



# ECtHR case law on asset recovery

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# Notion of possession under the ECHR: autonomous meaning

- Are proceeds of crime possession under the Convention?
- In several cases of confiscation respondent states declared that the applicant had no title to possession hence Convention rights did not apply
- In Saccoccia however the ECtHR stressed the autonomous meaning of the concept of possession and recalled that in the circumstances of the case the applicant had
  - -rented a safe where the assets were found
  - -the US court final forfeiture order was directed against him
  - -but for Austria's decision to enforce the US forfeiture order, the applicant would have been able to dispose of the cash amounts and bank accounts confiscated

# Beyeler v Italy

- Italian authorities declared that applicant could not claim right to possession because his purchase was void due to failure to declare the purchase of a work of art to the Italian authorities
- ECtHR declared that:
  - -applicant had been owner for length of time
  - -in national proceedings Italian authorities had treated and declared the applicant as owner of painting
  - -applicant was owner between time of purchase and date of exercise of pre-emption (applicant had substantive interest that was protected under the convention)

# **Insanov v Azerbaijan**

- Former minister convicted for embezzlement and sentenced with confiscation
- Court held that confiscation interfered with applicant's peaceful enjoyment of property

# Asset freezing and seizure orders

## Dzinic v Croatia

- Applicant held that seized property was grossly disproportionate vis a vis the pecuniary gain allegedly obtained as a result of the commission of offenses that were the object of the proceedings against him . The authorities had never made a proper assessment of the value of the restrained property
- ECtHR measures placed a temporary restriction on use of property and were aimed at securing possible confiscation following conviction. However the national courts, in ordering the seizure of all property indicated by the prosecutor office, never assessed whether such seizure was proportionate (value of property vis a vis pecuniary gain allegedly obtained as result of criminal conduct)
- Although applicant's allegations and requests for partial lifting of seizure were not frivolous and devoid of substance, they were ignored by the national courts which considered them speculative without further explanation

# Excessive length of seizure and confiscation proceedings

## Criteria for length of proceedings

- Violation in case of excessive length: Jouan v Belgium (3 years)
- The ECtHR held that a 3 ½ seizure of the applicant's bank accounts interfered with its possessions even if the deposited funds were the suspected proceeds of its manager's tax evasion (Benet Czech spol v Czech republic)
- 12 years seizure of valuable company voting rights to establish facts important for the criminal proceedings and prevent illegal transfers of securities did not strike the right balance between applicant's right to property and general interest to fight against economic crime (Forminster)

# Asset freezing

- No violation : Nedyalkov . But possible violation due to broad application, lack of time limits and limits of judicial review
- Possible violation in case of failure of national authorities to make provisions for reasonable living expenses, legal expenses and expenses necessary to continue exercise of profession

# Arcuri v Italy

Arcuri: asset freezing of suspected mafia members and his family .

- No violation:
- applicants had been present at hearing, had enjoyed defense rights and national courts had objectively analysed and ascertained evidence of the man's alleged criminal association and criminal origins of his assets. Measures amounted to control of use of property, were preventative and autonomous of criminal proceedings. Measures applied only to "dangerous" individuals already object to other preventative measures due to association to mafia-type organisation. Confiscation order was based on sufficient circumstantial evidence and not on mere suspicion.
- Wide margin of appreciation in implementing a major crime control policy



# Raimondo v Italy

- Raimondo: violation of applicant's right to peaceful enjoyment of possession due to failure of national authorities to remove seizure orders from registers.
- Applicant alleged damage to seized property that had been returned to him following acquittal: while in principle the ECtHR declared that certain degree of damage was inevitable but the applicant had not adduced any evidence

# Novikov v Russia

- Seizure of applicant's assets (fuel) on the basis of suspicion of smuggling.
- Criminal investigation dropped but authorities failed to return property after discontinuation of proceedings.
- ECtHR held that when authorities seized and hold chattel as physical evidence, there should be the possibility under national law to seek compensation for any damage resulting from the authorities failure to keep safe the said chattels in reasonably good conditions.
- Also Borzhonov v Russia (Bus seized and not returned after discontinuation of proceedings)

# East West alliance v Ukraine

- Violation of applicant's right to property on account of sale of seized assets to third parties although proceedings concerning title over property were still pending and assets were under a freezing order to secure the claim
- Violation on account of unlawful seizure, sale, damage, disappearance of seized assets as well as failure of national authorities to enforce court ruling ordering return of property to applicant.

