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BEEFING UP ASSET CONFISCATION FOR 21ST CENTURY CHALLENGES

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Abstract

Many Latin American countries are introducing new asset confiscation laws as part of a larger reform to put an end to high levels of corruption. In Peru, for instance, the so called «Extinción de Dominio» has been introduced, which is intended to facilitate the confiscation of illicit assets considerably. *Inter alia*, no criminal conviction of the asset holder is required and the confiscation is totally independent from criminal proceedings. Furthermore, confiscation is not only available with regards to proceeds of crime, but also for unjustified increases in a person's assets or for licit assets that were intermingled with illicit ones.

However, the aggressive nature of the Extinción de Dominio might lead to problems where the Latin American country needs to request mutual legal assistance in criminal matters (MLA) to achieve the confiscation of assets hidden in a foreign country. In Europe, where many of the tainted Latin American assets have traditionally reemerged, confiscations often follow more conservative concepts and MLA will generally only be provided unconditionally if the Latin American country's confiscation procedure respects human rights, the rule of law and procedural guarantees. This research looks at whether the Extinción de Dominio complies with the international due process framework, with a special focus on the European Charter on Human Rights.

The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the OECD or of its member countries.

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1. Introduction

In recent years, Latin America has been rocked by political corruption scandals of unprecedented magnitude. While symbioses between delinquent corporations and corrupt political classes have always posed threats to society's well-being, bribery and money laundering methodologies have evolved and improved over the course of time (cf. Solorzano 2018, 295 et seq.). Even more so, taking the profit out of these crimes, together with the prosecution of the offenders, is a primary policy goal in many countries.

The last decades have brought forth several high profile cases in which victim countries sought to reclaim assets that were diverted by corrupt individuals. However, macro forces such as globalization and the digital revolution pose ever increasing hurdles to the recovery of illicit assets. In reaction, legislators push the proverbial “taking the profit out of crime” further into the forefront, as they seek out ways to enable a more efficient confiscation of illicit assets, regardless of whether a criminal conviction on a person has been handed down.

For instance, in January 2019, the so called *Extinción de Dominio* (roughly translates to “termination of possession”) came into force in Peru (Decreto Legislativo de Extinción de Dominio, No. 1373). The *Extinción de Dominio* and similar laws recently enacted in Latin American countries facilitate the confiscation of assets considerably: A prior criminal conviction of an individual is not necessary to confiscate assets. Furthermore, the procedure is completely independent from any criminal procedure.

This raises delicate questions as to how to balance the effectiveness of law enforcement and the protection of the fundamental rights of the affected persons. Due to the aforementioned globalization, economic crime investigations will virtually always involve multiple jurisdictions. The assets which the Peruvian authorities – as well as their counterparts in other Latin American countries – will seek to confiscate, are oftentimes invested in a financial center overseas. Where this is the case, the Latin American authority will need to request mutual legal assistance in criminal matters from the judicial authorities in the country where the assets are stashed.

However, the requested authority will typically only be able to grant mutual legal assistance in criminal matters, where the requesting state's procedures adhere to concepts such as human rights, rule of law and procedural guaranties as per domestic and internationally binding legal instruments (for example: European Charter on Human Rights, International Covenant on Civil and Procedural Rights). As the new Latin American confiscation typologies divert from the traditional approach to asset confiscation, frictions are likely to appear where foreign assets are targeted by the *Extinción de Dominio*.

The aim of this short report¹ is to provide an overview over the enforceability of *Extinción de Dominio* decisions in Switzerland – a premier financial center, which, given the importance and size of its financial industry, has historically been involved in numerous money laundering and asset recovery cases (cf. Solorzano 2018, 308 et seq.). While the enforceability of foreign confiscation decisions is

¹ I would like to thank Oscar Solorzano, Prof. Mark Pieth and Rudolf Wyss for their valuable and much appreciated inputs in the preparation of this paper. Any inaccuracies are entirely mine.

subject to a range of conditions, this paper will focus on the observance of the guarantees of the European Convention on Human Rights (ECHR). Firstly, the paper provides a brief overview over the Extinción de Dominio. Secondly, the international mutual legal assistance framework, as per Swiss laws and practices is described. Thirdly, the Extinción de Dominio is contrasted with the fair trial rights such as the presumption of innocence, as well as the legality principle and the right to property as guaranteed by ECHR.

