

Case C-161/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

16 March 2023

Referring court:

Satversmes tiesa (Latvia)

Date of the decision to refer:

14 March 2023

Appellants before the Satversmes tiesa:

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LIREVA INVESTMENTS LIMITED

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FORTRESS FINANCE Inc.

Respondent:

Latvijas Republikas Saeima

Subject matter of the main proceedings

Assessment of the compatibility of Articles 124(6), 125(3) and 126(3.¹) of the Kriminālprocesa likums (Law on Criminal Procedure) with the first and second sentences of Article 92 of the Latvijas Republikas Satversme (Constitution of the Republic of Latvia).

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, the referring court seeks to ascertain, first, whether the national legislation being examined in the main proceedings, pursuant to

which a national court rules on the confiscation of the proceeds of crime in separate proceedings relating to illegally obtained assets, falls within the scope of Directive 2014/42/EU and Framework Decision 2005/212/JHA; second, whether the rules laid down in the provisions at issue concerning proof of the criminal source of the assets can be considered compatible with the right to a fair trial enshrined in the Charter of Fundamental Rights of the European Union and Directive 2014/42; and, third, whether, in the event that the provisions at issue should be considered incompatible with European Union law, their legal effects may be maintained while they are in force.

Questions referred for a preliminary ruling

1.1. Does national legislation pursuant to which a national court rules on the confiscation of the proceeds of crime in separate proceedings relating to the illegally obtained assets, which are separated from the main criminal proceedings before it is established that a criminal offence has been committed and before anyone has been found guilty of that offence, and which also provides for confiscation based on materials taken from the criminal case file, fall within the scope of Directive 2014/42, in particular Article 4 thereof, and of Framework Decision 2005/212, in particular Article 2 thereof?

1.2. If the first question is answered in the affirmative, may national legislation concerning proof of the criminal source of assets in proceedings concerning illegally obtained assets, such as that established in the provisions at issue, be considered compatible with the right to a fair trial enshrined in Articles 47 and 48 of the Charter and in Article 8(1) of Directive 2014/42?

1.3. Is the principle of the primacy of European Union law to be interpreted as precluding the constitutional court of a Member State, which is seised of an action for a declaration of unconstitutionality brought against national legislation which has been held to be incompatible with European Union law, from ruling that the principle of legal certainty is applicable and that the legal effects of that legislation are to be maintained in relation to the period during which it was in force?

Provisions of European Union law relied on

Charter of Fundamental Rights of the European Union ('the Charter'): Articles 47, first paragraph and second paragraph, first sentence, and 48(1).

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property ('Framework Decision 2005/12'): recital 10 and Articles 1, 2 and 4.

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime

in the European Union ('Directive 2014/42'): recitals 9, 15, 22 and 38 and Articles 1(1), 2(4), 4, 5 and 8(1).

Case-law of the Court of Justice

Judgment of the Court of Justice of 19 March 2020, '*Agro In 2001*', C-234/18, EU:C:2020:221, paragraphs 56 and 57.

Judgment of the Court of Justice of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraphs 36, 37 and 41.

Judgment of the Court of Justice of 21 October 2021, *Okrazhna prokuratura – Varna*, C-845/19 and C-863/19, EU:C:2021:864, paragraph 75.

Judgment of the Court of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraphs 132 and 133.

Case-law of the European Court of Human Rights

Judgment of the Grand Chamber, 28 June 2018, *G.I.E.M. S.r.l. and Others v. Italy* (CE:ECHR:2018:0628JUD000182806), paragraphs 211, 223 to 225 and 233.

Judgment of 12 May 2015, *Gogitidze and Others v. Georgia* (CE:ECHR:2015:0512JUD003686205), paragraphs 102 and 103.

Judgment of 25 May 1986, *Feldbrugge v. The Netherlands* (CE:ECHR:1986:0529JUD000856279), paragraph 44.

Judgment of 27 October 1993, *Dombo Beheer B.V. v. The Netherlands* (CE:ECHR:1993:1027JUD001444888), paragraph 33.

Judgment of 15 July 2010, *Šikić v. Croatia* (CE:ECHR:2010:0715JUD000914308), paragraph 52.