# Asset freezing of third parties: national practices

- R v Ahmed and Qureshi
- UK courts declared admissible freezing of assets of defendant's spouse.
- Article 8 consideration may arise only in respect of a confiscation procedure if a confiscation order may render the defendant's wife and children homeless

# **ECtHR case law on confiscation proceedings**

# Applicable limb of 1P1

Confiscation proceedings fall under the provisions on control of use of property

## **Exception:**

Vasilescu v Romania

- Applicant's house searched by police officers in connection with investigation against husband for unlawful possession of valuable and seized gold coins belonging to the applicant.
- Shortly afterwards investigation was discontinued but coins were retained without court authorization.
- Applicants filed court complaints to obtain restitution of coins. National courts held that prosecutor had exclusive power to decide over the restitution of the seized assets.
- ECtHR held that retention of coins had no basis under national law and amounted to de facto confiscation .

# Lawfulness

- Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
- No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law
- The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

# Two requirements of lawfulness

- interference must have a basis in national law
- national laws must be compatible with the rule of law



# Frizen v Russia

Confiscation of 250,000 rubles in cash by customs authorities was unlawful : authorities had failed to declare what was the legal basis of the confiscation (smuggling offence did not entail confiscation and applicant was legitimate owner)

## **Unlawfulness based on violation of national law**

### **Karamitrov and Patrikova v Bulgaria**

Failure of executive to obey judicial orders to return unlawfully seized goods

**If legal basis exists in national law for confiscation, its substantive and procedural conditions must be met**

### **Konovalova v Russia:**

Customs officials failed to inform the bailiff of pending appeal. Bailiff failed to inform the applicant of the enforcement proceedings.

Lawfulness principle requires that laws interfering into property are **foreseeable**

### **Honecker v Germany :**

Broad confiscation powers vested in the east German Legislature were compatible with 1P1(Federal administrative courts were empowered to review the decisions of the parliamentary committee)

### **Hentrich v France**

Pre-emption by French authorities was arbitrary, selective and not foreseeable. Applicant bore an individual and excessive burden and was not allowed to challenge the measure to prove that property had been acquired at declared price.

# Gogitidze v Georgia

- Applicant held that confiscation order was unlawful and it was arbitrary to extend retrospectively the scope of the confiscation mechanism to the property acquired prior to the entry into force of the 2004 law introducing administrative confiscation
- Court held that legislation holding public officials accountable for unexplained wealth had been passed already in 1997 (Law on conflict of interest). The 2004 law regulated anew the pecuniary aspects of existing anti-corruption legal standards: the **lawfulness** requirement under article 1P1 cannot be interpreted as preventing legislature from controlling the use of property via new retrospective provisions regulating continuing factual situations or legal relations anew.

# Legitimate aim

## Gogitidze v Georgia

“The 2004 law on administrative confiscation was part of a larger legislative package aimed at intensifying the fight against corruption in the public service”.

The rationale behind the law was **compensatory** and **preventive**

-to return assets that had been obtained from a third party as the result of duress

-to send a clear message to public officials involved in corruption or considering to engage in corrupt acts

International community had commended the new legislation although it had warned the authorities against **possible misuse** of the procedure and called for the utmost transparency