This report is intended as a discussion starter and no claim is made that its contents offer a complete view of the topic.

2. The Peruvian Approach: Extinción de Dominio

Spurred by glaring shortcomings in the fight against organized crime, Peruvian authorities introduced the *Decreto Legislativo sobre Extinción de Dominio No. 1373* (hereinafter DL 1373) in January 31st of 2019 (cf. Preamble, DL 1373). The DL 1373 formally introduced the Extinción de Dominio, a new kind of Non Conviction Based Confiscation (NCBC) in Peru. The Extinción de Dominio is strongly based on the principle that illicit acts can never lead to a lawful claim to an asset or object (cf. Art. 5.1 et seqq. Reglamento DL 1373). In this sense, the Extinción de Dominio primarily pursues reparative goals, as it seeks to remove assets that an individual has never lawfully owned from circulation. The scope of application of the DL 1373 is extremely broad. Any objects, instruments or proceeds of crime, as well as any good able to generate utility, profitability or other relevant advantages can be subjected to confiscation (Art. 3.5 et seqq. DL 1373).

The Extinción de Dominio is but a recent example of a number of far-reaching confiscation laws that have been introduced in Latin America and elsewhere (cf. CNN, 1 Feb. 2019: “Argentina acelera la recuperación de bienes provenientes del delito”). In many states, these laws are part of a larger reform seeking to complete a legal framework with a view to put an end to systemic levels of corruption.

In the traditional setting, confiscation is an *in personam* procedure, meaning that the right to confiscate depends on a criminal conviction of the asset owner. The Extinción de Dominio does not depend on a conviction of the defendant, however. Instead, the Extinción de Dominio introduces a model of *in rem* (meaning “against a thing”) confiscation. In other words, the prosecution initiates a procedure which directs the legal action against the asset itself. Art. 2.3 DL 1373 explicitly states that the Extinción de Dominio is independent and autonomous of any criminal, civil or other judicial procedure. Accordingly, there is no requirement for the asset holder to be convicted, or for his guilt to be investigated or even addressed.

Internationally, NCB confiscations are widely acknowledged and even recommended by international policy makers, courts and regulators. The G7’s anti-money laundering body, the Financial Action Task Force (FATF), for instance, states that countries may “consider adopting measures that allow [...] proceeds or instrumentalities to be confiscated without requiring a criminal conviction” (FATF Recommendation 4; cf. also Art. 54[c] United Nations Convention Against Corruption [UNCAC]). While none of these recommendations are binding, the European Court of Human Rights observes that

[C]ommon European and even universal legal standards can be said to exist which encourage,

firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offenses and so on, without prior existence of a criminal conviction (ECtHR 2015, Gogitidze and others v. Georgia, Appl. No. 36862/05, para. 105)

The procedure to confiscating assets pursuant to the *extinción de dominio* is modelled after a Colombian law, which was introduced in 2014 (Código de Extinción de Dominio, Ley 1708 de 2014; cf. Ardila 2014). In Peru, the *Extinción de Dominio* is available in the scenarios set forth by Article 7.1 DL 1373, the contents of which have been taken over from Article 16 of the Colombian law:

- a) Goods constituting the object, instrument, proceeds or profits of the commission of illicit activities
- b) Goods that constitute an unjustified increase in the assets of a natural or legal person, for which there are no elements that reasonably allow them to be considered to hail from licit activities
- c) Goods of lawful origin that have been used or are intended to be used to conceal, cover up, or intermingle with unlawful assets [...]

