

Abstract

This report adopts for the sake of thoroughness a broader understanding of the ‘extended confiscation’ beyond its definition under Art. 5 of the Directive 2014/42/EU and deals with all ‘new’ forms of confiscation extended beyond the traditional one (direct confiscation of instrumentalities and proceeds after conviction for a specific crime), whose common point can be found in a ‘loosened link between offences and confiscated proceeds’¹. In all these ‘new’ confiscation forms (extended confiscation, third party confiscation, non-conviction based confiscation), covered by the Directive 2014/42/EU, a link with criminal proceedings is still present and therefore excluded from the research field are any confiscation forms resembling to civil asset forfeiture instruments.

The Directive 2014/42/EU was transposed into the Greek legal order with the Law n. 4478/2017 published in the Government Gazette on the 23.06.2017, apparently after the expiry of the given time-limit for the Directive’s transposition on the 04.10.2016. It should be noted from the outset that the Greek anti money laundering legislation constitutes a central criminal legislation piece and the main field of transposition in the Greek criminal law of international and European rulings.²

The current report provides a general overview on the most important confiscation provisions in the Greek legal order and traces the transposition of these ‘new’ confiscation forms, namely the third party confiscation (from persons other than the offender), extended confiscation (proceeds other than those deriving from the crime for which the offender was convicted), non-conviction based confiscation (proceeds of illegal origin/of an offence which has not been proven at a trial) as well a form of unexplained wealth confiscation³ into the Greek legal order.

1. Introduction

The legal bases for confiscation can be found in the Greek legal order in various pieces of legislation. Two are the most important general provisions incorporated in the general part of the Greek Penal Code (*Poinikos Kodikas* - PK), namely confiscation as an ancillary penalty in Art. 68 PK and confiscation as a security measure in Art. 76 PK. A prominent place in confiscation issues occupies the anti-money laundering legislation and especially Arts. 40 (asset confiscation) and 41 (State’s compensation) Law n. 4557/2018. Other confiscation provisions can be identified both in the special part of the Greek Penal Code (e.g. Art. 238 PK confiscation in cases of bribery) and in other special criminal laws such as on drugs (Arts. 40 and 41 Law n. 4139/2013), smuggling (Art. 160 Law n. 2960/2001 – National Customs Code) and guns (Art. 16 Law n. 2168/1993).

Observing the evolution of confiscation as legal institution in the Greek legal order, it is true that for more than 67 years, namely from 1950 to 2017, it was considered a marginal sanction

¹ *Simonato*, Confiscation and fundamental rights across criminal and non-criminal domains, ERA Forum 18/2017, 365–379 (366).

² In this sense, see *Symeonidis*, Seizures in criminal proceedings and protection of individual rights [in Greek], Sakkoulas 2010, 20.

³ For such a new division of the confiscation forms see Commission, ‘Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation’ COM (2022) 245 final. For a commentary on the new proposal, see *Sakellarakis*, 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?, NJECL 13/4 2022, 478-501.

without any significant application in practice.⁴ Two were the milestone legislative acts that contributed to its ‘rebirth’. The first was Law n. 4478/2017, which fundamentally amended confiscation both in its general provision under Art. 76 PK⁵ and in its special provisions in the previous anti-money laundering legislation (Arts. 46 and 47 Law n. 3691/2008⁶). This happened under the pressure to ratify and transpose into the national legal order international and communitarian legal texts, including the Directive 2014/42/EU. The second key point was the new 2019 Greek Penal Code (Law n. 4619/2019⁷), which first introduced the division of the general confiscation into two separate provisions according to its different legal nature, namely in Art. 68 PK ruling the confiscation as an ancillary penalty and in Art. 76 PK ruling on the confiscation as a security measure.

a) Law n. 4478/2017

As regards Law n. 4478/2017 it should be first stressed that it ratified the 2005 Warsaw Convention⁸ and transposed several Union legal acts, among which⁹, also the Directive 2014/42/EU. It is also considered until now the main legal text for the cross-border confiscation.¹⁰ According to the explanatory memorandum of the Law n. 4478/2017 its main aim is *“the creation, within the framework of the EU, of a common area for the execution of judicial decisions on freezing and confiscation of assets deriving from criminal activities and the facilitation of the execution of judgments between Member States of the Council of Europe. At the same time, it improves the legislative framework for the adoption and implementation of relevant measures at national level, with the aim of more effective identification of the instruments and proceeds of crime, and on the other hand the extension of the possibilities for their seizure and confiscation, in particular in so far as they are linked to forms of organised criminal behaviour”*¹¹. Although this law modified considerably the provisions on the confiscation as an ancillary penalty (previous Art. 76 (1-5) PK and now Art. 68 PK), it did not change in terms of content the provision on the confiscation as a security measure (previous Art. 76 (6) PK and now Art. 76 PK). Art. 6 (1) Law n. 4478/2017 is transposing in the Greek legal order Arts. 4 (1) and 6 of the Directive 2014/42/EU on the direct and value confiscation as well third party confiscation amending Art. 76 PK and Art. 7 (2-5) Law n. 4478/2017 is transposing Arts. 5, 6, 7 (2) and 8 (4 and 9) of the Directive 2014/42/EU on the extended

⁴ Such a remark by *Androulakis* at the [14th Panhellenic Conference of the Hellenic Society of Criminal Law, 5.6.2022](#).

⁵ In the 1950 Greek Penal Code (Law n. 1492/1950) and until its latest amendment in 2019, Art. 76 PK was the unique confiscation provision in the general part of the Greek Penal Code, ruling on confiscation as an ancillary penalty under Art. 76 (1) PK and as a security measure, first under Art. 76 (2) PK and after 2017 with Law n. 4478/2017 under Art. 76 (6) PK.

⁶ The most important confiscation provisions in the evolution of the anti-money laundering legislation were Arts. 2 and 3 Law n. 2331/1995 (as amended by Law n. 3424/2005), Arts. 46 and 47 Law n. 3691/2008 and Arts. 40 and 41 Law n. 4557/2018 and Arts. 7 and 8 Law n. 4816/2021.

⁷ The new Greek Penal Code came into force on June 2019 and since then has undergone numerous amendments (Law n. 4637/2019, Law n. 4777/2021, Law n. 4855/2021, Law n. 4871/2021, Law n. 4908/2022, Law n. 4947/2022).

⁸ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

⁹ Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (OJ L 196, 45) and Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 59).

¹⁰ New national legislation ruling on the issues of cross-border confiscation is about to be adopted. A special legislative committee has already been established (Decision n. 44570/03.09.2021) for the adaptation of the Greek legislation to the provisions of Regulation (EU) 2018/1805 on the mutual recognition of the freezing and confiscation orders.

¹¹ Explanatory memorandum Law n. 4478/2017, 1.

confiscation, third party confiscation, third party freezing and third party protection amending some Articles of the former Law n. 3691/2008 on money laundering.

More precisely, regarding the novelties in Art. 76 PK after the introduction of Law n. 4478/2017, these can be summarised as follows: a) confiscation of the indirectly obtained from the criminal offences proceeds, b) confiscation only of the intermingled criminal proceeds in cases of intermingling of proceeds from criminal offences with legally obtained property, c) value confiscation, d) pecuniary penalty as an alternative to confiscation, e) third party confiscation as well f) proportionality clause and g) provision concerning the disposal of the confiscated proceeds for the public interest or social purposes or for the satisfaction of the victims.

At this point, it is important to highlight for the purposes of this report that according to the explanatory memorandum of Law n. 4478/2017, Art. 7 (3) Law n. 4478/2017 amended Art. 47 (1) Law n. 3691/2008 (now Art. 41 Law n. 4557/2018) on money laundering confiscation with the purpose to transpose into the Greek legal order the extended confiscation under Art. 5 of the Directive 2014/42/EU. Nevertheless, no explicit reference on ‘extended confiscation’ was made in this article. On the contrary Art. 47 (1) Law n. 3691/2008 was bearing the title ‘State’s compensation’ and was introducing an according to the legislator civil reparative measure before the civil courts and following the civil procedural law, which was however hardly criticised in the doctrine as a ‘hidden confiscation’ form, criminal in its nature raising important constitutionality issues¹². Extended confiscation is therefore introduced in the Greek legal order under the veil of a civil measure and in no case explicitly framed as ‘extended confiscation’.