## **Legitimate aim and anti-corruption campaigns used for political or commercial motives**

- Lukanov v Bulgaria; Tymoshenko v Ukraine; Lutsenko v Ukraine
- Distinction between criminal and political liability of ministers: national authorities failed to prove that the applicants had pursued private gain
- Venice Commission report: abuse of office offences should be interpreted narrowly; should apply only when a grave offence is committed affecting human rights, democratic principles and requirement of impartiality; when the offence is committed in connection to the exercise of public powers; laws and case law should specify relevant conduct; authorities should apply criteria such as gross negligence and review whether public official has sought personal gain or advantage for himself or third parties/
- Cumhuriyet Halk Partisi v Turkey: confiscation orders against opposition political party on account of alleged irregularities in its expenditures were unforeseeable and imposed disproportionate financial strain on the applicant party and affected its political activities.
- East West alliance v Ukraine: arbitrary interference into applicant's property

## **Khodorkovsky and Lebedev v Russia**

- Political motives do not exclude that the criminal prosecution of the applicants had a healthy core.
- Prima facie case of bad faith of authorities is not
- sufficient to prove abuse of criminal prosecution.

## **Honecker v Germany**

- Allegations about prejudicial press coverage and partiality of Western German Tribunals were dismissed as unsubstantiated and vague

# Proportionality

- Possible tensions between human rights guarantees and anti-corruption measures

But

- Wider margin of appreciation recognized by the ECtHR due to the importance of policies such as the fight against corruption, organized crime and drug trafficking. Special investigative techniques and reversal of the burden of proof may be justified by difficulty of obtaining evidence
- National authorities are better placed to harmonize conflicting social, political and economic interests.
- The ECtHR will reject the assessment of the public interest by national authorities only if it is manifestly unreasonable



## **Proportionality**

is assessed on the basis of:

- size of assets object of asset freezing or confiscation vis -a-vis gravity of the offense
- evidence of the owner's bad faith or guilt

## **Silickiene v Lithuania**

- Court held that criminal activity had lasted many years, was conducted systematically and did great harm to the state. The criminal case was exceptional

## **Air Canada:**

- value of confiscation order was based on value of cannabis discovered, value of the seized aircraft, length of seizure, applicant's history of security lapses and previous warnings

# Agosi v UK

- German company dealing in Golden and Silver coins. Sold Krugerrands to two individuals with provision that it would maintain ownership until full payment of value. However cheque was dishonored.
- Coins were confiscated by customs authorities pursuant to law prohibiting importation of gold coins (smuggling).
- Applicant held that
  - ❑ it had right to restitution of coins as it was “innocent” owner.
  - ❑ It had not been provided a reasonable opportunity to put its case before UK authorities
- ECtHR found that:
  - ❑ applicant had been provided opportunity to put its case
  - ❑ at the material time there was no uniform practice across CoE members on degree of fault of care of the owner of confiscated property

# Gasus Dosier v Netherlands

- Company leasing concrete-mixer to another company (Atlas). Atlas got into financial difficulty and concrete-mixer was seized by the tax bailiff
- ECtHR held that applicant could not claim restitution of property because Gasus dosier was a commercial venture so leasing of concrete –mixer was a risky activity . Applicant could have eliminated commercial risks by refusing leasing, by requiring additional security or by maintaining concrete-mixer on its premises
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- Retention of the title of property over the leased concrete mixer could only be opposed to other creditors but not to tax authorities.

- **Ismaylov v Russia and Gabric v Croatia**
- (Gabric had avoided customs control for the importation of cigarettes)
- Confiscation order was disproportionate because the applicants lost large sums relative to their wealth and offenses posed minor risks to the respondent state. Sums confiscated were not proceeds or instrumentalities of crime and applicants had no previous convictions.
- **Milosavljev** : administrative confiscation of a lawfully acquired taxi in discontinued misdemeanor proceedings was disproportionate (ECtHR expressly distinguished this case from confiscation of proceeds and instrumentalities of crime)

## **Azinas v Cyprus:**

- Automatic forfeiture of applicant's retirement benefits following his conviction for abuse of power and embezzlement was disproportionate as it deprived the applicant and his family any means of subsistence (combined with imprisonment and dismissal)
- Involvement of innocent third parties played a role
- Exemption for reasonable living and legal expenses may affect proportionality of a restraining order