Where there are reasons to believe that assets are of illicit origin, a specialized prosecutor may initiate an inquiry to investigate the factual, legal and financial circumstances of the targeted assets (cf. Art. 17 Reglamento DL 1373). If the initial inquiry by the specialized prosecutor results in a substantiation of the initial suspicion, she or he may request a specialized court to grant permission to confiscate the assets or objects in question (Art. 33 et seq. DL 1373). If the Court admits the request, the asset owner – or any person or entity which might have a claim to the targeted assets – must be informed (cf. Art. 3.2, 19 DL 1373). Where the asset owner does not present itself, a public defender is appointed to represent their interests (Art. 15 Reglamento DL 1373).

The notified party is then given a period of 30 days to contest the specialized prosecutor's findings and prove the legality of the objects or assets in question (Art. 20 DL 1373). If the court grants the prosecutor's request, the assets are declared to be illicit, wherefore the state is entitled to take possession of them (Art. 32 et seq. DL 1373; Art. 67 et seq. Reglamento DL 1373). Where the Court dismisses the prosecutor's request, the assets are handed back to their lawful owner (Art. 35 DL 1373). The court's decision may be appealed twice (Art. 9(2)(b) Reglamento DL 1373).

3. International legal assistance framework

As mentioned in the introduction, confiscation in economic crime cases will virtually always involve more than one jurisdiction. Therefore the DL 1373 explicitly states that assets located abroad can equally be targeted through the *Extinción de Dominio* procedure (Art. 51.1 DL 1373). Where prosecutors seek to obtain evidence from abroad or where a confiscation decision needs to be enforced in a foreign jurisdiction, the requesting of international mutual legal assistance in criminal matters (MLA) is required. The DL 1373 confirms the applicability of the Peruvian MLA framework in its Article 49 and 51.3. In Article 50 DL 1373, the Public Ministry and the specialized prosecutor are tasked with requesting assistance from the authorities at the place where the suspect assets are located, or are believed to be located.

One of the most important MLA partners for Peru and other Latin American countries is Switzerland (cf. Libération, 21. Aug. 2002: “Montesinos: la Suisse rend des fonds au Pérou”; Tagblatt, 10. Feb. 2019: “Schweizer Banker frösteln beim Gedanken an Venezuela”). Therefore, the following sections showcase

Switzerland’s MLA regime, as well as the jurisprudence of the Swiss Federal Supreme Court.

3.1 Basic concept

In the usual setting, MLA refers to the assistance of a requested state in a procedure of a predominantly criminal nature in the requesting state (cf. Popp 2000, 4). Principally there are three parties involved in MLA: the requesting state, the requested state and the individual(s) directly involved or materially affected by the procedure for which MLA is requested (Popp 2000, 4). The assistance may *inter alia* consist in the extradition of persons, the disposition over objects or assets, or the gathering and/or forwarding of relevant information (Popp 2000, 56 et seq.).

The framework of international legal assistance consists of international and national norms, as well as a number of principles. International law sources primarily include bilateral and multilateral treaties which aim at standardizing and facilitating international cooperation (for example: Treaty on mutual legal assistance in criminal matters between the Swiss Confederation and the Republic of Peru of 1997). Furthermore, numerous sectoral international conventions contain provisions of relevance for international legal assistance (e.g. terrorism, money laundering, or drugs. See for example Chapter IV United Nations Convention Against Corruption [UNCAC]).

National laws stipulate domestic requirements for the requested state authorities to be permitted to provide legal assistance (Gless 2015, 81; Popp 2000, 12). In Switzerland, MLA is primarily governed by the Mutual Assistance Act of 1981 (IMAC), which in *inter alia* stipulates the procedure and conditions under which Switzerland will hand over assets to a foreign state or enforce a foreign confiscation decisions (See Article 2, 74a, 94 et seq. IMAC; Pieth 2016b, 79).

