv/mbtdr_v1.

A huge leap forward was represented by 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, whose Art. 1 introduced the phrase freezing orders and confiscation orders issued *"within the frameworks of proceedings in criminal matters"* yet maintained ambiguity as to what constitutes *"criminal matters"* for EU law purposes. Recital 13 clarifies that *"proceedings in criminal matters"* are an autonomous concept of the EU law, and specified that the regulation shall cover: *"all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, not only orders covered by Directive 2014/42/EU"*, including also other types of orders issued without a final conviction. This is supported also by Recital 18, which suggests that: *"essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation"*. The CJEU has on several occasions clarified the meaning of this concept, as discussed below. This is a significant milestone, as Regulation 2018/1805 – a tool for international judicial cooperation in criminal matters (IJCCM) – thereby permits non-criminal procedural instruments to be treated as proper IJCCM, with all associated benefits.

So far, the latest state of play has been laid down by Directive 2024/1260. Its Art. 1 maintains the wording *"within the framework of proceedings in criminal matters"*, whose character as an autonomous EU law concept is reaffirmed in Recital 7, which refers to the CJEU's case-law. Directive 2024/1260 is based on Arts. 82(2), 83(1) and (2), and 87(2) of the Treaty on Functioning of the European Union (TFEU), providing multiple sources of competence: Art. 83(1) TFEU addresses confiscation related to certain categories of crimes, including organized crime, terrorism, trafficking, money laundering, and corruption – precisely the types of offences typically associated with unexplained wealth accumulation.

Of course, this measure must satisfy certain standards. The relevant one is that, as already noted, such a measure must occur *"within the framework of proceedings in criminal matters"*. While the exact scope of this term remains uncertain, it is undisputable within the confines of Art. 16 that it requires connection to *"criminal conduct committed within the framework of a criminal organisation"*, must involve conduct *"liable to give rise, directly or indirectly, to substantial economic benefit"* and the confiscation decision has to be issued upon the *court's satisfaction* that the identified property is derived from criminal conduct.

CJEU'S CASE-LAW

Probably the most significant decision of the CJEU regarding CUW is the famed *AGRO IN 2001* case,[16] which interpreted the Directive 2014/42 regarding the scope of EU's competence in legal instruments against unexplained wealth. In that case, the CJEU assessed the nature of the Bulgarian domestic legal regulation of confiscation, which was not conducted in criminal proceedings but was aimed at the confiscation of

[16] Judgment of the CJEU of 19 March 2020, case C-234/18, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v. BP and Others*.

assets with no identified legal source of acquisition. The CJEU held that confiscation measures related to offences not listed in EU harmonisation instruments fall outside the scope of Art. 3 of Directive 2014/42,[17] potentially excluding significant categories of unexplained wealth cases from the EU law regime. As the Bulgarian domestic legal regulation was found to be civil or administrative in nature,[18] coexisting with possible criminal proceedings yet independent of them, the CJEU found it likewise outside the scope of FD 2005/212, thereby affording Member States considerable leeway to potentially circumvent EU standards through purely domestic legal classification, while arguably retaining a punitive or deterrent character to at least some degree. It further explicitly permitted the Member States to allow civil law proceedings regime for confiscation which are not subject to the determination of a criminal offence or to a previous conviction.

When contemplating legal avenues for CUW, the question of the presumption of innocence immediately arises. The CJEU has established fundamental principles for protecting the presumption of innocence specifically in the context of confiscation proceedings affecting unexplained wealth, building upon the foundational case *AH and Others*,[19] where it (against the background of plea bargaining) laid down several general principles of the presumption of innocence applicable also in the CUW legal environment. It concluded that Art. 48 of the Charter of Fundamental Rights of the European Union (Charter) corresponds to Art. 6(2) and (3) of the European Convention on Human Rights (Convention), requiring that *"it is necessary to take account of Article 6(2) and (3) of the ECHR for the purposes of interpreting Article 48 of the Charter, as a minimum threshold of protection"*.[20] In relation to the right to property enshrined in Art. 17 of the Charter, the CJEU ruled that limitations on the exercise of this right are permissible where necessary to meet objectives of general interest recognised by the European Union, provided that the principle of proportionality is respected.[21]