# Confiscation orders affecting legal entities

- Yukos: 7 % enforcement fee and sale of main production unit. Government did not consider whether the debt could be met through the sale of other assets that would not affect the company's economic viability
- But: Yukos criteria may not apply to a legal entity that was created and used solely to invest or hide illicit wealth.
- Cfr: Order forfeiting a company running a legitimate business simply because unlicensed gaming machines were in the restroom used by workers (Mohundram v NDPP- South Africa)
- Cfr: moneys from unlicensed street trading may not amount to property obtained through unlawful conduct as the penalty for unlicensed trading is set by Parliament (a fine of 50 pounds) and the sentence must be proportionate to the offender's culpability. Civil recovery order should not automatically extend to all money received in making lawful sales while committing that offence (Director of ARA v John and Lord- UK)

# Possible violations of the proportionality requirement

- Confiscation order imposed with respect of a person's entire asset base may be disproportionate (Radha Ivory)

But

## **Aboufadda v France**

- The court considered that the confiscation of the house where the applicants were living following their conviction for drug trafficking was not disproportionate because the house had been bought to a large extent with the proceeds of drug trafficking. The applicants could not prove that the house had been bought with money from an inheritance and from the sale of a land in Morocco. The applicants failed to prove that the proceeds of the sale had been transferred to France for the purchase of the house. The applicants had been given reasonable opportunities to put their case to the national courts.
- The prosecution of grave crimes such as drug trafficking justified such interferences into the applicant's right to a home under article 8
- ECtHR has not decided cases of double recovery yet

# National practices: United Kingdom

## R v Waya

- On compatibility of the (POCA) proceeds of crime act with the (HRA) Human Rights act: there must be a reasonable relationship of proportionality between the means employed in the deprivation of property as a form of penalty and the legitimate aim which is sought to be realised by the confiscation (i.e. to recover the financial benefit obtained through criminal conduct)

## R v Morgan

- In case the victim claimed civil damages, a confiscation order should be discretionary. Defendant **had caused loss to a single victim but subsequently repaid almost all the money and was ready to reimburse the remainder.** Supreme Court held that a confiscation order which requires the defendant to pay the same sum again does not achieve the object of the legislation of removing from the defendant the proceeds of his crime, but amounts to a further pecuniary penalty. It is for that reason disproportionate



# Proportionality of confiscation orders and criminal lifestyle

If a defendant is deemed to have a criminal lifestyle, his benefit is not linked to any particular crime. Rather the figure is determined by applying statutory assumptions that the assets he has or which have passed through his hands in the last 6 years came from a criminal source

But

Violation of the proportionality criteria may take place in cases of confiscation following convictions for crimes that are removed from the paradigm of "repeat offender": extended confiscation orders were originally intended for repeat offenders and drug traffickers. It is important that national courts have sufficient discretion to mitigate the harshest effects of the application of national laws on confiscation of proceeds of crime

## **R v Lunnan**

- Prosecution **conceded that the defendant had no prior involvement in drug trafficking** so it would be disproportionate to confiscate all his assets because the defendant had no criminal lifestyle

## **R v Shabir**

- Defendant had been indicted for obtaining money transfer by deception. The total amount of the illicit benefit was 500 pounds vis a vis an overall transfer of 170,000 pounds. Defendant was convicted of 6 counts (not "samples"). By statutory definition defendant had a criminal lifestyle which would lead to the confiscation of all his assets for the past 6 years (400,000 pounds). Court of first instance ordered confiscation for 200,000 Pounds. But appeal court quashed decision and ordered confiscation of sole benefit of 500 pounds.