3.2 Mutual legal assistance and the Extinción de Dominio

Considering that the Extinción de Dominio is explicitly labeled as being independent and autonomous from criminal procedure, this section will look at whether it would nonetheless fall within the scope of application of Switzerland’s MLA regime. This is particularly crucial, because several EU member states have refused to enforce confiscation decision through MLA when these are based on civil procedures (CEART Project 2009, 20).

Principally, MLA in Switzerland may only be granted in “criminal matters” (Art. 1 [1] IMAC; cf. Popp 2000, 61). However, as the procedural rules the foreign authority follows are not decisive for the Swiss determination of what constitutes a “criminal matter”, it is possible to grant MLA for non-criminal procedures (cf. Art. 63 [3] IMAC; Popp 2000, 90). This is so because the question of whether Switzerland assists in an Extinción de Dominio procedure is determined based on an autonomous interpretation by Switzerland on whether the Extinción de Dominio is a “criminal matter” (cf. Popp 2000,

83).

The Swiss definition of criminal matters is extremely broad and encompasses civil and NCB confiscation typologies (BSK IRSG 2015 – Fiolka, Art. 74a, para. 37). Fundamentally speaking, Switzerland grants MLA if the foreign procedure is tied to conduct which is considered a criminal offense pursuant to Swiss criminal law (Popp 2000, 90). It is therefore to be expected that Extinción de Dominio actions pursuant to Article 7.1.a) DL 1373, which attaches to objects, instruments and proceeds of crime constitutes a criminal matter, wherefore Switzerland should be able to cooperate through MLA. Regarding the confiscation of unjustified increases in a person's assets (Article 7.1.b DL 1373), as well as the confiscation of licit goods used to cover up illicit ones (Article 7.1.c DL 1373), the picture seems less clear, however. Here, the nexus to a criminal offense recognized by Swiss law is not immediately evident.

4. Human rights boundaries

In addition to the above-mentioned international sources of law explicitly applicable to MLA, states must also adhere to their international human rights obligations, which has a direct influence on the granting or refusal of legal assistance. As any granting of MLA constitutes a state action, the requested state needs to ensure it does not contribute to a violation of human rights (Popp 2000, 232, cf. Harari/Corminboeuf Harari 2016, 78 et seq.). To underline this principle, the 1990 Convention of the Council of Europe (CoE) states that Member States can refuse to cooperate through MLA if "the action sought would be contrary to the fundamental principles of the legal system of the requested party" (See Art. 18[1][a] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ETS No. 141]).

In concreto, Switzerland – and many if not all financial centers stable enough to be an attractive hiding place for illicit assets - will not grant an MLA request where they perceive the requesting state's procedure to represent an apt and concrete danger to the asset holder's human rights (Art. 2 IMAC; BBI 1995 III 25, BGE 123 II 595, 605, see also BGer 1C_397/2018 where a Turkish request for MLA was rejected because the defendant did not receive a fair hearing; Popp 2000, 232 et seqq.). Accordingly, all MLA requests to Switzerland need to respect the guarantees of the European Charter on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) (cf. Popp 2000, 224. *Ius cogens* and the fundamental rights protected by Switzerland's constitution also need to be adhered to).

The prevalent international codification of human rights in the Swiss context is the ECHR. The ECHR contains human rights provision, violations of which may be brought to the European Court of Human rights (ECtHR) by an individual, against a state party to the ECHR. The Convention was adopted in the CoE and all 47 member states have ratified it. In practice, the jurisprudence of the ECtHR is of high importance for the member states, as the Court can overturn decisions by national courts. Particularly for the study of confiscation systems it must be said, however, that the ECtHR's casuistic and at times discordant approach rarely ever provides any uniform guidelines (cf. Simonato 2017, 366). Furthermore, the significant regional and country-specific differences between confiscation regimes makes it even more difficult to discern common answers to legal questions.