The CJEU has further developed these general principles specifically in the context of confiscation. As a very general rule, the CJEU requires that where confiscation proceedings are directed at a third party not involved in the underlying criminal proceedings for the source crime, certain procedural safeguards must be available, such as the opportunity to effectively present that party's case against the confiscation before a court of law and access to a lawyer.[22] The CJEU has also ruled, in the context of attributing a criminal offence of a natural person in a controlling function to a legal person, that even though it is not precluded to penalise a mere objective fact, the entity

17 Ibid., § 47.
18 Ibid., §§ 60–42.
19 Judgment of the CJEU of 5 September 2019, case C-377/18, *criminal proceedings against AB and Others*.
20 Ibid., § 41.
21 Judgment of the CJEU of 12 December 2024, case C-419/23, *CN v. Nemzeti Földügyi Központ*, § 74.
22 Judgment of the CJEU of 21 October 2021, joined cases C-845/19 and C-863/19, *criminal proceedings against DR and TS*, §§ 79–82. This decision was made against the backdrop of the so-called extended confiscation.

in question cannot be completely deprived of the possibility to contest the underlying conviction of the natural person.[23]

It is evident that the CJEU, on the one hand, has delimited private and criminal instruments for confiscation in general – and CUW in particular – with possible repercussions for the applicability of judicial cooperation instruments, while on the other hand it has been quite permissive towards the concept of CUW and its impact on human rights. In conclusion, the CJEU's case-law does not pose a fundamental obstacle to or limitation on CUW, requiring only very basic fair trial guarantees. In its case-law, it has thus far adhered closely to the ECtHR's jurisprudence. It is therefore useful to examine the ECtHR's relevant case-law as well.

ECTHR CASE-LAW

The ECtHR has had numerous opportunities to set out its position on non-conviction-based confiscation of unexplained wealth, establishing fundamental human rights requirements under Arts. 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms and, of course, under Art. 1 of Protocol No. 1 to the Convention. Notably, the ECtHR has consistently accepted CUW and its case-law does not impose as stringent requirements on it as one might expect.

One of the most important early insights on this issue may be found in *M. v. Italy*,[24] where the ECtHR acknowledged that confiscation following an imposition of a preventive protective measure for demonstrating *mafia life-style* and a confiscation of property of suspected unlawful origin following a trial with flipped burden of proof was not inconsistent with the Convention neither in the Art. of Protocol No. 1 nor under Art. 7 of the Convention. Many subsequent rulings have followed that line. As a notable example, *Phillips v. United Kingdom*[25] further expanded the distinction between post-conviction confiscation and true non-conviction-based procedures. In that case, the ECtHR confirmed that Art. 6(2) of the Convention (presumption of innocence) does not apply to post-conviction confiscation proceedings, because such proceedings are analogous to sentencing rather than to the determination of a criminal charge. This early line of case-law was animated by the principle that neither an individual nor a criminal organisation should profit, to the detriment of the community, from property obtained through criminal activity[26] and that crime must not pay,[27] which the ECtHR has maintained ever since.

As the presumption of innocence does not apply in this context, nothing prevents Member States from creating legal presumptions to the detriment of the convicted person in respect of property deemed to be of criminal origin, or even to the detriment of

---

[23] Judgment of the CJEU of 10 November 2022, case C-203/21, *criminal proceedings against DELTA STROY* 2003, §§ 61–63.

[24] Decision of the Commission of 15 March 1991, case *M. v. Italy*, app. No. 12386/86.

[25] Judgment of the ECtHR of 5 July 2001, case *Phillips v. United Kingdom*, app. No. 41087/98.

[26] See, e.g., judgment of the ECtHR of 22 February 1994, case *Raimondo v. Italy*, app. No. 12954/87, § 30.

[27] See, e.g., judgment of the ECtHR of 15 January 2015, case *Veits v. Estonia*, app. No. 12951/11, § 71. It can of course be argued that year 2015 is not that much old to be labelled as demonstrating the *original* line of case-law, but it expresses this thought explicitly while referring to the original case-law.

that person's close relatives such as family members, and to introduce the evidentiary standard of the balance of probabilities in place of beyond reasonable doubt.[28] Nevertheless, the ECtHR has established certain minimum crucial safeguards, including the right to a public hearing at which the affected person may adduce documentary and oral evidence, and the effective opportunity to rebut presumptions applied by the state. The reversal of burden of proof in such contexts does not violate Art. 6(1) of the Convention, provided these safeguards are maintained.[29]