As an overall evaluation of Law n. 4478/2017 by the side of the doctrine¹³, it is argued that it was a successful legislative choice to ratify and transpose the previous mentioned international and communitarian legal acts under a single legal act as highly relevant in content with each other. This marked also the entrance of Greece into a common European legal order through the enhanced cooperation on cross-border confiscation cases and the extension at a national level of the confiscation possibilities. On the other hand, it is also emphasised that it is an ‘unusually lengthy and complex law’ whose amendments are in any case limited if compared to the already existing considerably broader provisions under the previous Law n. 3691/2008 on money laundering. As ‘steps in the right direction’ were considered the provisions on the protection of the *bona fide* third parties, which can claim rights on frozen bank accounts, ownership titles or financial products and the recognition to them of the right of appeal for the release of specific amounts crucial for meeting vital needs, maintenance or operating costs, legal support expenses and basic expenses for the maintenance of the frozen assets. Several issues remain however unresolved, such as the lack of cohesion between the general confiscation provision under Art. 76 PK (now 68 PK) and the specific one under Art. 46 Law n. 3691/2008 (now Art. 40 Law n. 4557/2018) on money laundering and the problematic provisions of the latter concerning the third party confiscation, confiscation without conviction, lack of a regulation on the protection of *bona fide* third parties on confiscation orders and lack of effective management mechanism for the maintenance of the value of the already frozen or seized assets.

b) Law n. 4619/2019

¹² See on the issue page 9 below.

¹³ See *Androulakis*, New regulations on the asset seizure and confiscation (Law n. 4478/2017) [in Greek], *Nova Criminalia*, 1/2018, 3-4.

As regards the second important modification on confiscation issues, the recently adopted new 2019 Greek Penal Code systematises, as said before, confiscation according to its different legal nature in two separate Articles, namely Art. 68 PK, which provide for the confiscation as ancillary penalty and Art. 76 PK as security measure. Confiscation as an ancillary penalty can only be ordered after a conviction and a main penalty, while as a security measure it can be imposed without previous conviction but only under the precondition that the confiscated objects are inherently dangerous for the public security. This systematic and substantial division of the general confiscation provisions into two different major types according to their different legal nature corresponds to the ‘dual-track’ system of sanctions, which also the Greek Penal Code among other continental criminal laws¹⁴ follows¹⁵. Somehow simplified and generalised presented, confiscation’s main aim as an ancillary penalty is to punish the offender for its moral guilt (retribution) and as a security measure, aims at neutralising a danger for the public order (prevention).

Here it is also important to mention that confiscation as ancillary penalty under Art. 68 PK is non-mandatory, leaving the judge discretion as to whether or not to impose it and as to the extent of its imposition. In case the judge decides to provide for a confiscation order, such a judicial decision should include a specific and detailed statement of reasons (Art. 93 (3) S, Art. 139 KDP and Art. 79 (9) PK) concerning the necessity of its order. This statement of reasons is based on Arts. 79 and 80 PK concerning respectively the computation of custodial sentence and pecuniary penalty. A confiscation order under Art. 68 PK can be therefore reasoned taking into account the following criteria: imprisonment is not considered enough to prevent the offender from the commission of further illegal acts, offender’s economic status and the importance of the assets under confiscation for his and its family own maintenance. This judicial decision is an assessment on the merits and is therefore not subject to appellate review¹⁶. On the contrary, confiscation of inherently dangerous objects as security measure under Art. 76 PK is mandatory and can be ordered without conviction of the affected person, even after a judicial decision on their acquittal or a relevant council’s decision not to proceed to trial and can be ordered even against third parties who were not related to the crime. The legislator attributes such a mandatory nature to the confiscation under Art. 76 PK because of the danger that derives from the objects under confiscation for the public security. Mandatory nature is however attributed also to confiscation forms which are imposed as ancillary penalties under the special part of the Greek Penal Code (e.g. Art. 238 PK on bribery) or special criminal laws (e.g. Art. 160 Law n. 2960/2001 on smuggling) and therefore is redundant any statement of reasons as mentioned before on the necessity of such confiscation orders¹⁷.

2. The scope of confiscated assets

Only in 2017 was introduced in the Greek legal order the possibility to confiscate beyond objects also assets (Art. 10 (c) Law n. 4478/2017)¹⁸. Two are the most important provisions ruling on the property, which can be confiscated, namely Art. 68 (1) PK and Art. 40 (1) Law n. 4557/2018 on money laundering. As a preliminary remark, it should be stressed that before the

¹⁴ See further on the matter, *Fragoso*, The “Dual-Track” System of Sanctions in Continental Criminal Law, *International Journal of Offender Therapy* 12(1) 1968, 37–40.

¹⁵ See, among others, *Bitzilekis*, Meaning and aim of criminal sanctions, in: *Kaiafa-Gbandi/Bitzilekis/Symeonidou-Kastanidou*, *Criminal Sanctions Law* [in Greek], 3rd edition, Nomiki Bibliothiki 2020, 27.

¹⁶ See *Symeonidou-Kastanidou*, The threat of penalty and security measures, in: *Kaiafa-Gbandi/Bitzilekis/Symeonidou-Kastanidou*, *Criminal Sanctions Law* [in Greek], 3rd edition, Nomiki Bibliothiki 2020, 99.

¹⁷ *Ibid.*

¹⁸ *Ibid.* 89.

2017 confiscation reform, the special confiscation under the previous Art. 46 (1) Law n. 3691/2008 on money laundering was more advanced and broader in its scope of application compared to the general confiscation under the previous Art. 76 PK.

According to Art. 68 (1) (a) PK confiscated can be objects or assets which are (i) the proceeds of a felony or misdemeanor with intent, as well as (ii) their value, and (iii) what has been obtained directly or indirectly through them, as well as (iv) objects or assets used or intended to be used in the commission of such a crime, if they belong to the perpetrator or to one of the participants. First, proceeds of crime can now be both tangible and intangible assets (rights)¹⁹. Second, confiscated can be not only the direct but also the indirect surrogates in the ‘surrogates transfer chain’ (e.g. a boat acquired from the sale of real estate acquired from the sale of drugs)²⁰. Third, a cumulative confiscation of all these objects and assets is in principle possible but always under the condition of proportionality²¹. Fourth, what is clearly excluded from such a confiscation under Art. 68 PK are objects that the perpetrator used during the preparatory for the crime acts or after the crime’s completion²².

Moreover, according to Art. 68 (1) (b) PK if the above mentioned objects or assets have been mixed with property acquired from lawful sources, the property subject to confiscation arises just to the amount of the mixed criminal assets²³.

And if the objects or assets of Art. 68 (1) PK do not exist anymore or cannot be found there is the possibility under Art. 68 (3) PK to order value confiscation, namely to confiscate other (legal) property of the offender of the same value at the time of the conviction with the not existing or not found illegal one. The *ratio* of this confiscation form lies on the idea that should not be rewarded the offender who has managed diligently to hide, disappear and destroy the liable to confiscation products²⁴.

Alternatively when the above mentioned property does not exist or is not enough or belongs to a third party (in whole or in part) to whom no confiscation can be imposed (e.g. *bona fide* third party not involved in the crime), then there is the possibility to impose to him a pecuniary penalty equal to the value of the objects to be confiscated (Art. 68 (4) PK).

According to Art. 40 (1) Law n. 4557/2018 on money laundering confiscated can be property, which (i) is the proceeds of a predicate offence under Art. 4 Law n. 4557/2018 or proceeds of

¹⁹ This harmonised the general confiscation provision (previous Art. 76 PK) with the special confiscation provision on money laundering (previous Art. 46 Law n. 3691/2008).

²⁰ Such an advanced provision was already the case for the money laundering confiscation (Art. 46 Law n. 3691/2008) and the corruption confiscation (Art. 238 (1) PK). Also here it was previously argued that the chain of surrogates falling under confiscation, should not be extended in perpetuity to all the indirect surrogates but from such a surrogates transfer chain confiscated should be just the first/direct surrogate. In this sense, see *Pavlou*, The confiscation in the Penal Code and the special criminal laws [in Greek], Ant. N. Sakkoula 1994, 85.