From the point of view of a requested state, the risk of assisting in a procedure which contrasts the ECHR is all the bigger where shortcomings are already apparent in the procedural norms of the requesting state (Popp 2000, 235). Therefore, the further discussion focuses on the compliance of the Extinción de Dominio norms with the fair trial guarantee, the legality principle and the right to property, as these rights and guarantees are central to the analysis of a confiscation system.

4.1 Fair trial and legality principle

The following section investigates the relationship between the Extinción de Dominio procedure and the guarantees of fair trial and legality as stipulated in the ECHR. To reiterate, Peru as a non-European country is certainly not directly bound by the ECHR. However, where Peruvian authorities seeks to enforce a decision in a ECHR member state such as Switzerland, the latter will only cooperate unconditionally where the Peruvian procedure leading up to the confiscation decision meets the requirements of the ECHR in all aspects.

The starting point of the present discussion is the general principle of the right to a fair trial, as stipulated in Article 6(1) ECHR. Article 6(1) ECHR guarantees each defendant who faces civil allegations or criminal charges a fair and public hearing within a reasonable timeframe and in front of an independent and impartial tribunal constituted by law.

While Article 6(1) ECHR applies for both civil and criminal procedure, Article 6(2) and (3) ECHR grants further-going protections to defendants facing criminal charges. As criminal charges are generally more severe than civil or administrative claims, the accused is guaranteed additional safeguards against abuse of state authority and arbitrary punishment (Obura 2013, 130). Accordingly, Article 6(2) and (3) ECHR contains additional rights such as the *presumption of innocence*, pursuant to which “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law” (Art. 6(2) ECHR).

Similarly, if the Extinción de Dominio were to be considered a criminal charge, it would have to respect the principle of legality found in Article 7 ECHR. The ECtHR has found that Article 7 ECHR lends a right to “any individual not to be punished without his personal liability, involving a mental link with the offense having been duly established” (ECtHR 2018, G.I.E.M. and others v. Italy, Appl. No. 1828/06, N. 244). Accordingly, the *in rem* measure of the Extinción de Dominio would have to be called into question.

Furthermore, Article 7 ECHR contains the prohibition of the retroactive application of law by stating that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed” (*nulla poena sin lege*). Peruvian authorities are currently planning to transfer around 70 cases out of an older confiscation regime to the Extinción de Dominio. Furthermore, Art. 2.5 DL 1373 explicitly states that the extinción can be sought for assets derived from crimes committed prior to the introduction of the Extinción de Dominio. In addition, there is no statute of limitations restricting the retroactive application of the Extinción de Dominio. Due to the principle stated in Article 7 ECHR, courts in ECHR member states could potentially refuse to enforce decisions resulting out of such retroactive applications of the Extinción de Dominio, if the Extinción de Dominio is considered a criminal charge. Consequently,

extinción actions would only be available for foreign assets associated to conduct undertaken after the introduction of the DL 1373 in January 2019.

For all of these reasons, the key question is whether the confiscation pursuant to the Extinción de Dominio is to be considered a criminal charge.

Internationally, most countries classify confiscation as being a non-punitive measure (see for example for Switzerland's "selbstständige Einziehung": Pieth 2017, 270 et seq.). An Expert Committee by the CoE acknowledged that "confiscation in some States is not considered as a penal sanction but as a security or other measure" (Explanatory Report, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism [CETS No. 198], para. 38).

Several ECtHR decisions have led to the creation of "well-established case-law" to the effect that NCB confiscation generally does not qualify as a penalty (Gogitidze v. Georgia, 121; cf. also ECtHR 2002, Butler v. The United Kingdom, Appl. No. 41661/98; ECtHR 2001, Phillips v. The United Kingdom, Appl. No. 41087/98). In *Dassa v. Liechtenstein*, for instance, the Court held that Liechtenstein's civil confiscation was in fact "more comparable to a restitution on unjustified enrichment under civil law than to a fine under criminal law" (ECtHR 2007, Dassa Foundation and others v. Liechtenstein, Appl. No. 696/05, p. 18). In the Court's view, an important aspect of Liechtenstein's confiscation system was that the confiscation did not go beyond the actual enrichment of the beneficiary of the offense (ibid, p. 17).