This approach was taken in case of *pure* civil confiscations. *Butler v. United Kingdom*[30] is worth mentioning here, as it addressed civil forfeiture proceedings independent of any criminal conviction. The ECtHR clarified that civil forfeiture proceedings are not subject to Art. 6(2) of the Convention when they operate as *in rem* procedures against property rather than determinations of criminal responsibility against individuals, without triggering the presumption of innocence in favour of the defendant. In essence, the ECtHR's approach to this issue may be summarised as follows: 1) it is acceptable under the Convention to have confiscation measures of property linked to serious crime without prior existence of a criminal conviction; 2) the burden of proof may be legitimately shifted to the defendant (respondent); 3) the scope of these measures may include not only direct proceeds of crimes but also other related property; and 4) the defendant (respondent) need not be suspected of direct involvement in the source crime; it suffices that the person holds ownership rights *sine bona fide*.[31]

The fundamental preconditions of any legitimate interference with the right to property enshrined in Art. 1 of Protocol No. 1 must be satisfied. Prevention of crime has consistently been accepted by the ECtHR as a legitimate aim of such non-conviction-based confiscation measures.[32] It has also afforded states a wide margin of appreciation in implementing property-oriented measures in combating specific serious forms of crime afflicting their societies at a given time.[33]

Another human rights issue raised in relation to the confiscation of unexplained wealth emerges from Art. 7 of the Convention, which enshrines the *nullum crimen sine lege* principle. In this aspect, *G.I.E.M. S.R.L. and Others v. Italy*[34] represents the most significant development in the ECtHR's case-law regarding non-conviction confiscation. The Grand Chamber established that Art. 7 of the Convention applies to confiscation measures that constitute *penalties* within the autonomous Convention meaning, regardless of their domestic legal classification, abandoning to a certain extent

---

28 See, e.g., judgment of the ECtHR of 12 May 2015, case *Gogitidze and others v. Georgia*, app. No. 36862/05, § 107.

29 See, e.g., session of the ECtHR of 4 April 2001, case *Riela v. Italy*, app. No. 52439/99.

30 Decision of the ECtHR of 27 June 2002, *Butler v. the United Kingdom*, app. No. 41661/98, Reports of Judgments and Decisions 2002-IV, p. 349.

31 See, e.g., judgment of the ECtHR of 26 June 2018, case *Telbis and Viziteu v. Romania*, app. No. 47911/15, § 76.

32 See, e.g., decision of the ECtHR of 10 April 2003, case *Yildirim v. Italy*, app. No. 38602/02.

33 See *Gogitidze and others v. Georgia*, § 108.

34 Judgment of the Grand chamber of the ECtHR of 28 June 2018, case *G.I.E.M. S.R.L. and Others v. Italy*, app. Nos. 1828/06 and 19029/11.

its previous strict criminal/civil nature duality.[35] When answering the natural question of what constitutes the penalties within the autonomous meaning, the ECtHR applied the Engel criteria, examining 1) domestic legal classification; 2) nature of the offence; and 3) nature and degree of severity of the penalty.[36] This means that substantive assessment by the ECtHR prevails over formal classification.

In another vein, as each confiscation of property constitutes *per se* an infringement of the right to property,[37] the ECtHR has applied proportionality analysis to confiscation affecting property rights. Confiscation measures must satisfy the three-part test: 1) lawfulness – clear legal basis with adequate accessibility and foreseeability; 2) legitimate aim – public interest including crime prevention and asset recovery; and 3) proportionality – fair balance between individual and community interests. The last criterion is notably flexible, the ECtHR having described it as depending on numerous factors, including the conduct of the owner of the property.[38]

Despite the general acceptance of CUW, the ECtHR has also held on multiple occasions that the scope of this measure must not be excessively broad or unduly decoupled from specific criminal activity, requiring at least some ascertained link, even if not established by a criminal conviction.[39] It has thus found unacceptable legislation that would require defendants to prove the lawfulness of their income over many years without establishing clear criteria for demonstrating such lawfulness and without the state providing a sufficiently substantiated basis for its assumption that the income is linked to illegal activity[40] or that lacks at least some estimation of the extent of the property potentially acquired through criminal activities.[41]

The ECtHR has established minimum procedural requirements for non-conviction confiscation affecting unexplained wealth, including 1) right to effective legal challenge;[42] 2) access to evidence; 3) access to legal representation; 4) reasonable time limits; and 5) reasonable and proportionate standards for the assessment of unexplained wealth existence itself. Even from this brief overview of the ECtHR's case-law, it can be inferred that its recent jurisprudence signals a shift away from the very broad margin of appreciation afforded to the national legislature and practice, towards enhanced procedural protection in CUW matters, but without prejudice to the possibility of CUW as a measure outside of the scope of the criminal limb of Art. 6 of the Convention.