²¹ See *Symeonidou-Kastanidou*, The threat of penalty and security measures, in: Kaiafa-Gbandi/Bitzilekis/Symeonidou-Kastanidou, Criminal Sanctions Law [in Greek], 3rd edition, Nomiki Bibliothiki 2020, 90 in alignment with *Pavlou*, The confiscation in the Penal Code and the special criminal laws [in Greek], Ant. N. Sakkoula 1994, 85, who is arguing that no cumulative confiscation of criminal proceeds and of their surrogates is possible when the first still exist and confiscated in such cases should be only the proceeds in respect of the proportionality principle (e.g. in case of smuggling confiscated should be just the money from the sale of the smuggled goods and not also the latter if they are still at his disposal).

²² See *Symeonidou-Kastanidou*, The threat of penalty and security measures, in: Kaiafa-Gbandi/Bitzilekis/Symeonidou-Kastanidou, Criminal Sanctions Law [in Greek], 3rd edition, Nomiki Bibliothiki 2020, 91.

²³ *Ibid.* 92. Such a provision existed in Art. 238 (1) (b) PK and in Recital 11 of the Directive 2014/42/EU.

²⁴ *Ibid.* 93.

the money laundering offence under Art. 2 Law n. 4557/2018 (*producta sceleris*) or (ii) has been obtained directly or indirectly from the proceeds of such offences (direct and indirect surrogates – *scelere quaesita*) or (iii) the means used or intended to be used to commit such offences (*instrumenta sceleris*).

Confiscated can be therefore any kind of property, namely both objects and intangible assets as well not only the direct proceeds of the offence (e.g. counterfeit banknotes and forged documents in case of counterfeiting, stolen assets in case of theft or robbery, gifts or payment from bribery, money from drug sale) but also the indirect proceeds, namely whatever was obtained from the transformation of the direct proceeds of the criminal offence (e.g. sale or exchange) and all kinds of financial gains from the latter (e.g. interests on bank deposits, rents from real estate and dividends on shares²⁵). It is a common practice by the offenders in order to disguise the illegal origin of the assets either to transfer the direct proceeds to third parties (horizontal transformation chain) or to transform them to other assets in their own hands (vertical transformation chain)²⁶. And confiscation is gradually extended to all these assets in the direct and indirect ‘surrogates transformation chain’, what lurks at the same time the risk to confiscate property, which is considerably remote from the criminal offence and cannot prove any link with the latter.

In order to avoid any objections of unconstitutionality²⁷ is therefore important to highlight the limits set to such an extension of the scope of the assets that can be confiscated. Regarding the transfer of the direct proceeds to third parties the presence of a *bona fide* third party breaks this horizontal transformation chain; the assets are ‘cleaned’ at the time that the *bona fide* third party acquired them and therefore integrated in the legal economy. No confiscation in the hands of *bona fide* third parties is therefore permissible (Art. 40 (2) (4) Law n. 4557/2018)²⁸. Another limit to the horizontal transformation chain is posed by the statute of limitations of the predicate offence. Here it is argued that, if the predicate offence got time-barred before the money laundering activities, the proceeds derived from the first cannot be confiscated. The reason is that with the time-barring of the predicate offence there is no longer any criminal claim by the State to proceed with the prosecution and the proceeds of the predicate offence are disconnected from the latter and therefore ‘cleaned’²⁹. A contractionary interpretation of Art. 40 (3) Law n. 4557/2018, ruling on the confiscation also in cases of final termination of the criminal proceedings, including thus also cases of time-barring of the criminal offence according to Art. 370 KPD, should be preferred in the sense that only when the proceeds are laundered before the time-barring of the predicate offence is a confiscation of them possible³⁰.

²⁵ *Dionysopoulou*, When an asset derives from criminal activity? - Contribution to the definition of the scope of the assets of the money laundering offence [in Greek], *PoinChron* 2006, 361 (366).

²⁶ *Tzannetis*, The confiscation of proceeds deriving from criminal activity, in: Minutes of the 4th Congress of the Hellenic Criminal Bar Association: Money laundering – “Clean or Free Society?” [in Greek], *Ant. N. Sakkoulas* 2007, 249 (262).

²⁷ For such a violation of the right to property, see *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], *Nomiki Bibliothiki* 2009, 30.

²⁸ *Dionysopoulou*, When an asset derives from criminal activity? - Contribution to the definition of the scope of the assets of the money laundering offence [in Greek], *PoinChron* 2006, 361 (364); *Tzannetis*, The confiscation of proceeds deriving from criminal activity, in: Minutes of the 4th Congress of the Hellenic Criminal Bar Association: Money laundering – “Clean or Free Society?” [in Greek], *Ant. N. Sakkoulas* 2007, 249 (264).

²⁹ *Dionysopoulou*, When an asset derives from criminal activity? - Contribution to the definition of the scope of the assets of the money laundering offence [in Greek], *PoinChron* 2006, 361 (365); *Tzannetis*, The confiscation of proceeds deriving from criminal activity, in: Minutes of the 4th Congress of the Hellenic Criminal Bar Association: Money laundering – “Clean or Free Society?” [in Greek], *Ant. N. Sakkoulas* 2007, 249 (264).

³⁰ See for the previous Art. 2 (8) Law n. 2331/1995

On the other hand, when it comes to the vertical transformation of the direct proceeds of the predicate offence, all surrogates can be in principle confiscated in the hands of the perpetrator and *mala fide* third parties without any limit. What counts here is the depiction of the illegal profit in any subsequent surrogate of the direct proceed³¹.

Similar with Art. 68 (1) (b) PK is the provision under Art. 40 (1) (2) Law n. 4557/2018 ruling on the confiscation just of the illegal property in case of intermingling of legal and illegal one. In the same sense with the previous Art. 68 PK also the special anti-money laundering legislation provides for value confiscation (Art. 40 (2) (1) Law n. 4557/2018) and alternatively for a pecuniary penalty (Art. 40 (2) (2) Law n. 4557/2018). Attention should be given to the fact that when the same assets have already been subjected to confiscation in other proceedings, value confiscation order or imposition of pecuniary penalty should be considered redundant (Art. 40 (2) (3) Law n. 4557/2018).

As an overall assessment, it could be said that the spectrum of the confiscated assets under Art. 40 (1) Law n. 4557/2018 on anti-money laundering is a lot broader compared to the one under Art. 68 (1) PK, which is limiting the circle of confiscated assets to the one deriving from felonies or misdemeanors with intent. In contrast to this, Art. 40 (1) in conjunction with Art. 4 Law n. 4557/2018 provides for the confiscation of any property deriving either by the money laundering offence (Art. 2) or by the predicate offences (Art. 4) and ultimately under the predicate offences falls also any other, apart from the listed one, offence punishable by imprisonment for more than three months and from which there is a pecuniary advantage.

At this point, it is important to highlight that the confiscation of property in case of money laundering is an ancillary penalty and therefore previous conviction is needed. The question remains which kind of conviction is needed, the one for the predicate offence (Art. 4) or for the money laundering activities (Art. 2). Art. 39 (3) Law n. 4557/2018 provides that conviction for money laundering does not require conviction for a predicate offence. However, when it comes to the confiscation of the property deriving from the predicate offence and in case of a sole conviction for money laundering, the property deriving from the predicate offence should be identical to the one which got later ‘laundered’ (e.g. robbery as a predicate offence and transfer of the money acquired by the robbery to a third person as a donation). In the opposite case, if there is no such identification of the property deriving from the predicate offence and the money laundering activities and there is a transformation of the property deriving from the predicate offence after its ‘laundering’ (e.g. purchase and sale of shares with the money from the robbery), then in order to confiscate the property deriving from the predicate offence, it is necessary to gain a conviction for it. Otherwise, it would occur a violation of the principle of guilt imposing the ancillary penalty of the confiscation without previous conviction for the offence, from which the property derives.³²

These Articles of the national legislation ruling on what kind of property can be confiscated correspond to Art. 2 paras. 1-3 of the Directive 2014/42/EU providing for the definitions of proceeds, property and instrumentalities as below:

³¹ *Tzannetis*, The confiscation of proceeds deriving from criminal activity, in: Minutes of the 4th Congress of the Hellenic Criminal Bar Association: Money laundering – “Clean or Free Society?” [in Greek], Ant. N. Sakkoulas 2007, 249 (268 et seq.). However it is to mention that confiscated in the hands of the perpetrator or the *mala fide* third party can be just one surrogate and this would be just the final one and the intermediate one will be automatically released after the transformation.