Whether this conclusion by the Court also holds true for the Extinción de Dominio needs to be analyzed individually for the different scenarios for confiscation stipulated in Article 7.1 DL 1373(cf. above p. 2 et seq.). In the view presented here, the confiscation scenarios vary significantly in their degree of intrusiveness. While the above-quoted conclusion of the Dassa decision might hold true for the confiscation of instruments and proceeds of crime pursuant to 7.1.a) DL 1373, the qualification of Article 7.1 b) and c) DL 1373 seem less clear, as they seem to go beyond confiscating "the actual enrichment of the beneficiary of the offense". Therefore, they will be looked at in more detail in the following.

4.1.1 Article 7.1.b) DL 1373

According to Article 7.1.b) DL 1373, confiscation is possible for "goods that constitute an unjustified increase in the assets of a natural or legal person, because there are no elements that reasonably allow them to be considered to hail from licit activities". This provision facilitates the task of the prosecutor considerably, as it will typically be easier to argue that there is no plausible explanation for an increase in assets, than to positively relate assets to a crime. It also forces the person claiming to have a lawful right to the asset in question to produce evidence to that end (reversal of the burden of proof).

In the often-cited *Phillips* case, the ECtHR held that a reversal of the burden of proof – provided in the UK in order to establish the link between asset and offense – did not violate the guarantee of a fair hearing pursuant to Article 6(1) ECHR (ECtHR 2001, Phillips v. The United Kingdom, Appl. No. 41087/98). According to the ECtHR, the applicant could provide documentary and oral evidence in a public hearing and could thereby rebut the assumption of the asset's illicit origin. (See also ECtHR 2005,

Van Offeren v. The Netherlands, Appl. No. 19581/04 and Walsh v. The United Kingdom, Appl. No. 43384/05).

It must be said at this point, however, that in countries, where large parts of the population still make their living in the informal economy, providing credible documentary evidence for licit income or the licit acquisition of goods will not be possible for everyone.

In further decisions, the ECtHR qualified reversals of the burden of proof in *in rem* confiscation procedures to be compliant with the ECHR, as long as the reversal only took place “after the public prosecutor had submitted a substantiated claim” (Gogitidze v. Georgia, para. 122, referencing ECtHR, Grayson and Barnham v. The United Kingdom, Appl. No. 19955/05, paras 103 et seq.).

Article 17.1.b) DL 1373 introduces a similar obligation in the Peruvian context. Pursuant to this provision, the specialized prosecutor needs to substantiate the unjustified increase in order to request confiscation. At a first glance it appears paradoxical to require a substantiation for the lack of a justification for an increase in assets. And much will depend on how – and especially against who – the Extinción de Dominio is applied by the specialized prosecutors and the specialized courts.

In the view presented here, the confiscation of unjustified increases in a person’s assets should only be available in cases in which there is a significant disparity between a person’s (estimated) income and the asset under his or her control (for the Colombian approach, see: Ardila 2014, 34 et seq.). Where appropriate, a substantiated claim by the prosecutor would at least need to establish that a person has had suspicious contacts with other persons known to engage in criminal activities (cf. CEART Project 2009, 21). Furthermore, the prosecutor should have an obligation to also investigate the existence of licit sources for an increase in a person’s assets (cf. Ardila 2014, 35).

4.1.2 Article 7.1.c) DL 1373

Pursuant to Article 7.1 c) DL 1373, “goods of lawful origin that have been used or are intended to be used to conceal, cover up, or intermingle with unlawful assets” may be subject to confiscation (cf. for Colombia: Ardila 2014, 50).