---

35 *G.I.E.M. S.R.L. and Others v. Italy*, § 233.

36 In the confiscation context, see *M. v. Italy.*

37 See *inter alia multa*, decision of the ECtHR of 4 September 2001, case *Rieal and others v. Italy*, app. No. 52439/99.

38 See, e.g., judgment of the ECtHR of 24 October 1986, case *Agosi v. The United Kingdom*, app. No. 9118/80, § 54.

39 See, e.g., judgment of the ECtHR of 26 September 2023, case *Yordanov and others v. Bulgaria*, apps. No. 265/17 and 26473/18, §§ 123–125.

40 See, e.g., judgment of the ECtHR of 3 March 2015, case *Dimitrovi v. Bulgaria*, app. No. 12655/09, §§ 47–53.

41 See, e.g., judgment of the ECtHR of 15 January 2015, case *Rummi v. Estonia*, app. No. 63362/09, § 108.

42 See, e.g., judgment of the ECtHR of 10 April 2012, case *Silickiene v. Lithuania*, app. No. 20496/02, § 47.

3. CRITICAL ANALYSIS

CRITICISM

The concept of CUW is susceptible to criticism on many levels, both theoretical and practical, and has indeed attracted more than a generous share of it. The most profound criticism rests on human rights concerns,[43] namely that the entire concept operates through a denial of the right to silence and the presumption of innocence[44] as fundamental principles of criminal procedure[45] by simply circumventing them. Moiseienko even calls it a *"deliberate concession to human rights that would otherwise arise"*.[46] This critique is very difficult, if even possible, to rebut. Circumventing the strict procedural guarantees of criminal procedure by abandoning the necessity to establish criminality at the outset[47] is the very core of the philosophy of CUW. Since its origin, it exists as a direct consequence of the challenges law enforcement faces in executing the ideal of *crime doesn't pay* in everyday life, rendering conviction-based and other traditional instruments toothless not only against the upper echelons of criminal organisations, but also frequently against ordinary ones. The core purpose of CUW is to override the evidentiary standard of criminal procedure – amounting to an acknowledgment that, on the standard playing field of criminal law, organised crime is effectively unbeatable at any meaningful scale.

A further objection concerns the proportionality of CUW.[48] Its addressees risk losing substantial property not for what they obtained through crime, but for what they cannot document. The competing interest – justifying this burden – is a vague, imprecise, and unproven suspicion of some unspecified link between the assets and some unspecified crime. Most jurisdictions address this concern by requiring certain *de minimis* criteria, on the basis that where property is grossly disproportionate to a person's lawful income beyond a given threshold, it is legitimate to presume its illicit origin.

A different critique holds that CUW exemplifies the ever-growing powers vested in asset-recovery authorities in a self-serving manner.[49] This objection is among the more easily rebutted. As the operational capacity of criminal organisations expands owing to technological development, globalisation, and related factors, the operational capacity of law enforcement agencies must inevitably keep pace.

---

43 See, e.g., DEWI, D. A. S. et al. Asset Seizure Regulations Against Public Officials with Unexplained Wealth (A Comparative Study of the Philippines and Australia). *Jurnal Pembangunan Hukum Indonesia* [Indonesian Journal of Legal Development]. 2025, Vol. 7, No. 3, p. 383.

44 See, e.g. BARTELS, L. Unexplained Wealth Laws in Australia. *Trends & Issues in Crime and Criminal Justice*. 2010, No. 395, p. 1; or LOVEJOY, *c. d.*, p. 2.

45 Borlini and Rose called them along with right to own property as *especially pertinent human rights* in this context. BORLINI, L. – ROSE, C. The Normative Development of Laws on Asset Preservation and Confiscation: An Examination of Emerging Best Practices. *International Journal of Constitutional Law*. 2024, Vol. 22, No. 2, p. 517.