# Harsh but not oppressive confiscation orders

- When more defendants have shared or obtained benefits, confiscation can be applied to each for the full value of the benefit
- When a defendant is denied the possibility of deducting the expenses incurred in respect of proceeds of crime (principle of confiscation of benefit rather than of profit)
- In case of hidden assets orders when a defendant has failed to persuade the authorities that the value of his assets is lower than the benefit. Confiscation order for the whole value of the estimated benefit is admissible because prosecutors can assume that a defendant has hidden his assets and the burden of proving otherwise is reversed (Grayson and Burnham v UK)

# Procedural guarantees in confiscation proceedings under article 1P1

- When states hold that confiscated assets have connection to a crime, the ECtHR will consider whether property holders had sufficient opportunities to effectively challenge the interference into their property rights
- Article 1P1 contains no explicit procedural requirements. However the ECtHR held that the proceedings at issue must afford an individual a reasonable opportunity of putting his case to the relevant authorities for the purpose of effectively challenging the measures interfering with the rights under 1P1. In ascertaining whether this condition has been satisfied, the ECtHR takes a comprehensive view.

# Procedural guarantees under 1P1

## Saccoccia v Austria

- applicant had participated through his legal representatives in the judicial proceedings leading to the exequatur order.
- Applicant had made ample submissions that had been considered in detailed written decisions by the Viennese Courts
- Complaints concerning failure of Austrian courts to admit expert testimony, excessive length of proceedings and failure to serve the MLA request were declared inadmissible due to non-exhaustion of internal remedies.

# Gogitidze v Georgia

- ECtHR held that confiscation measure was not a purely administrative confiscation but in reality was connected with the existence of a previous criminal charge.
- StAR Good practice guide on non-conviction based(NCB) asset forfeiture: NCB asset forfeiture should never be a substitute for criminal prosecution when the jurisdiction has the ability to prosecute the violator.
- Prosecutors and courts should not view disgorgement of assets as a sufficient sanction when a crime has been committed. NCB should be complementary to criminal prosecution or conviction and may precede or run in parallel to criminal proceedings.

# **Applicants had been provided with reasonable opportunity to put their arguments before the national courts**

- the national courts had transmitted to the applicants the prosecutor's claims and supporting evidence
- applicants had been duly summoned to make written submissions and take part in oral hearings
- the fact that one applicant was a fugitive did not exclude that he could appoint a lawyer to represent him in oral hearing. Court held that two of the applicants had effectively waived their right to submit arguments before first-instance court
- national courts accepted other applicants' arguments as to the origin of specific assets and removed those assets from the confiscation list
- confiscation of assets was not based on mere suspicion of prosecutor but was based on numerous supporting documents that assets could have not been acquired with salary of one of the applicants while holding a public office
- careful examination of applicant's financial situation confirmed the existence of a considerable discrepancy between income and wealth

# **Application of fair trial guarantees to confiscation proceedings: civil or criminal limb?**

Proceedings for confiscation such as civil proceedings in rem, which do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty but rather represent a measure of control of the use of property within the meaning of art 1P1, cannot amount to a determination of a criminal charge. Hence the right to be presumed innocent does not apply (Gogitidze)

Confiscation proceedings following criminal conviction are similar to determination of length of deprivation of liberty, as they form part of criminal proceedings (Phillips). So certain guarantees under art 6 in its criminal limb apply although with certain modifications (no beyond reasonable doubt and reversal of burden of proof on balance of probabilities)



# Phillips v United Kingdom

- Extended confiscation proceedings following conviction for drug offenses did not amount to the bringing of new charges but was analogous to the determination of the length of a period of imprisonment.
- However article 6(2) should have some application to protect the applicant from assumption made during the confiscation proceedings.
- Article 6(1) includes right to be presumed innocent. But right is not absolute. Admissibility of certain presumptions of law and fact.
- Applicant was granted public hearing, advanced disclosure of the prosecution case, and had opportunity to adduce documentary and oral evidence.
- Applicant was required to prove on the balance of probabilities that he had acquired property other than through drug trafficking. Applicant had no official source of income and in certain cases providing evidence of source of property would have been easy( such as calling as witness the purchaser of property he had allegedly sold)
- Judge had discretion ; assessed evidence for every item of property and eventually confiscated only two items.
- Possible issues may arise if amount of confiscation order was based on the value of assumed assets.