The confiscation of licit assets which were mingled with illicit ones is difficult to square with legitimate criminal policy goals. It goes beyond reparation as the asset holder is deprived of assets that she or he have lawfully earned or acquired. In the wrong hands, such a tool may be employed to abuse and disempower political adversaries (In pre-enlightenment Europe, absolutist rulers used a form of confiscation nicknamed the “civil death penalty” to make entire families penniless, cf. Pieth 2016a, 83).

Furthermore, the confiscation of licit assets goes beyond the international consensus with regards to confiscation of intermingled assets. UNCAC, for example, states that proceeds of crime which “have been intermingled with property acquired from legitimate sources” shall only “be liable to confiscation up to the assessed value of the intermingled proceeds” (Art. 31[5] UNCAC).

In conclusion, it will be difficult to argue that a confiscation of licit assets pursuant to Article 7.1.b) is of strictly non-punitive nature and therefore outside the scope of Article 6 et seqq. ECHR. It must be questioned whether MLA would be provided without conditions or restrictions for such a confiscation

procedure.

4.2 Right to property

The principle of peaceful enjoyment of property is laid down in Article 1 of ECHR Protocol 1. It is not an absolute right, however, as the state remains entitled to “control the use of property in accordance with the general interest” (Art. 1 Prot. 1, 2nd para. ECHR; cf. for Peru see: Yupanqui 1992, 11).

The ECtHR held that “judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully” constitute an intrusion into the asset owner’s property rights (ECtHR 2015, Gogitidze and others v. Georgia, Appl. No. 36862/05, para. 94; ECtHR 1995, Air Canada v. the United Kingdom, Appl. No. 18465/91, para. 34). With regards to MLA, the Swiss Federal Tribunal concluded that the handing over of assets to a foreign state for the latter to confiscate them equally constitutes a serious infraction into fundamental rights (BGE 115 Ib 517, 556).

Pursuant to the ECtHR’s reading of the ECHR, intrusions into the right to property are compliant with the ECHR where they are lawful, pursue a public interest and are proportionate (cf. Art. 1 Prot. 1 ECHR; ECtHR 1983, Sporrang and Lönnroth v. Sweden, Appl. No. 7152/75, para. 69).

The ECtHR held that the lawfulness criteria requires the wording of legal provisions to be clear, precise and foreseeable (ECtHR 2012, Khoniakina v. Georgia, Appl. No. 17767/08, para. 75). This can, for instance, be called into question with regards to the aforementioned Article 7.1.b) DL 1373, which permits the confiscation of goods that constitute an unjustified increase in a person’s assets. In the view presented here, it is hardly clear and foreseeable when the specialized prosecutor and court would determine that there are no reasonable elements for an increase in a person’s assets or how they would reach such a finding.

Secondly, the interference must pursue a *legitimate aim*. Regarding the fight against corruption, this appears unproblematic. According to an OECD study, corruption is the third most pressing problem for Peruvians, right after crime/insecurity and unemployment (OECD 2017, 25 et seq.). Peru is currently in the midst of a large-scale and multi-faceted push back against corruption in the public and private sectors (see also *Gogitidze v. Georgia*, para. 101, where the ECtHR acknowledged a similar argument regarding Georgia). Furthermore, popular repulsion against corruption becomes particularly tangible in increasingly frequent mass rallies. The fight against corruption and other serious forms of macro-criminality is thus aligned with general interests of the Peruvian public.

Thirdly, the interference must be reasonably proportional. The ECtHR holds that a “fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights” (*Gogitidze v. Georgia*, para. 97). The condition is not fulfilled, where an individual has to bear an individual and excessive burden (ECtHR 2000, *The Former King of Greece and Others v. Greece*, Appl. No. 25701/94, paras. 79, 82). However, the Court usually grants the national legislature’s policy choices a broad margin of discretion – particularly so regarding the confiscation of all types of proceeds of crime – unless it is “manifestly without reasonable foundation” (ECtHR 2014, *Azienda Agricola Silverfunghi S.a.s. and Others v. Italy*, Appl. No. 48357/07, para. 103;

ECtHR 2003, *Yildirim v. Italy*, Appl. 3860/02).