³² *Kaiafa-Gbandi*, Elements of European Criminal Law and their transposition in the Greek Legal Order [in Greek], Sakkoulas 2016, 126-127.

(1) *'proceeds'* means any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits;

(2) *'property'* means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property;

(3) *'instrumentalities'* means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

As an interim conclusion, Greece seems to follow the EU tendency towards the extension of the 'assets liable to confiscation box' in compliance with the general rationales of maximizing effectiveness in fighting and preventing crime. The alignment with the European provision under Art. 2 (1) of the Directive 2014/42/EU is a fact. At the same time, it is also true that the Greek anti-money laundering legislation adopted from the very beginning a broader understanding of the assets which can be confiscated and therefore can be characterised as innovative. Discrepancies however arise concerning the relationship between such general and special provisions and is also argued that the latter can also be conceived as *lex generalis*.³³ In any case, the adoption of a broader understanding of what is considered to be 'proceed of a crime' falling under confiscation provides also an internal coherence in the national legislation between the general confiscation (now Art. 68 (1) PK) and the, already more advanced, specific confiscation in the special part of the Greek penal code (see e.g. Art. 238 PK – corruption confiscation) and the one under specific criminal laws (see e.g. now Art. 40 (1) Law n. 4557/2018).

3. Third party confiscation

Confiscation can be ordered against a third person, who is in the possession of the illegal property, which has been transferred to him and who is not involved in the crime, namely he is not convicted neither as the perpetrator nor as the participant in the criminal offence. Two are the most important legal bases in the Greek legal order for the third party confiscation, namely the general one under Art. 68 (5) PK and the special one under Art. 40 (1) (3) Law n. 4557/2018. As a preliminary remark as long as confiscation under both Art. 68 PK and Art. 40 Law n. 4557/2018 continues to be considered in the Greek doctrine an ancillary penalty, it is obvious that such a confiscation order against a non-convicted third party raises several constitutionality doubts³⁴.

Art. 68 (5) PK provides for the third-party confiscation transposing in the Greek legal order Art. 6 of the Directive 2014/42/EU. The preconditions are the following: a) third party received in any way from the perpetrator or another the illegal objects or assets, which are at his disposal, b) the third party knew at the time of the property acquisition that this could have derived from a felony or misdemeanor with intent and that the purpose of the property transfer may have been to avoid confiscation and c) no confiscation against the perpetrator (consideration received for the transfer or value confiscation) was possible (subsidiarity clause).

³³ Such a discussion for the general application of such anti money laundering legislative provisions was already initiated with the previous Law n. 2331/1995. See *Papakyriakou*, The Criminal Legislation on Combating Money Laundering as a Fundamental Axis of a New Model of Criminal Law Policy [in Greek], in: Essays in Honour of I. Manoledakis, vol. II, Sakkoulas 2007, 483-529 (485).

³⁴ See for the third party confiscation under Art. 68 (5) PK *Symeonidou-Kastanidou*, The threat of penalty and security measures, in: *Kaiafa-Gbandi/Bitzilekis/Symeonidou-Kastanidou*, Criminal Sanctions Law [in Greek], 3rd edition, Nomiki Bibliothiki 2020, 94. The constitutionality issue may be overcome if the third party is convicted for receiving of stolen goods (Art. 394 PK) or for money laundering (Art. 2 Law n. 4557/2018).

In an effort to evaluate the impact of such a confiscation form on third parties, some positive and negative aspects are presented. When it comes to the positive one *first*, the external limit to third party confiscation is that this cannot be ordered against a *bona fide* third party. *Second*, third party confiscation can only be ordered in a subsidiary basis if the direct or value confiscation against the offender is not possible³⁵. On the other hand, as negative for the third party effects can be perceived *first*, when it comes to the level of knowledge that the third party should have so that the property can be confiscated in its hands, it seems that the general provision under Art. 68 (5) PK sets a lower standard of knowledge in comparison to the special one under Art. 40 (1) (3) Law n. 4557/2018, as analyzed below. It is enough for the confiscation order that the third party knew that the assets probably derived from a felony or misdemeanor with intent and that the purpose of the property transfer was to avoid confiscation (*dolus eventualis*). This makes the third party confiscation order by the court a lot easier, having to prove such a lower standard of knowledge of the third party. *Second*, the use of ‘presumptions of knowledge’ under Art. 68 (5) (2) PK. In order to facilitate the courts in the establishment of the element of knowledge, the legislator introduced some kind of ‘presumptions of knowledge’ by the third party of the asset’s unlawful transfer, as for example when the transfer or acquisition of the asset took place for no consideration or for consideration significantly below the market value or below that which would be obtained in the ordinary course of business. Of course, these criteria are only provided as indicators, are not exclusively listed³⁶ and the court should ground its decision on the existence of the element of knowledge to an overall assessment of several facts of the case. But in any case the use of such ‘presumptions of knowledge’ as means of facilitation of evidence burdens third parties’ position. *Third*, it is also introduced the possibility to confiscate even from a legal person as third party, what is also seen in the doctrine as a first shred of introduction of criminal liability of the legal persons in the Greek legal order³⁷. In that sense Art. 68 (5) (4) PK mentions that when the third party is a legal person then the element of knowledge should be present in any natural person who has the power of representation or the authorisation to take decisions or to exercise control within the legal person or who in fact exercises such functions. *Dolus eventualis*, presumptions of knowledge and inclusion of legal persons under third parties create the triangle, which transforms third party confiscation to a potentially effective tool against different forms of criminality.

Another legal basis for the third party confiscation is provided by Art. 40 (1) (3) Law n. 4557/2018 on money laundering, which provides for it when the third party knew at the time of the property acquisition about the commission of the predicate offences (Art. 4 Law n. 4557/2018) or the money laundering activities (Art. 2 Law n. 4557/2018). The preconditions are in more detail the following: a) conviction of the perpetrator at least for the money laundering offence and not necessarily also for the predicate offence, b) the unlawfully acquired property must be transferred to a third party, c) the third party knew at the time of the property acquisition the commission of the predicate offence or the money laundering offence. This last means that *dolus eventualis* concerning the commission of the offence is not enough as under Art. 68 (5) PK but the third party should know the commission of the concrete predicate offence or money laundering offence. Nothing is however mentioned concerning the knowledge of the

³⁵ In this sense *Symeonidou-Kastanidou*, The threat of penalty and security measures, in: Kaiafa-Gbandi/Bitzilekis/Symeonidou-Kastanidou, Criminal Sanctions Law [in Greek], 3rd edition, Nomiki Bibliothiki 2020, 95 mentioning that the Greek legislator understands third party confiscation under Art. 68 (5) PK as a third option after the direct and value confiscation but before the imposition of the pecuniary penalty as the last alternative.

³⁶ This follows directly from the letter of the law, namely the use in Art. 68 (5) (2) PK of the wording ‘in particular’ before stating the above-mentioned criteria.

³⁷ Such a remark by *Androulakis I.* at the [14th Panhellenic Conference of the Hellenic Society of Criminal Law, 5.6.2022](#).

origin of the assets under confiscation from the relevant offence.³⁸ and *dolus eventualis* could be enough considering the origin of the assets from the before mentioned offences.

Two are the main conclusions comparing the different provisions on third party confiscation. First, it seems at a first sight more difficult to establish the money laundering third party confiscation order under Art. 40 (1) (3) Law n. 4557/2018 compared to that under Art. 68 (5) PK, because of the need to prove a higher level of knowledge concerning the commission of the offence by the third party. However, this cannot be said with absolute certainty, because Art. 40 (1) (3) Law n. 4557/2018 misses the additional precondition provided under Art. 68 (5) PK, namely that the third party knew that the purpose of the property transfer may have been in order to circumvent the confiscation.