Provisions of national law relied on

Latvijas Republikas Satversme (Constitution of the Republic of Latvia) ('the Constitution'): first and second sentences of Article 92, according to which 'everyone is entitled to defend his rights and legitimate interests before an impartial court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law.'

Krimināllikums (Criminal Code): Articles 70.¹⁰, which defines the special confiscation of assets, and 70.¹¹(1), which defines illegally obtained assets.

Kriminālprocesa likums (Law on Criminal Procedure): Article 124, which defines what is to be proved, paragraph 6; Article 125, which establishes a rebuttable presumption of fact, paragraph 3; and Article 126, which defines the burden of proof and the persons on whom it lies, paragraph 3¹ ('the provisions at issue'). The provisions at issue, as currently worded, have been in force since 24 December 2019.

Article 356 of the Law on Criminal Procedure establishes the procedure for declaring that assets have been obtained illegally.

Succinct presentation of the facts and the main proceedings

- 1 Pursuant to Article 124(6) of the Law on Criminal Procedure, in criminal proceedings and proceedings concerning illegally obtained assets, the circumstances that must be proved as regards the criminal source of the assets will be considered proved if, as a result of the taking of evidence, there are reasons to believe that the source of the assets is more probably criminal than legal.

According to Article 125(3) of the Law on Criminal Procedure, it is to be considered proved that assets used for money laundering activities have been obtained illegally if the person involved in the criminal proceedings fails to give a credible account of the legal origin of the assets concerned and if the evidence as a whole provides the person directing the proceedings with a basis for presuming that the source of the assets is probably illegal.

Article 126(3¹) of the Law on Criminal Procedure stipulates that if a person involved in criminal proceedings claims that the assets should not be found to have been obtained illegally, that person will have the burden of proving that the source of the assets concerned is legal. If the person concerned does not provide credible information about the lawfulness of the source of the assets within the time limit laid down, the opportunity for that person to obtain compensation for the prejudice caused by the restrictions on the ability to dispose of those assets, imposed in the criminal proceedings, will be lost.

- 2 As a result of the five actions for a declaration of unconstitutionality brought by the appellants before the Satversmes tiesa (Constitutional Court, Latvia) ('the referring court'), that court is called upon to determine whether the provisions at issue are compatible with the first and second sentences of Article 92 of the Constitution. The appellants before the Satversmes tiesa (Constitutional Court) submit that the provisions at issue are incompatible with the first and second sentences of Article 92 of the Constitution, in conjunction with the safeguards contained in Article 8 of Directive 2014/42 and with Framework Decision 2005/212.
- 3 It can be seen from the case file that several separate sets of criminal proceedings relating to alleged large-scale money laundering have been instituted in Latvia under Article 195(3) of the Criminal Code. Those proceedings are still at the

investigation stage. In each of those criminal proceedings, the person directing the proceedings seized financial assets or immovable property from the appellants before the Satversmes tiesa (Constitutional Court), instituted proceedings concerning illegally obtained assets and sent the case file relating to those assets to the court hearing the latter cases. In all those proceedings, the assets of the appellants before the Satversmes tiesa (Constitutional Court) were found by a final judicial decision to have been obtained illegally and their confiscation in favour of the State was ordered.