## **Barnham and Grayson v UK:confiscation of hidden assets**

- ECtHR held that rebuttable presumption that an offender has sufficient property to meet a confiscation order is compatible with article 6, including when the prosecution had factored hidden assets.
- Relevant for the Court's finding were the existence of sufficient safeguards in the UK proceedings, the seriousness of the proven offenses, and the strength of the evidence before the English courts that the applicant had held illicit benefits and unreported wealth

## **Salabiaku v France**

- Presumption of innocence was applicable in respect of the applicant as it took place in the course of a trial on the merits before applicant's conviction and not after the applicant had been convicted.

# Geerings v Netherlands

- Applicant convicted for burglary, handling stolen goods and for participation in criminal organisation.
- Acquitted for some of the charges due to lack of sufficient evidence but prosecutor summoned applicant and issued confiscation order also in respect of other assets **“for which there was sufficient indication that the applicant had committed the offences for which he had been acquitted”**. National court held that **acquittal for certain offenses did not mean that they could not be considered as “similar offenses”**. Assessment of proceeds of crime were based on an estimate of conjectural extrapolation of probable benefits as member of organised criminal group.
- However applicant was not in possession of any assets for whose provenance he could not give an adequate explanation.
- ECtHR held that although the applicant had been acquitted for several of the charges, the national authorities decision to confiscate amounted not to voicing of mere suspicion but to a determination of his guilt without the applicant having been found guilty according to law

# Walsh v UK

- After applicant was acquitted of fraud, asset recovery agency initiated a NCB confiscation procedure seeking 70,000 pounds held on behalf of the applicant.
- National courts granted application for confiscation because it held that it was more probable than not that funds were proceeds of crime. The court considered:
  - ❑ prior conviction for similar property crimes
  - ❑ close association with people with similar criminal records
  - ❑ his arrest in connection with a robbery
  - ❑ his inability to explain the origins of the funds
- ECtHR considered that:
  - ❑ proceedings were civil (hence 6(2) did not apply), were separate in timing, procedure and content from the previous criminal proceedings
  - ❑ were intended to remove an unlawful advantage rather than to punish or deter specific or potential offenders
  - ❑ the court had imposed the orders without making any pronouncement of guilt and without taking into account the conduct for which the applicant had been acquitted
  - ❑ order was hefty but not substantially punitive
- As there was no criminal charge, there was no penalty under article 7

# Other violations

- Kopecky v Slovakia
- Applicant had tried to recover gold coins confiscated in 1999 but was unable to do so as authorities had required the applicant to show where the coins had been deposited following the confiscation.
- Applicant was unable to obtain restitution of confiscated coins for reasons which were imputable to national authorities.

# Third parties' rights

- EU directive on freezing and confiscation of proceeds of crime (2014) allows confiscation of property of third parties who:
  - knew or should have known that property was proceeds of crime
  - knew or should have known that property had been transferred to avoid confiscation
  - had received property for free or below market value

# Silickiene v Lithuania

- Applicant's husband arrested and charged together with other public officials with corrupt related offences though an organised criminal group. Following the official's suicide, proceedings were continued in respect of other officials. Court ruling contained sufficient finding that applicant's husband had led criminal organisation for smuggling purposes. Confiscation order was issued in respect of certain items acquired as results of criminal activity.
- Applicant was aware of husband's criminal activity
- Property had been shared among members of criminal group (other co-accused were family members)

# Procedural guarantees under article 6

- Applicant held that she was no party to criminal proceedings
- ECtHR held that she could have challenged the seizure of assets (in fact mother in law challenged seizure and obtained restitution of some assets) and had de facto appointed lawyer had represented her interests. In the proceedings it had been proven that the applicant knew and had participated in the purchase of some smuggled good and had used a shell company created by the criminal group
- Applicant held that she had been effectively held liable for crimes of late husband who had not been convicted
- ECtHR held that confiscation was based on sentence of other members of organised criminal group
- Courts' findings were not based on simply suspicion but were based on detailed examination of available evidence for each piece of property. In fact confiscation only concerned limited items vis a vis larger number of assets that had been initially seized