Second, third party confiscation under Art. 68 (5) PK can be ordered only in a subsidiary basis, when the direct or value confiscation against the offender is not possible. However open remains the issue if third party confiscation can be ordered cumulatively with a pecuniary penalty against the offender. On the other hand, when it comes to the money laundering confiscation under Art. 40 (1) (3) Law n. 4557/2018 and under a narrow grammatical interpretation this can be ordered cumulatively with a confiscation against the property of the offender. This has been already criticised in the theory³⁹ concerning the previous Art. 2 (6) Law n. 2331/1995 as an unconstitutional provision, which violates the proportionality principle, and which does not have to be applied by the Greek courts or in any case if applied this should be done only in a subsidiary basis if the assets cannot be confiscated in the hands of the offender and only if the third party knew that the assets derive from the predicate offence (knowledge concerning the commission of the predicate offence and *dolus eventualis* concerning the origin of the money from the predicate offence) and with the purpose to circumvent the confiscation order.

Other constitutionality issues arise concerning the money laundering third party confiscation. First, it is argued that as long as third party confiscation is considered in essence an ancillary penalty and taking into account that is ordered against a non-convicted third party, this violates the guilty principle, presumption of innocence and the principle *nullum crimen nulla poena sine lege* (Art. 7 of the Greek Constitution).⁴⁰ Second, it seems highly problematic the fact that on the one hand for the money laundering third party confiscation there is no need to prove that the third party knew, apart from the commission of the criminal offence also that the illegal origin of the assets and on the other hand such a precondition (knowledge of the origin of the assets from the criminal offence) is considered mandatory in order to convict the third party for money laundering offence. This discrepancy on the level of knowledge asked by the third party in case of the conviction for the money laundering offence and the money laundering

³⁸ See *Dionysopoulou*, The confiscation of the products of criminal activity. Observations and de lege ferenda proposals on the provisions of Law n. 2331/1995 [in Greek], *Yper.* 2000, 793 (798), who argued thereof for the previous Art. 2 (6) Law n. 2331/1995 that such a knowledge of the illegal origin of the assets is presumed.

³⁹ See *Papakyriakou*, The Criminal Legislation on Combating Money Laundering as a Fundamental Axis of a New Model of Criminal Law Policy [in Greek], in: *Essays in Honour of I. Manoledakis*, vol. II, Sakkoulas 2007, 483-529 (521 ff.).

⁴⁰ *Dionysopoulou*, The confiscation of the products of criminal activity. Observations and de lege ferenda proposals on the provisions of Law n. 2331/1995 [in Greek], *Yper.* 2000, 793 (802-803). See also, *Triantafyllou*, Money Laundering. The contested legal goods and their contribution to the interpretation of Art. 2 (1) Law n. 2331/1995 [in Greek], 739 (784), who considers money laundering confiscation in essence a security measure but concludes also that the provision is unconstitutional because it is based on a presumption of the dangerousness of assets, whereas this does not result from the acts of criminal activities.

confiscation leads to the conclusion that the third party is downgraded in case of confiscation to a mere instrument for criminal preventive purposes violating the guilty principle.⁴¹

4. Confiscation without conviction

a) Art. 40 (3) Law n. 4557/2018 – Confiscation of property

In Greece there is no introduction of a comprehensive model of NCBC. A first form of NCBC can be found in Art. 40 (3) Law n. 4557/2018 on money laundering, which provides for a mandatory confiscation even in the absence of previous prosecution because of the death of the offender or without conviction because of the definitive termination of criminal proceedings (e.g. because of statute of limitations on crime) or the declaration of the prosecution as inadmissible. In such cases, confiscation shall be ordered by a decision of the judicial council or by a decision of the court terminating or declaring inadmissible the criminal prosecution and, if no prosecution has been brought, by a decision of the locally competent regional judicial council. This provision is not new in the Greek legal order but existed already under the same wording in the previous anti money laundering legislation Art. 2 (8) Law n. 2331/1995 and later on unmodified in Art. 46 (3) Law n. 3631/2008.

The introduction of a mandatory confiscation form, fully disconnected from the conviction and even prosecution of the owner of the assets, raised since the beginning of its introduction in the Greek legal order controversies concerning its legal nature and constitutionality. It is therefore argued that this confiscation form, based on its application requirements (mandatory nature and order without conviction), would resemble under the *formal criterion* to a security measure, but this cannot be the case, as the assets under confiscation are not absolutely dangerous for the public order, so that the main legitimization rationale for the imposition of a security measure is missing out. But also under the *substantive criterion*, no security purpose of such a confiscation form is pursued, as we do not have to deal with absolutely dangerous for the public order assets. On the contrary in the theory it is argued that there is a general-preventive purpose and therefore this form of confiscation should be considered a genuine penalty.⁴² So, either perceived as a security measure where no absolute dangerousness of the assets for the public security can be proved or characterised as a genuine penalty ordered without previous conviction or as an ancillary penalty without the existence of a main conviction, this extended confiscation form is criticised in the theory as unconstitutional and it is thus suggested not to be applied by the courts.⁴³

⁴¹ *Tzannetis*, The confiscation of proceeds deriving from criminal activity, in: Minutes of the 4th Congress of the Hellenic Criminal Bar Association: Money laundering – “Clean or Free Society?” [in Greek], Ant. N. Sakkoulas 2007, 249 (294).

⁴² For such a point of convergence, see *Dionysopoulou*, The confiscation of the products of criminal activity. Observations and de lege ferenda proposals on the provisions of Law n. 2331/1995 [in Greek], Yper. 2000, 793 (800); *Tzannetis*, The confiscation of proceeds deriving from criminal activity, in: Minutes of the 4th Congress of the Hellenic Criminal Bar Association: Money laundering – “Clean or Free Society?” [in Greek], Ant. N. Sakkoulas 2007, 249 (295); *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], Nomiki Bibliothiki 2009, 280. At a more general level see also, *Kaiafa-Gbandi*, The confiscation of criminal assets within the EU. The 2012 Commission proposal and the new challenges for the rule of law, PoinChron 2013, 401 (402), arguing on the criminal nature of such extended confiscation forms in a form of overlap of restorative, preventive and punitive purposes but always remaining attached to the binary system of penalties and security measures.

⁴³ *Dionysopoulou*, The confiscation of the products of criminal activity. Observations and de lege ferenda proposals on the provisions of Law n. 2331/1995 [in Greek], Yper. 2000, 793 (804); *Tzannetis*, The confiscation of proceeds deriving from criminal activity, in: Minutes of the 4th Congress of the Hellenic Criminal Bar Association: Money laundering – “Clean or Free Society?” [in Greek], Ant. N. Sakkoulas 2007, 249 (295); *Dimitrainas*, Money laundering: application issues of Law 2331/1995 [in Greek], Nomiki Bibliothiki 2002, S. 219; *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], Nomiki Bibliothiki 2009, 280; *Papakyriakou*, The Criminal Legislation on Combating Money Laundering as a Fundamental Axis of a New Model of Criminal Law Policy [in

In particular, it is argued that it violates both human dignity (Art. 2 (1) of the Greek Constitution) and the *nullum crimen nulla poena sine lege* principle (Art. 7 (1) of the Greek Constitution).⁴⁴ Finally, it is also mentioned under a procedural rights perspective that this confiscation form can be ordered against a suspected or accused person even in its absence from the criminal proceedings and violating its right to be heard in essence before the relevant competent judicial body.⁴⁵

The *ratio* behind this efficiency oriented criminal policy decision by the Greek legislator already in 1995 was to confiscate all assets, which are suspected of deriving from criminal activities, under the general imperative of the fight against money laundering.⁴⁶ Or as *Papakyriakou* is underlining, the aim of the Greek legislator was to extend the confiscation form in cases of smuggling of goods, as interpreted in the Greek jurisprudence, to a variety of other offences, as the smuggling confiscation can be ordered mandatorily even if the accused was acquitted or after the termination of the criminal proceedings due to the expiry of the statute of limitations for the smuggling offence.⁴⁷

Concluding this short analysis on this kind of confiscation without conviction under Art. 40 (3) Law n. 4557/2018 of the Greek anti money laundering legislation, can be observed that this is not the result of the transposition of Art. 4 (2) of the Directive 2014/42/EU, which is anyway restricted to such confiscation without conviction cases because of illness or absconding of the suspected or accused person. The Greek legislation already in 1995 paved the way for the adoption of a wider than Art. 4 (2) Directive 2014/42/EU range of confiscation without conviction forms. Confiscation can be ordered even before the initiation of the criminal proceedings when the death of the suspected person occurred even before the prosecution and in all cases of definite termination of the criminal proceedings on formal grounds, e.g. waiver or revocation of the right to complain, amnesty, limitation period, death (Art. 370 (b) KPD) or of the declaration of the prosecution as inadmissible, e.g. existence of *res judicata* or non-existence of the necessary complaint, application, authorisation for criminal prosecution (Art. 370 (c) KPD). Here it is also to mention that there is no explicit provision in the Greek legislation about the confiscation in cases of illness or absconding of the accused but in these cases where the accused is absent from the criminal trial, in Greek law there is the possibility to proceed to a trial *in absentia*⁴⁸, so if the accused gets convicted, the applicable confiscation form will be the direct one after conviction.