The essential arguments of the parties in the main proceedings

- 4 The appellants before the Satversmes tiesa (Constitutional Court) contend that the provisions at issue fail to safeguard the principle of equality of arms between the parties and infringe the presumption of innocence. They submit that Directive 2014/42 applies to proceedings concerning illegally obtained assets and that, as a result, in such proceedings, the safeguards laid down in Article 8(1) of that directive are to be applied to the persons whose assets have been confiscated, thereby ensuring respect for the right to an effective remedy and a fair trial of the persons connected to the assets. According to the appellants, since proceedings concerning illegally obtained assets follow the principles of confiscation in the absence of a criminal conviction instead of the principles of extended confiscation within the meaning of Article 5 of Directive 2014/42, the rebuttable presumption of fact should not be applied in those proceedings.
- 5 According to the appellants before the Satversmes tiesa (Constitutional Court), once the person directing the proceedings declares that the source of the assets can be presumed to be criminal, they bear the disproportionate burden of proving that the source of the assets is legal, and are not given sufficient and effective procedural safeguards in order to refute that presumption. As a result, in proceedings concerning illegally obtained assets, the person in charge of the proceedings could in their view be at an advantage vis-à-vis the person connected to those assets.
- 6 The institution that issued the contested act, the Latvian Parliament, takes the view that the provisions at issue are compatible with both the principle of equality of arms between the parties and the presumption of innocence. Proceedings concerning illegally obtained assets concern situations in which the matter of the criminal source of assets must be determined before anyone has been found guilty of a criminal offence in accordance with the procedure laid down by law. Latvia's international obligations include that of establishing a framework ensuring that illegally obtained assets will be confiscated. The same obligation is also apparent from Directive 2014/42.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 7 Since the provisions at issue form part of legislation governing proceedings for the confiscation of the proceeds of crime, Articles 47 and 48 of the Charter, Directive 2014/42 and Framework Decision 2005/12 are relevant in that assessment.
- 8 The referring court takes the view that the offences linked to proceedings concerning illegally obtained assets fall within the material scope of Directive 2014/42. Furthermore, the punishment laid down for those offences is a prison sentence of between 3 and 12 years, in line with the punishment established in Article 2(1) of Framework Decision 2005/12.
- 9 The Court of Justice has held that Directive 2014/42, like Framework Decision 2005/12, to which it refers, is a legal act which requires Member States to adopt common minimum rules on the confiscation of crime-related instrumentalities and proceeds, in order to facilitate the mutual recognition of confiscation orders issued by a court in criminal proceedings. Directive 2014/42 does not govern the confiscation of instrumentalities and proceeds resulting from illegal activities ordered by a court in a Member State in proceedings that do not concern the finding of one or more criminal offences or do not immediately follow such a finding. Such confiscation falls outside the scope, in fact, of the minimum rules laid down by that directive, in accordance with Article 1(1) thereof, and the rules governing it therefore fall within the scope of the Member States' competence, referred to in recital 22 of that directive, to provide more extensive powers in their national law. Accordingly, the referring court must examine whether Directive 2014/42, and Framework Decision 2005/12, to which it refers, is applicable to the provisions on proceedings concerning illegally obtained assets contained in the Law on Criminal Procedure.
- 10 The provisions at issue relate to the means of proving the criminal origin of assets in separate proceedings relating to illegally obtained assets, before the court's final judgment in the criminal prosecution. The legislature's objective in separating the examination of property issues into a special procedure was, in the interests of procedural economy, to secure the timely resolution of any property issues arising in criminal proceedings. That procedure does not determine a person's guilt, but rather rules on whether the origin of the assets is illegal or whether those assets are connected to a criminal offence. That special procedure relating to illegally obtained assets corresponds to what are referred to in Latvian legal literature as 'proceedings *in rem*', and it gives rise to a final ruling on property issues. If the preliminary stage of criminal proceedings includes proceedings relating to illegally obtained assets and in those proceedings the court declares that assets have been obtained illegally, in the main criminal proceedings the court then does not rule on what will happen to those assets. In the proceedings concerning illegally obtained assets there is therefore no assessment of a person's guilt. Those proceedings are not based on a conviction and do not depend, in terms of substance, on the criminal case under investigation in respect of the criminal offence or on the outcome of that case.