46 MOISEIENKO, *c. d.*, p. 230.

47 CAMPBELL – CLANCY, *c. d.*, p. 43.

48 See, e.g., CLANCY, *c. d.*, p. 110.

49 Ibid., p. 87.

However, placed within the broader framework of a slippery slope argument, this objection acquires some relevance. As Clancy aptly pointed out, recent legislative developments in the United Kingdom have moved in the direction of enabling CUW not only in relation to assets of suspected criminal origin but also in relation to assets linked to politically exposed persons.[50] Such seemingly inconspicuous shifts are naturally a source of scepticism and distrust as to what may follow. It is also worth noting that even the notion of CUW itself represents a linguistic shift – from tying the measure to assets linked to crime (it is not "criminally suspicious wealth") to the undocumented character of the assets – a point that carries weight, as this shift in some jurisdictions also reflects the legal foundations and preconditions of the instrument.[51]

A further, more practical reservation about CUW in practice concerns its international dimension. For example, an overly heavy reliance on convictions for the source crime in third states with questionable human rights standards has been identified as a weakness of the current UK CUW framework.[52] Moreover, in the EU law context, an objection has been raised to the effect that CUW insufficiently fulfils the international obligation to return the assets to the third countries of origin.[53] The handling of criminal assets very frequently occurs in a cross border fashion, typically involving third states with very different approaches to law and society, and this aspect cannot therefore be dismissed as rare or merely academic.

Even the practical outcomes of deploying this measure in real life – ostensibly its most promising advantage and the strongest argument in its favour – have come under fire.[54] For example, for the first five years since unexplained wealth orders came to effect in the UK, only nine of them were issued, necessitating further legislative amendments to increase their utility.[55] A frequently noted precondition for CUW's effectiveness is that authorities must first identify the suspicious property – something that is far from guaranteed.[56]

One of the aspects of CUW most susceptible to serious critique is its selectivity. I readily understand the argument that desperate times call for desperate measures and that, given the extensive capabilities of organised crime members to ensure that they peacefully enjoy the ill-gotten fruits of their criminal activities, we are indeed living in such desperate times and that every potentially effective option deserves to be explored and possibly introduced. However, this proposition is not unique to the fight against

---

[50] CLANCY, *c. d.*, p. 95.

[51] KOLAROV, *c. d.*, p. 484.

[52] MUJUZI, J. D. Relying on Foreign Convictions from Non European Economic Area States to Investigate Unexplained Wealth for the Purpose of Combating Money Laundering in the United Kingdom. *European Criminal Law Review*. 2019, Vol. 9, No. 1, p. 125.

[53] See, e.g., OCHNIO, A. H. Recent Developments in EU Anti Corruption Strategy: The Missing Element of the Return of Corrupt Assets to "Victim Countries". *Journal of Money Laundering Control*. 2024, Vol. 27, No. 7, p. 8.

[54] See, e.g., CLANCY, *c. d.*, p. 112; or BIKELIS, S. Chasing Criminal Wealth: Broken Expectations for the Criminalization of Illicit Enrichment in Lithuania. *Journal of Money Laundering Control*. 2022, Vol. 25, No. 1, p. 96.

[55] BOGGESS – ZAGARIS, *c. d.*, p. 150.

[56] PRASETYO, *c. d.*, p. 314.

proceeds of crime or money laundering. There are many examples in many fields of criminality that face very similar problems. High presumed latency, evidentiary difficulties, and the limited reach of conviction-based instruments to prevent reoffending and protect victims – these themes occur throughout criminal law in our recent postmodern, hyper-technologized era. This state of affairs also frequently tests the boundaries of classical criminal law doctrines and sometimes finds them outdated; yet CUW is, to my knowledge, the only instance in which this general process has been so drastic as to directly, openly, and deliberately deny the presumption of innocence on the grounds that it is difficult to overcome.

Consider an analogous situation in domestic violence, where a suspect cannot be prosecuted for lack of evidence. Would we accept special proceedings – not formally criminal – in which behavioural indicators (such as an angry temperament, a fondness for violent sports, films or videogames, or ties to persons already convicted of violent crimes) alone suffice to trigger a procedure requiring the suspect to rebut a presumption of their violent character, under threat of liberty-restricting measures designated as "therapy for unrebutted aggression"? Such proceedings would be inconceivable, as they would undermine the foundational structure of criminal law. Analogous constructions could be devised in relation to other categories of offence where establishing liability is equally problematic (e.g., imposing "non-criminal measures" based on suspicious on-line behaviour to overcome the difficulties of proving cybercrime or mandating "non-criminal" measures in case of alcohol or illicit substances abuse, as this risky behaviour often leads to crime. Once the procedural safeguards of criminal law are set aside, the possibilities for protecting society from perceived threats become limitless – yet such an unbridled protective regime would be incompatible with the rule of law.