Greek], in: Essays in Honour of I. Manoledakis, vol. II, Sakkoulas 2007, 483-529 (524); *Xatzinikolaou*, in: Kaiafa-Gbandi, Financial crime and corruption in the public sector [in Greek], Vol. I, 2014, 833 (843).

⁴⁴ *Dimitrainas*, Money laundering: application issues of Law 2331/1995 [in Greek], 2002, Nomiki Bibliothiki, S. 219.

⁴⁵ *Xatzinikolaou*, in: Kaiafa-Gbandi, Financial crime and corruption in the public sector [in Greek], Vol. I, 2014, 833 (843).

⁴⁶ Critical to this legislative decision *Dionysopoulou*, The confiscation of the products of criminal activity. Observations and de lege ferenda proposals on the provisions of Law n. 2331/1995 [in Greek], Yper. 2000, 793 (803-804).

⁴⁷ *Papakyriakou*, The Criminal Legislation on Combating Money Laundering as a Fundamental Axis of a New Model of Criminal Law Policy [in Greek], in: Essays in Honour of I. Manoledakis, vol. II, Sakkoulas 2007, 483-529 (523-524).

⁴⁸ In cases where the defendant is accused of having committed a misdemeanour, whether he is of known (340 (4) KPD) or unknown residence (429 (2) KPD) a judgment *in absentia* could follow. In cases where the defendant is accused of having committed a felony, it should be differentiated if he was of known residence (432 (2) KPD), then a judgment in absentia could follow, but if he was of unknown residence (432 (1) KPD) then the criminal proceedings shall be suspended by order of the prosecutor of the court until the accused is arrested or appears in the trial.

As confiscation without conviction can also be considered the confiscation of dangerous objects under Art. 76 (1) PK, which is ruling that when property under Art. 68 (1) PK is intrinsically dangerous for the public security, then it is mandatorily confiscated in the hands of its possessors independently of their previous conviction. It can be therefore ordered also against the heirs of the person against whom confiscation was sought while it was alive and the relevant confiscation judgment became final. If no prosecution or conviction was possible then competent is either the court, which ruled on the case or the Judicial Council. The confiscation of dangerous objects under Art. 76 (1) PK is considered a security measure.

b) Art. 41 (1) Law n. 4557/2018 – Compensation in favour of the State

The form of extended confiscation is implied, but not explicitly mentioned as such, in Art. 41 (1) Law n. 4557/2018, which is entitled “State’s compensation” and rules on such State’s compensation claims before the civil courts from any other property acquired from Art. 2 (AML predicate offences) of the convicted for an offence under the same Art. 2 person. In Art. 41 (2) Law n. 4557/2018 it seems that there is a restriction of the applicable offences, so that not all offences under Art. 2 could active such a civil claim but only the listed one that they may directly or indirectly lead to financial gain. The list of offences under Art. 41 (2) Law n. 4557/2018 includes the following:

- a) those of article 4 (a) to (c) and (h) of Law n. 4557/2018, so 187 PK (participation in a criminal organisation), 187A PK, 187B PK and Arts. 32-35 Law n. 4689/2020 (terrorist acts, terrorist organisation and their criminal support and financing), 159 PK, 159A PK and 237 PK (active and passive bribery of political persons and judicial officials) and 235 PK and 236 PK (active and passive bribery of officials) and those offences of articles 20-23 Law n. 4139/2013 (drugs act), and those of articles 237A PK (influence peddling-intermediaries), 323A PK (human trafficking), 396 PK (active and passive bribery in the private sector);
- b) those of articles 207 PK (counterfeiting of currency and other tangible means of payment), 208 PK (circulation of counterfeit currency and other means of payment), 208A PK (excessive currency construction);
- c) those of articles 216 PK (forgery), 372 PK (theft), 374 PK (aggravated theft), 375 PK (unauthorised use of a means of transport) and 394 (1) PK (handling and receiving of stolen goods), in so far as they relate to means of payment other than cash;
- d) those of articles 348A PK (child pornography), 348B PK (recruitment of children for sexual purposes), 348C PK (pornographic performances for minors) and 349 PK (procuring);
- e) those of article 292B PK (cybercrime).

The State may therefore claim, following a report or opinion of the State Legal Council, from the competent civil courts from the party that is irrevocably convicted to imprisonment of at least three (3) years for a criminal offence of para. 2 (predicate offences) any other property acquired by said party by any other offence of para. 2, even when there was no prosecution for said offence due to death of the offender or the prosecution that had been brought has ceased finally or was declared inadmissible. For this kind of hidden extended confiscation is therefore needed any conviction for a predicate offence (Art. 2), and not of the money laundering offence (Art. 4), punishable by more than 3 years imprisonment and then confiscated can be also other property deriving from any other predicate offence under Art. 2 without any conviction for the latter.

This article replaced the previous Art. 47 Law n. 3691/2008 (and already amended Art. 3 Law n. 2331/1995⁴⁹) on money laundering, which was amended through Art. 7 Law n. 4478/2017 in the transposition of Art. 5 of the Directive 2014/42/EU in the national legal order.⁵⁰ It should be however highlighted that the transposition of the extended confiscation under Art. 5 of the Directive 2014/42/EU in the Greek legal order has not been done under a general provision in the Greek Penal Code, but under a provision of the special criminal law on money laundering, which raises some doubts on the issue if Art. 41 Law n. 4557/2018 constitutes just a *lex specialis* for the money laundering or if it has a more general validity. It can be said that it is a general provision hidden in a provision of a special criminal law. The extend of the predicate offences may support the argumentation that Art. 41 Law n. 4557/2018 assumes a general legal validity (*lex generalis*), even if it is ruled under a special criminal law and not in the general part of the Greek Penal Code. It can be therefore concluded that it is created by the Greek legislator a parallel confiscation regulatory system outside the Greek Penal Code, namely in the money laundering legislation, seeking for general application and as a side effect, as already highlighted in the doctrine⁵¹, undermining the general character of the confiscation provisions in the Greek Penal Code.⁵²

However, the critic of this measure is summarised on the fact that there is a “label change”⁵³, namely although this measure is framed as a State’s compensation and therefore as a civil measure, it is in its essence a hidden criminal confiscation form, characterised in the theory as a real penalty under the Engel criteria because of its nature and severity. It is first argued that it has the same, if not more, detrimental effects and retributive purpose with the confiscation under Art. 40 Law n. 4557/2018.⁵⁴ The principle argument in support of this position is that it can be confiscated any property deriving from a predicate offence under Art. 2 without any explicitly mentioned limit, what can also bear the risk of an unconstitutional general confiscation of the whole property of the offender violating Art. 7 (3) of the Greek Constitution.⁵⁵ This criticism in the previous legislation is still relevant as long as it concerns the proportionality principle and the extend of the confiscation order, but is also mitigated by the fact that Art. 41 (2) Law n. 4557/2018 is restricting the scope of application of this confiscation form to a specific list of serious offences and only when financial gain is expected to derive from those. A second point of criticism in this “State’s compensation” is that, a

⁴⁹ Here it is to mention that some problematic parts of Art. 3 Law n. 2331/1995 were abandoned with the adoption of Art. 47 Law n. 3691/2008, such as the reversal of the burden of proof of the legal origin of the assets to the defendant or the confiscation of property deriving from the offences (predicate offence or money laundering) during the last 5 years before their commission and until the irrevocable conviction or even after it. See thereof *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], *Nomiki Bibliothiki* 2009, 283 and *Xatzinikolaou*, in: *Kaiafa-Gbandi*, Financial crime and corruption in the public sector [in Greek], Vol. I, 2014, 833 (845-846).