- 11 Directive 2014/42, like Framework Decision 2005/12, to which it refers, may therefore be interpreted as meaning that it is not applicable to the proceedings relating to illegally obtained assets established in the Law on Criminal Procedure, because the judicial decision rules that assets have been obtained illegally before any finding that a criminal offence was committed and before anyone has been found guilty of that offence.
- 12 The European Court of Human Rights, when examining whether confiscation in the absence of a criminal conviction equates to punishment within the meaning of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), has ruled that the starting point for conducting such an assessment is whether confiscation is ordered following a decision in which the person concerned is found to be guilty of committing a criminal offence. However, other factors are also involved in that assessment, such as the character and purpose of the proceedings and the scale of the confiscation, and the nature of those proceedings as defined in national law and the detailed rules for their application.
- 13 Under the Latvian legislation, in proceedings relating to illegally obtained assets, the materials providing the basis for the connection between the assets and the offence or for the criminal source of the assets are separated from the criminal case being investigated in relation to a criminal offence. In those proceedings, the parties are entitled to produce evidence, but the findings on the connection between the assets and the criminal offence or on the criminal source of the assets are based, *inter alia*, on materials from the criminal file compiled in the main criminal proceedings.
- 14 Article 4(2) of Directive 2014/42 provides that, in certain circumstances, the directive is also applicable in cases where criminal proceedings have been initiated regarding a criminal offence but there has been no conviction in those criminal proceedings. No case-law of the Court of Justice exists in relation to that provision.
- 15 It can be inferred from Article 4(2), in conjunction with Article 2(4) of Directive 2014/42, that Directive 2014/42 is also applicable, in certain circumstances, to proceedings regarding the confiscation of proceeds of crime which do not concern a finding of one or more criminal offences or which do not immediately follow proceedings of that kind, that is to say, the confiscation of proceeds of crime in the absence of a criminal conviction. Furthermore, the wording of Article 4(2) of Directive 2014/42 may also indicate, *inter alia*, that the circumstances it mentions as reasons why confiscation may not be possible are not listed exhaustively.
- 16 Accordingly, in case No 2022-32-01, the interpretation of Directive 2014/42 and of Framework Decision 2005/12 could give rise to divergent conclusions regarding whether the rules governing proceedings concerning illegally obtained assets contained in the Law on Criminal Procedure fall within the Member States'

competence, as referred to in recital 22 of that directive, and whether, as a consequence, those legislative acts are not applicable to such proceedings.

- 17 Those legislative acts have not, to date, been interpreted in relation to proceedings regarding the confiscation of illegally obtained assets, provided for in national law, where those proceedings are not conducted in the context of civil proceedings and are initiated on the basis of a body of evidence existing in criminal proceedings before it is found that a criminal offence has been committed and before anyone is found guilty of the offence concerned. The correct interpretation and application of Directive 2014/42 and Framework Decision 2005/12 is not, in the light of their aim of improving the confiscation of assets in criminal proceedings within the European Union, so obvious in the present factual and legal circumstances being examined by the *Satversmes tiesa* (Constitutional Court) as to leave no room for reasonable doubt regarding the scope of those legislative acts.
- 18 If the rules governing proceedings relating to illegally obtained assets contained in the Law on Criminal Procedure fall within the scope of Directive 2014/42 and Framework Decision 2005/212, to which it refers, the Member States have an obligation to adopt the measures necessary to ensure that persons affected by the measures provided for in that directive are entitled to an effective remedy and a fair trial to safeguard their rights. Article 48 of the Charter, for its part, contains the presumption of innocence.
- 19 Article 124(6) of the Law on Criminal Procedure establishes a lower standard of proof in relation to illegally obtained assets – a ‘balance of probabilities’ – with the effect that, in proceedings relating to illegally obtained assets, the person directing the proceedings is not required to prove beyond reasonable doubt that the assets have a criminal source. As soon as the person directing the proceedings informs the persons connected to the assets that the latter are presumed to have been obtained illegally, those persons, if they believe that those assets should not be found to have been obtained illegally, bear the burden of proving that the origin of the assets is legal. If those persons cannot offer a credible account of the legal origin of the assets concerned and if the evidence as a whole provides the person directing the proceedings with a basis for finding that the source of the assets is more probably illegal than legal, under Article 125(3) of the Law on Criminal Procedure it will then be deemed to be proved that the assets used for money laundering were obtained illegally.
- 20 Proceedings that do not involve a conviction or the imposition of a penalty are not related to ‘any criminal charge’ within the meaning of Article 6(1) of the Convention. Nevertheless, the confiscation of assets that have been found to be the proceeds of crime, as the outcome of proceedings relating to illegally obtained assets, must be regarded as ‘controlling’ the use of property within the meaning of Article 1 of the Additional Protocol to the Convention, and those proceedings therefore also concern the determination of a person’s civil rights and obligations within the meaning of Article 6(1) of the Convention. The principle of equality of

arms between the parties is an integral part of the concept of a 'fair trial' and applies, in the sense of a fair balance, in both civil and criminal cases. The principle means that each party must be afforded a reasonable opportunity to present his or her case, including by submitting evidence, under conditions which do not place him or her at a substantial disadvantage vis-à-vis the other party.