In this light, it is clear that the *in rem* nature of CUW plays an important role, as a natural counterargument to the scenario described above is that while such proceedings would address the attributes, character, and history of a *person*, CUW is directed at *assets*. However, the connection[57] between CUW and the person at whom it is directed – inextricable to at least a significant degree – is striking, even in the context of Art. 16. The conditions under which a court may be satisfied that the property in question derives from criminal conduct within an organised criminal group are all tied to the person, not to the property itself. At this point, I submit that this criticism cannot be easily deflected.

DEFENSE

As valid as the foregoing arguments may be, three things are certain 1) Directive 2024/1260 must be transposed; 2) the existing case-law of the CJEU and the ECtHR is here to stay; and 3) confining the confiscation of proceeds of crime exclusively to full criminal proceedings is unrealistic at the current stage of development of the EU. The technological, societal, and economic challenges to maintaining this strict approach are self-evident. Something must be done differently, if we are not to abandon

[57] See, e.g., LOVEJOY, *c. d.*, p. 8.

the EU's ambition of constituting an area of freedom, security, and justice. These observations may appear pragmatic, even defeatist; yet pragmatic necessity has overridden theoretical ideals in criminal law before. E.g., the expansion of corporate criminal liability in EU Member States in last decades followed similar trend.

The drawback of pragmatic arguments is that however strong or even decisive they may be, they need not be convincing on a theoretical and conceptual level. This does not therefore relieve legal scholars of their obligation to reconcile pragmatic requirements with theoretical concepts as far as possible, in order to produce the most meaningful and sustainable outcomes. As mentioned above, Art. 16 departs from its common law inspirations, and is deliberately ambiguous as to the nature of the confiscation; the definition of the subject matter in Art. 1 of Directive 2024/1260, however, as noted above, places it within the *"criminal matters framework"*. It remains to be seen whether the CJEU will insist that CUW constitute an integral part of criminal proceedings, or whether it will recognise purely civil or administrative proceedings as falling within this framework, provided there is a necessary connection to prior criminal proceedings from which a suspicion of the criminal origin of the assets arises.

In my opinion, that would actually be a viable way out. CUW as purely civil proceedings would not be altogether inconceivable even within the continental legal tradition. From a very general perspective, it lies at the very heart of civil proceedings that parties must bear both the burden of allegation and the burden of proof in respect of their claims. The situation with CUW is of course different by its nature and objectives, but schematically both contexts share a number of common traits.

In both, the plaintiff claims that the defendant is not the legitimate owner of the property. The plaintiff must base this claim on tangible evidence that at least potentially undermines the defendant's claimed rights. Once the plaintiff succeeds in convincing the court of this, it falls to the defendant to rebut the plaintiff's claims and to assert their rights by producing the necessary records, deeds, contracts, and so forth. If the defendant fails to do so, the case is lost. In civil proceedings, even the most honest and law-abiding citizen, whose property is not under the slightest suspicion of having been obtained through illicit means, may lose a case simply because they are unable to document their claims or entitlements to the property. In civil law, it is also not uncommon for part of the plaintiff's assertion to be supported by a legal presumption, so that the plaintiff need not prove the case in its entirety, but merely raise a reasonable claim (e.g., presumptions in consumer claims, discrimination claims, liability of hazardous enterprises, etc.).

This is where I locate the most fundamental aspect of CUW as an instrument directed primarily *in rem*, not *in personam.* While no one is required to prove their good character and personality before a court of law and accordingly need not take precautionary evidentiary measures to that end, everyone must reasonably expect that they may be required to prove their property rights in court. This legal environment would suit CUW considerably better than criminal proceedings, or still worse, undefined pseudo-criminal proceedings.

It is not a private dispute between two individuals, and the state does not challenge property rights by asserting its own ownership. But if certain property is of criminal origin, it is not even lawfully the property of the defendant. In most cases, under private law, it still belongs to the victim of the crime, unless the *bona fide* rights of a third party mentioned in Art. 16(3) come into play. Nor is it unfamiliar to civil procedural law that not all civil claims need be brought directly by the person who holds the corresponding rights. In instances where such a person is unable to assert their rights for objective reasons (being a minor, of unsound mind, missing, etc.), a legal guardian or other procedural representative exercises those rights on their behalf. Would it be contrary to the foundations of civil law to presume that, where there is reasonable suspicion that certain property is of criminal origin, there is a victim to whom it belongs and that the agents of the state act as a form of legal guardian on the victim's behalf?