⁵⁰ Explanatory memorandum Law n. 4478/2017, S. 4.

⁵¹ *Kaiafa-Gbandi*, Financial crime and corruption in the public sector [in Greek], Vol. III, 2015, 108 (115), describing the whole situation as the „anarchic development of a lateral general part“.

⁵² In this sense also OECD (2018), Review of Legal and Regulatory Asset Recovery Framework in Greece, recommends the transfer of legislative provisions on extended confiscation and non-conviction based confiscation from the anti-money laundering legislation to the Greek penal code avoiding in this way any overlap between those provisions.

⁵³ *Kaiafa-Gbandi*, Elements of European Criminal Law and their transposition in the Greek Legal Order [in Greek], Sakkoulas 2016, 128, concluding also that this confiscation form is a penalty.

⁵⁴ *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], *Nomiki Bibliothiki* 2009, 282; *Kaiafa-Gbandi*, Elements of European Criminal Law and their transposition in the Greek Legal Order [in Greek], Sakkoulas 2016, 128.

⁵⁵ For the same critic already in Art. 3 Law n. 2331/1995, see *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], *Nomiki Bibliothiki* 2009, 282, who also concludes that this confiscation form is a penalty under the Engel criteria.

compensation presupposes a damage, which in our case would mean that all offences under Art. 2 are causing a damage to the State, what is however not always the case.⁵⁶

The constitutionality of Art. 41 Law n. 4557/2018 falls however under hard critic in the doctrine. And interestingly there is until now no application of this provision neither in its current nor in its previous form by the courts.⁵⁷ First, it is argued that there is a violation of Art. 96 (1) of the Greek Constitution⁵⁸, as the affected persons are deprived of the judge assigned to them by the law, which is in case of the imposition of penalties or security measures the criminal one. Art. 96 (1) states „*The punishment of crimes and the adoption of all measures provided by criminal laws belong to the jurisdiction of ordinary criminal courts*“. As we have seen before Art. 41 Law n. 4557/2018 may label this measure as „civil compensation“ but it is in the reality a form of „hidden confiscation“ with pure criminal character. This further means that competent are not as provided under the previous article the civil courts but the criminal courts, which are in that case deprived of their exclusive competence. The critic is also focused on the argument that although it is actually a penalty the national legislator decides to delegate the relevant competence to the civil courts and the civil procedural law, followed by the use of presumptions, in order to avoid the higher procedural guarantees of criminal law⁵⁹. Moreover, the imposition of a criminal in nature measure without previous conviction would directly violate the presumption of innocence⁶⁰ and principle of guilt.⁶¹

For this provision the Greek legislator is hardly characterised from “institutional insecurity” as it tries on the one hand to show that it is in conformity with the international obligations and on the other hand not to deviate completely from the way confiscation is understood in the domestic legal order.⁶² What comes however as a result is that with this provision overrides the relevant international and european regulations on extended confiscation forms.⁶³ As a conclusion, it is observed that the transposition of the far reaching extended confiscation provisions under the Directive 2014/42/EU in the Greek legal order comes at odds with the

⁵⁶ See *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], *Nomiki Bibliothiki* 2009, 282, mentioning that it can of course happen in some of the offences such as the tax fraud that they cause a damage to the State but this does not extend as a general rule to all other offences.

⁵⁷ For such an observation also *Xatzinikolaou*, in: *Kaiafa-Gbandi*, Financial crime and corruption in the public sector [in Greek], Vol. I, 2014, 833 (847) and *Papakyriakou*, The Criminal Legislation on Combating Money Laundering as a Fundamental Axis of a New Model of Criminal Law Policy [in Greek], in: *Essays in Honour of I. Manoledakis*, vol. II, Sakkoulas 2007, 483-529 (525).

⁵⁸ *Kaiafa-Gbandi*, Elements of European Criminal Law and their transposition in the Greek Legal Order [in Greek], Sakkoulas 2016, 128, *Tsiridis*, The new anti-money laundering Law n. 3691/2008 [in Greek], *Nomiki Bibliothiki* 2009, 282

⁵⁹ Already such a critic for the previous Art. 3 Law n. 2331/1995, see *Dionysopoulou*, The confiscation of the products of criminal activity. Observations and de lege ferenda proposals on the provisions of Law n. 2331/1995 [in Greek], *Yper.* 2000, 793 (804).

⁶⁰ This is not explicitly mentioned in the Greek Constitution but it is a constituent element of both the constitutional guarantees relating to the imposition of penalties and fair trial (Articles 6, 7 and 20 of the Greek Constitution) and the rule of law principle (Art. 25 of the Greek Constitution).

⁶¹ This principle finds its legal bases in the Greek constitutional legal order in Articles 2 (1), 5 (1) and 7 (1) of the Greek Constitution. *Kaiafa-Gbandi*, Elements of European Criminal Law and their transposition in the Greek Legal Order [in Greek], Sakkoulas 2016, 128.

⁶² *Xatzinikolaou*, in: *Kaiafa-Gbandi*, Financial crime and corruption in the public sector [in Greek], Vol. I, 2014, 833 (847).

⁶³ *Papakyriakou*, The Criminal Legislation on Combating Money Laundering as a Fundamental Axis of a New Model of Criminal Law Policy [in Greek], in: *Essays in Honour of I. Manoledakis*, vol. II, Sakkoulas 2007, 483-529 (525). *Kaiafa-Gbandi*, Elements of European Criminal Law and their transposition in the Greek Legal Order [in Greek], Sakkoulas 2016, 129.

fundamental principles of national law and sometimes even overrides the international recommendations in the field of confiscation.⁶⁴

c) Art. 160 (3) of Customs Code (Law n. 2960/2001)

According to Art. 160 (3) of Customs Code (Law n. 2960/2001) all smuggled goods are confiscated, irrespective of the participation in the offence (smuggling) of the person having any right to the property, except if it can prove lack of participation in or lack of knowledge of the offence committed. This provision seems to introduce a form of mandatory confiscation of the products and instruments of smuggling without conviction for the latter and under the sole precondition of the proof of the commission of the offence of smuggling and that the goods under confiscation derive from it. This was already the case in the previous Art. 107 of Customs Code. This provision introduces moreover an unacceptable for Greek criminal law and contrary to the presumption of innocence reversal of the burden of proof to the owner of the smuggled goods, meaning that he has to prove his lack of knowledge or participation to the offence of smuggling, in order to avoid the confiscation order.⁶⁵ This implies the existence of a rebuttable presumption of the participation or knowledge of the owner of the smuggled goods to the commission of the smuggling or in other words a presumption of guilt of the owner of the contraband, unless he can prove the opposite.⁶⁶

The legal nature of this confiscation form was since the beginning highly debatable and a point of divergence between theory and jurisprudence. The jurisprudence still argues that this kind of confiscation in cases of smuggling has a mixed character of ancillary penalty and compensation. A corrective interpretation from the doctrine is underlying that this jurisprudence should be understood as meaning that this kind of confiscation of smuggled goods can interchangeably function either as an ancillary penalty or as a compensation.⁶⁷ However this last compensatory component of confiscation is mainly rejected in the theory, and this confiscation form is under the prevailing in the theory opinion considered a penalty.⁶⁸ The main argument against the compensatory nature of this confiscation form is that compensation is conditional on damage and compensation is set for the exact amount of the damage suffered. In the case of the confiscation because of smuggling, the State's damage is specified in the unpaid custom duties, but in the practice the amount of confiscation is extended far beyond the latter, so that we cannot characterise this confiscation form a restitutive measure.⁶⁹ Moreover, the fact that a pecuniary penalty can be imposed alternatively under Art. 160 (2) (2) of the Customs Code when a confiscation is not possible supports the argument that the latter cannot be but a penalty.⁷⁰ On the other hand is supported that such a confiscation form should be treated as a peculiar *poena*

⁶⁴ *Giannakoula*, Crime and punishment in the EU – Approximation of definitions of crime and punishment in the area of freedom, security and justice [in Greek], *Nomiki Bibliothiki* 2015, 355.

⁶⁵ *Androulakis*, Punishment without crime? Confiscation without conviction? [in Greek], *PoinChron* 2017, 241 (245).