- 21 While admittedly, under the Latvian legislation, proceedings relating to illegally obtained assets are not aimed at finding a person guilty, the fact remains that the presumption of innocence is infringed not only where a person is actually found guilty, but also where an assessment makes it possible to find a person guilty in relation to a criminal offence.
- 22 Assessment of whether assets may have a criminal source is therefore closely linked to whether money laundering operations have been carried out using the assets concerned. The finding by the person directing the proceedings or the court is likely to be regarded as an assessment of the person's guilt as regards a criminal offence. It could therefore be inferred that the provisions at issue require the persons connected to the assets to rebut the presumption that they participated in money laundering activities. Such a situation would conflict with the presumption of innocence.
- 23 It is therefore unclear whether, in the event that the provisions at issue fall within the scope of the European Union legislative acts, national legislation which, in proceedings relating to illegally obtained assets, establishes a rebuttable presumption of fact that the source of the assets is illegal and places the burden of proving that the source of the assets is legal on the person connected to the assets is compatible with the right to an effective remedy established in Article 47 of the Charter, the presumption of innocence enshrined in Article 48 of the Charter and the safeguards laid down in Article 8(1) of Directive 2014/42.
- 24 The referring court also asks the Court of Justice to rule on whether the provisions at issue should maintain their legal effects.
- 25 Pursuant to Article 32(1) of the Satversmes tiesas likums (Law on the Constitutional Court), a judgment of the referring court is final and enforceable as soon as it is delivered. In accordance with Article 32(3), a legal provision which the referring court has declared to be inconsistent with a higher-ranking rule of law is treated as void from the day of publication of that court's judgment, unless the court decides otherwise. However, pursuant to Article 31(11) of the Law on the Constitutional Court, the referring court may state in its judgment the point at which a contested provision that has been declared inconsistent with a higher-ranking rule of law will cease to have effect. In order to determine the specific point at which the provision at issue will cease to have effect, the referring court also assesses whether there are reasons why the provision at issue should be declared invalid with retroactive effect. When deciding the point at which the provisions at issue will cease to have effect, the principle of legal certainty must be weighed against the fundamental rights of certain persons.

- 26 In the light of the foregoing, were the referring court to be required to find that the provisions at issue are incompatible with the first and second sentences of Article 92 of the Constitution, the Charter, Directive 2014/42 and Framework Decision 2005/212, it would have to determine the point from which those provisions would cease to have effect.
- 27 As the Court of Justice has held, it is only exceptionally that it may, in application of the general principle of legal certainty inherent in the European Union legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. Such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought.
- 28 The referring court believes that, in the present case, it should be borne in mind that the confiscation of illegally obtained assets is carried out to protect an important public interest and is aimed at safeguarding the principle of the rule of law.
- 29 The provisions at issue, as currently worded, have been in force since 24 December 2019. The legal relationships which would be affected by a definitive judgment of the referring court are numerous. If illegally obtained assets are confiscated in favour of the State, the corresponding funds are transferred to the State budget. The provisions at issue are therefore closely linked to the State budget and to declare them retroactively invalid could both have negative consequences for the stability of the State budget and undermine legal certainty.
- 30 Legal stability is an essential component of the principle of legal certainty, which requires not only legal proceedings which are provided for by law but also a legally sustainable outcome to those proceedings. The provisions at issue are considered to be lawful and the State authorities apply them in all proceedings relating to illegally obtained assets.
- 31 Having regard to the foregoing, it is necessary to determine whether, in the event that the provisions at issue are found not to comply with the requirements under the first and second sentences of Article 92 of the Constitution and under the Charter, Directive 2014/42 and Framework Decision 2005/12, the principles of legal certainty and of the primacy of European Union law must be interpreted as meaning that, according to those principles, the circumstances of the main proceedings bring to light considerations pursuant to which the provisions at issue could be applicable and their legal effects could be maintained temporarily until the time determined by *Satversmes tiesa* (Constitutional Court) in its decision, at which point the provisions at issue would cease to have effect.