It may be argued that there are indeed many victimless crimes in which this civil concept would not operate effectively (e.g., counterfeiting of currency, bribery, tax evasion), or crimes in which the harm to the victim consists in something other than the seizure of property (e.g., selling drugs or weapons), such that no one holds a direct private-law claim to the property. However, in most instances of them, the property either infringes directly upon the rights of the state itself (counterfeiting, tax evasion profits) or constitutes an illicit enrichment. The concept of state guardianship that I propose would not constitute genuine procedural guardianship in the form of direct representation; it would instead ground CUW on a notion of general, abstract, and derivative guardianship in favour of all individuals or of the state that may have been economically harmed by the source crime, with the aim of restoring the private-law economic equilibrium. It would amount to more of a theoretical grounding that legitimises the conduct of CUW in civil proceedings than an actual procedural role. In some common law jurisdictions, CUW is conceived of as merely a civil debt owed by the defendant to the Commonwealth.[58]

However, as mentioned above, there is yet another pragmatic reason why Directive 2024/1260 intentionally employs the ambiguous phrase *"framework of proceedings in criminal matters"* – the applicability of functioning mechanisms of IJCCM also in CUW. The risk of admitting the civil nature of CUW is threefold: the EU may lack competence to harmonise this specific area; the CJEU may find such regulation in breach of the requirement of Art. 1 of Directive 2024/1260; and third states may refuse to provide IJCCM in response to a request made within openly acknowledged civil proceedings.

The objection of possible lack of competence arises from the blurred legal nature of CUW. Its borderline character between civil and criminal legal instruments has been observed many times.[59] There is no general competence of the EU to harmonise substantive civil law, as the EU's competence to harmonise instruments of judicial cooperation in civil matters based on Art. 81(2) of the TFEU doesn't cover the creation

[58] GLOVER, J. Trusts at the Intersection of Tax and Criminal Laws: Unpaid Tax, 'Unexplained Wealth Orders' and the Proceeds of Crime Act 2002. *Australian Tax Forum*. 2021, Vol. 36, No. 1, p. 37.

[59] See, e.g., SAKELLARAKI, A. EU Asset Recovery and Confiscation Regime – Quo Vadis? A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction? *New Journal of European Criminal Law*. 2022, Vol. 13, No. 4, p. 495, footnote 90. The Commission itself acknowledged that there is a plurality of approaches to the legal nature CUW among the Member States. See Report from the Commission to the European Parliament and to the Council: Asset Recovery and Confiscation: Ensuring That Crime Does Not Pay, COM(2020) 217 final [online]. Brussels, 2. 6. 2020 [cit. 2026-05-11]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0217.

of specific civil delicts such as CUW, as it aims at procedural sphere, most notably to enforcement of civil decisions.[60] However, the EU has some limited competence to harmonise private law in particular fields based on matter-oriented provisions (e.g., Art. 114 or Art. 169 of the TFEU or secondary EU law regarding specific fields of regulation), although usually with quite strict limitations. E.g., in relation to Art. 114 of the TFEU (its predecessor), any measure adopted on its basis requires a *"genuine object of the improvement of the conditions for the establishment and functioning of the internal market"*,[61] namely, e.g., to prevent distortion of competition[62] or to secure another value enshrined in the primary treaties, such as public health requirements etc.[63]

In the sphere of civil delicts (damages, torts) and quasi delicts (unjust enrichment), the CJEU's case-law has so far dominantly followed the approach of merely assessing whether the national law regulating them is compatible with the EU law.[64] Despite that, more than once has the CJEU stepped into this domain, e.g., by requiring equal legal consequences for breaching national law and EU law as a part of core principles of EU law (principle of effectiveness, principle of equivalent protection).[65] Regarding unjust enrichment, which is probably the closest purely private law concept to CUW, the CJEU has consistently acknowledged that unjust enrichment law are consistent with the EU law.[66] I see a possible legal venue based on the core principles of the EU law also for CUW. The CJEU has on multiple occasions and in different contexts related to the principle that no one may benefit from their own dishonest behaviour.[67] Creating a unified inner market and enjoyment of the economic freedoms lying at the core of the project of EU must go hand in hand with barring free movement of illicit property and proceeds of crime. Even if the competence actually can't be found in the existing EU law, it would be worth and more transparent to try and establish it through Art. 352 TFEU, even though it would be a very demanding task.