⁶⁶ *Androulakis*, Punishment without crime? Confiscation without conviction? [in Greek], *PoinChron* 2017, 241 (245).

⁶⁷ *Symeonidou-Kastanidou*, Confiscation under Art. 107 of the Customs Code [in Greek], *Yper.* 2000, 1105 (1106).

⁶⁸ For the legal nature of this confiscation form, see several divergent opinions in the theory. For an ancillary penalty, see *Symeonidou-Kastanidou*, Confiscation under Art. 107 of the Customs Code [in Greek], *Yper.* 2000, 1105 (1106). In the same sense also *Androulakis*, Punishment without crime? Confiscation without conviction? [in Greek], *PoinChron* 2017, 241 (245), who is arguing that such a confiscation form is a penalty and in particular *poena suspicionis*. Under the previous legislation *Pavlou*, Confiscation of means of transport under the Customs Code and other specific criminal laws [in Greek], *Armenopoulos* 1989, 733 (740) underlines that such confiscation form resembles to a penalty. Another opinion adopts *Zagarolas*, Confiscation order under the Customs Code by subsequent decision [in Greek], *PoinChron* 1954, 525 (528), arguing that it constitutes a security measure.

⁶⁹ *Symeonidou-Kastanidou*, Confiscation under Art. 107 of the Customs Code [in Greek], *Yper.* 2000, 1105 (1106).

⁷⁰ *Symeonidou-Kastanidou*, Confiscation under Art. 107 of the Customs Code [in Greek], *Yper.* 2000, 1105 (1107).

suspicionis under the resolute condition, that the owner of the smuggled goods proves his non-relevance with the offence of smuggling.⁷¹

Concerning the constitutionality of such a confiscation of the smuggled goods in case of acquittal of the person concerned theory and jurisprudence are opposed. In the decision of the Supreme Court in plenary session (OIAP 145/1965) the detected argumentation is that the only unconstitutional confiscation form is the general one, which is explicitly prohibited under Art. 7 (3) of the Greek Constitution and therefore any other partial confiscation can be introduced by the national legislator. This is not accepted in the theory which emphasises that partial confiscation is also bounded by the right to property under Art. 17 of the Greek Constitution and falls under certain limits and confiscation is anyway allowed only when it can be considered under the dual track system as an ancillary penalty or a security measure.

5. Guarantees and Limits

Confiscation constitutes as a measure a final deprivation of property and therefore a limitation of the right to property under Art. 17 of the Greek Constitution, Art. 1 of the I. AP of the ECHR and Art. 17 of the Charter. Such a drastic limitation of the right to property should first comply with the legality principle and therefore explicitly provided as a measure by the law (sufficient and concrete legal basis).⁷² Moreover, the mandatory nature of some confiscation forms should not deprive the affected person from their right to judicial protection, meaning that the legality of the confiscation order should always fall under the judicial control, as the right to an effective judicial protection is of superior legal force.⁷³ In order that such a limitation of the right to property can be perceived as constitutional, it should also comply with the proportionality principle. This provides somehow the guidelines for both the order or not of the confiscation and the extent of such a confiscation order, namely which property can fall under the confiscation order. Another explicitly mentioned constitutional limit to confiscation is the absolute prohibition under Art. 7 (3) of the Greek Constitution of the general confiscation of all property. This does not mean however that any other partial specific confiscation can be ordered without any further constitutional limitation.⁷⁴ Another constitutional limit to confiscation draws Art. 2 (1) of the Greek Constitution, namely no confiscation can be ordered when this would violate a person's human dignity.

As a preliminary remark, the right to property is not an absolute right, what means that it can be limited under certain conditions. Art. 17 (1) of the Greek Constitution states, "*Property is under the protection of the State, but the rights deriving from it cannot be exercised to the detriment of the general interest*". It is therefore clear that the right to property can be limited when there is a grounded prevailing general interest. When it comes for the confiscation as an ancillary penalty, it is a constitutionally legitimate restriction of the right to property based on the argument that the owner of the property makes an abusive exercise of its right, either using its property for the commission of an offence or acquires property through an offence, against the public interest.⁷⁵ The prohibition of the abusive exercise of individual rights finds its legal

⁷¹ *Androulakis*, Punishment without crime? Confiscation without conviction? [in Greek], *PoinChron* 2017, 241 (245).

⁷² *Symeonidis*, Seizures in criminal proceedings and protection of individual rights [in Greek], *Sakkoulas* 2010, 106.

⁷³ *Symeonidis*, Seizures in criminal proceedings and protection of individual rights [in Greek], *Sakkoulas* 2010, 108.

⁷⁴ *Pavlou*, The confiscation in the Penal Code and the special criminal laws [in Greek], *Ant. N. Sakkoula* 1994, 96.

⁷⁵ *Pavlou*, The confiscation in the Penal Code and the special criminal laws [in Greek], *Ant. N. Sakkoula* 1994, 98 with further note to the AP 949/1983 *PoinChron* 1984, 45 et seq.

basis in Art. 25 (3) of the Greek Constitution and is a general restriction on their exercise. On the other hand, when it comes for the confiscation as a security measure, the restriction of the right to property is constitutionally justified by the fact that confiscated are absolutely dangerous objects, which run counter to the general interest.⁷⁶

Moreover, as during the computation of the main penalty under Art. 79 PK should be taken into account *in concreto* the seriousness of the crime and the personality of the offender, the same article should find application for the confiscation as a non-mandatory ancillary penalty. The judge should therefore order the confiscation taking into account the seriousness of the offence and the seriousness of the main penalty.⁷⁷ This latter means that the ancillary penalty cannot be harsher than the main penalty (e.g. imposition of a custodial penalty, which was suspended or commuted into pecuniary penalty followed by the confiscation of a vehicle of high value).⁷⁸ What arises however as a great problem are the confiscation cases as mandatory ancillary penalty (e.g. Art. 238 PK corruption cases or confiscation under money laundering legislation), where no margin of appreciation is being left to the judge, so that the proportionality principle cannot find full application in these cases. This has been criticised in the doctrine and a repeal of all this kind of confiscation forms has been proposed.⁷⁹ To the judge's discretion remains however the extend of the assets, which are about to be confiscated.

The proportionality principle is ruled in the Greek legal order in Art 25 (4) of the Greek Constitution stating: "*Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality*". Focused on the application of the proportionality principle in confiscation cases, Art. 68 (2) PK includes an explicit proportionality provision mentioning that "*no confiscation shall be imposed where the court, of its own motion or at the request of a party or a third party, considers that it is disproportionate in the particular case, such as where there is a risk of depriving the convicted person or a third party, in particular their family, of something that serves their necessary livelihood or of causing them excessive and irreparable harm. In the cases referred to in the preceding subparagraph, the court may impose a correspondingly limited confiscation or a fine in accordance with paragraph 4*". This is also in accordance with Recital 18 of the Directive 2014/42/EU stating that confiscation should not be ordered in exceptional cases when according to national law this would cause an "undue hardship for the affected person". Some kind of such proportionality criteria had already been developed in the Greek jurisprudence highlighting that confiscation may be ordered only after an *in concreto* reasoned decision finding out that a custodial sentence is not sufficient to prevent the offender from the commission of further offences and taking also into account his/her economic status and the importance that the confiscation measure may have for the maintenance of his/her family. However, and as Art. 68 (2) PK is mentioning, when the imposition of confiscation is considered disproportional this does not have as a consequence that no confiscation will be ordered but a limited confiscation to the amount that can be considered in compliance with the proportionality principle or alternatively a pecuniary penalty can be imposed.

⁷⁶ Pavlou, The confiscation in the Penal Code and the special criminal laws [in Greek], Ant. N. Sakkoula 1994, 101.

⁷⁷ Pavlou, The confiscation in the Penal Code and the special criminal laws [in Greek], Ant. N. Sakkoula 1994, 113-114.

⁷⁸ Symeonidis, Seizures in criminal proceedings and protection of individual rights [in Greek], Sakkoulas 2010, 109-110, Pavlou, The confiscation in the Penal Code and the special criminal laws [in Greek], Ant. N. Sakkoula 1994, 114.

⁷⁹ Pavlou, The confiscation in the Penal Code and the special criminal laws [in Greek], Ant. N. Sakkoula 1994, 118 (second proposal).