Generally, the ECtHR does “not see any problem in finding the confiscation measures to be proportionate even in the absence of a conviction establishing the guilt of the accused persons” (cf. *Gogitidze v. Georgia*, para. 107). Particularly with regards to the confiscation of licit assets as per Article 7.1.d) DL 1373, the intrusion into the individual’s fundamental rights may in practice prove to be disproportionate to the general public interest in fighting corruption.

5. Conclusion

While the *Extinción de Dominio* introduces a facilitated confiscation regime, its potency will arguably be limited by due process challenges at the MLA stage. The confiscation of licit assets which were used to cover up illicit ones stands out as being particularly problematic, while the confiscation of unjustified asset increases also bears controversy. Depending on the individual circumstances of the case, such a confiscation must be considered to be a punitive measure, which would trigger additional guarantees of the ECHR and other international treaties.

Confiscation norm should be modeled and applied in such a way that confiscation exclusively removes unlawful goods from circulation. However, where an individual is effectively penalized, she or he has a right to the enhanced procedural protections afforded to an accused in a criminal process.

6. Index of References

- Ardila, R. (2014), *La Extinción de Dominio, un análisis al Código de Extinción de Dominio*, Bogota
- Boucht, J. (2014), *Civil asset forfeiture and the presumption of innocence under Article 6(2) ECHR*, *New Journal of European Criminal Law*, 221 et seqq.
- CEART Project (2009), *White Paper on Best Practices in Asset Recovery*, Madrid
- Gless, S. (2015), *Internationales Strafrecht*, 2. edn., Basel
- Harari, M./Corminboeuf Harari, C. (2016), *Entraide internationale en matière pénale et transmission anticipée à l'État requérant*, in: Eigenmann et al. (eds.) *Mélanges en l'honneur de Claude Rouiller*, Basel, 77 et seqq.
- Niggli, M./Heimgartner, S. (2015), *Basler Kommentar Internationales Strafrecht*, Basel (cited as: BSK IRSG 2015 – Contributor, Article, para.)
- Obura, K. (2013), *Combating Corruption while respecting human rights. A critical study of the non-conviction based asset recovery mechanism in Kenya and South Africa*, Grahamstown
- OECD (2017), *Estudio de la OCDE sobre integridad en el Perú*, Paris
- Pieth, M. (2016a), *Wirtschaftsstrafrecht*, Basel
- Pieth, M. (2016b), *Schweizerisches Strafprozessrecht*, 3. edn. Basel
- Pieth, M. (2008), *Recovering stolen assets – a new issue*, in: Pieth (ed.) *Recovering Stolen Assets*, Bern, 1 et seq.
- Popp, P. (2000), *Grundzüge der internationalen Rechtshilfe in Strafsachen*, Basel
- Quiroga, C./Rojas, C (2007), *Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección*, Santiago
- Simonato, M. (2017), *Confiscation and fundamental rights across criminal and non-criminal domains*, *ERA Forum Paper*, 365 et seqq.
- Solorzano, O. (2018), *La recuperación de activos de la corrupción en Perú*, Instituto de Estudios Constitucionales del Estado de Querétaro
- Stephenson, K. et al (2011), *Barriers to Asset Recovery*, Washington DC
- Yupanqui, S. (1992), *Límites y Respeto al Contenido Esencial de los Derechos Fundamentales : Estudio Preliminar*, *Thémis Revista de Derecho* No. 21, 7 et seq.
- Zimmermann, R. (2009), *La coopération judiciaire internationale en matière pénale*, 3 edn., Bern