---

60 See, e.g., RODRÍGUEZ PINEAU, E. Article 81 [Judicial Cooperation in Civil Matters]. In: BLANKE, H. J. – MANGIAMELI, S. (eds.). *Treaty on the Functioning of the European Union – A Commentary*. Cham: Springer, 2021, p. 49.

61 Judgment of the CJEU of 5 October 2000, case C-367/98, *Federal Republic of Germany v. European Parliament and Council of the European Union*, § 84.

62 E.g., judgment of the CJEU of 8 June 2010, case C-58/08, *The Queen v. Secretary of State for Business, Enterprise and Regulatory Reform*, § 32.

63 E.g., judgment of the CJEU of 10 December 2002, case C-491/01, *The Queen v. Secretary of State for Health*, § 61.

64 See, e.g., judgment of the CJEU of 15 June 2023, case C-520/21, *Arkadiusz Szcześniak v. Bank M. SA.*, dealing with the legal consequences of annulment of mortgage contract under Polish law.

65 See, e.g., famous judgments of the CJEU of 19 November 1991, joint cases C-6/90 and C-9/90, *Francovich*; of 5 March 1996, joint cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. The Federal Republic of Germany and The Queen v. The Secretary of State for Transport*; or of 8 March 2001, joint cases C-397/98 and C-410/98, *Metallgesellschaft Ltd. and others*.

66 See, e.g., judgment of the CJEU of 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, joint cases C-295/04, C-296/04, C-297/04 and C-298/04, § 94.

67 See, e.g., *Arkadiusz Szcześniak v. Bank M. SA.*, § 81; judgment of the CJEU of 9 March 1999, *Centros Ltd. V Erhvervs. Og Selskabsstyrelsen*, case C-212/97, § 24; or judgment of 2 March 2010, *Janko Rottmann v. Freistaat Bayern*, C-135/08, § 52.

I believe the risks are worth taking. If a new civil measure is constructed and a strong link is maintained to the narrow, limited definition of suspicion of criminal origin of the property in question – as set out in Art. 16(1) and (4) and Art. 2(1), (2), and (3) of Directive 2024/1260, and not refuted in prior criminal proceedings – as the two key preconditions for initiating civil CUW proceedings, I claim that this would still satisfy the requirement of the *framework of proceedings in criminal matters* to the CJEU's satisfaction. Even if it is not this case, judicial cooperation in civil matters may be used as a substitute. And if, by any chance, the reason the EU drafted Art. 1 of Directive 2024/1260 in this manner was a concern that a purely civil nature would hamper IJCCM, I am convinced that this problem would likewise be solvable by appropriate tools far more respectful of the fundamental principles of criminal law.

The dangers and negative consequences of criminal assets and their unrestrained use by criminals are so widely shared among states internationally that most of them would surely be interested in a treaty which would allow for civil (or also criminal in one package) measures of cooperation as well. Of course, there are states that benefit from harbouring such assets and their holders, who wouldn't be interested in participating. However, these states cannot be compelled to accept the characterisation of CUW based on Art. 16 *within framework of proceedings in criminal matters* for the purposes of IJCCM already under the current arrangements if they choose not to, and their position is currently stronger as this characterisation is problematic, in comparison to a scenario in which they would have to openly state that they don't want to engage in a project of international cooperation in civil CUW measures.

4. CONCLUSION

This paper has examined the conceptual problems of CUW as mandated for all MS by Art. 16. It situated CUW within its theoretical, historical, and case-law context and subjected it to critical analysis – both drawing on existing academic discourse and casting certain aspects in a new light, particularly the selectivity of an that denies the presumption of innocence with respect to the economic dimension of crime, while the same rationale would be unacceptable in other spheres of criminality. The paper concludes that a preferable approach to CUW would be to openly subject it to the civil law framework and offers argumentation in support of this position. It also identifies the pragmatic reasons for which the EU framed CUW under Art. 16 within "proceedings in criminal matters", addresses those reasons, and offers solutions that do not undermine the conclusion that, all things considered, the civil procedure route is the optimal approach.

JUDr. Jan Provazník, Ph.D., LL.M.
Masaryk University, Faculty of Law
Jan.Provaznik@law.muni.cz
ORCID: 0000-0002-2253-8958