## **Moyseyeva v Russia**

- National courts ordered confiscation of alleged proceeds without hearing applicants' ownership claims (applicant were wife and daughter of defendant in criminal proceedings)

## **Arcuri v Italy**

- Son, wife and daughter of first applicant had not been convicted or suspected of membership in mafia type organisation. But was sufficient that they had been given an opportunity of putting their case before national authorities and that courts were satisfied that assets were proceeds of crime

## **Confiscation and third parties' rights: national practices**

- R v Ahmed and Qureshi
- The fact that a defendant's spouse is not complicit in a defendant's crime may be necessary but not sufficient against competing confiscation order (for example in connection with divorce proceedings)
- National courts will review whether ex spouse had made financial contributions to the assets to be confiscated, whether the ex spouse had knowledge of offending behavior and whether he or she will depend of state benefit system if a confiscation order is enforced

# **A.P., M.P. and T.P v Switzerland**

- ECtHR held that tax proceedings against applicants violated applicant's rights to be presumed innocent
- Following death of applicant's father tax authorities uncovered evidence of tax evasion and opened tax proceedings for recovery of proceeds of tax evasion and of fines against applicant's inherited assets.
- ECtHR held violation of art 6(2) because proceedings were not continuation of existing proceedings against applicants' deceased father but were opened following his death.
- Applicants did not contest recovery of unpaid taxes but challenged imposition of fine against them

# Post confiscation measures: sale of assets

## Yukos v Russian Federation

- ECtHR held that the organisation of the tender for the sale of the applicant's assets had been marred by irregularities not only leading to the destruction of the applicant's business empire but also unfairly advantaging state-owned bidders.
- The court held that the enforcement proceedings had been unlawful, disproportionate and arbitrary, resulting in the gross undervaluing of the applicant's assets, the introduction of a sham bidder, the artificial lowering of the bids due to the limited numbers of allowed candidates while the applicants had been granted insufficient time to prepare for the procedure.

# MLA proceedings and fair trial guarantees: Saccoccia v Austria

Austrian authorities enforced through exequatur procedure a US forfeiture order for money laundering

Article 6 applicable with some adaptations :

- written procedure, credibility of applicant not at issue, issues discussed were of technical character, proceedings did not require hearing of witnesses
- Applicant held that as US proceedings had entailed violation of his right to fair trial, Austrian authorities should have not enforced confiscation order.
- ECtHR held that refusal to execute foreign court order only applied in cases of flagrant denial of justice: a fundamental violation of article 6 guarantees entailing the nullification of the essence of the right to fair trial (not mere irregularities)

Possible cases include:

- trial in absentia
- grave violation of defense rights
- no independent or impartial tribunal
- systematic refusal to grant access to a lawyer

# Retrospective asset recovery and article 7

- Welch v Uk
- Applicant arrested and convicted for drug trafficking offenses committed before entry into force of drug trafficking offenses act allowing extended confiscation for previous 6 years.
- Dispute between applicant and respondent state as to whether confiscation order was penalty
- ECtHR considered confiscation order as penalty on the basis of following considerations:
  - -confiscation followed criminal conviction
  - -confiscation was not only or preventative measure to remove from drug trade assets and to deprive applicant of benefit, but had also punitive measure as it aimed at confiscation of proceeds of crime
  - -amount of confiscation order was not decisive
  - -court had discretion to consider degree of culpability
  - -imprisonment in default
- Violation of article 7

# Varvara v Italy

- Post acquittal forfeiture of real estate violated article 7 and the lawfulness requirement of art 1P1
- Italian authorities had considered measure as administrative and not of criminal nature.
- ECtHR held it was penalty under autonomous meaning of the convention: goal was deterring commission of crime but also to punish responsible individuals
- ECtHR also held violation on account of application of confiscation order to innocent third parties