



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF RADELIĆ v. CROATIA

(Application no. 12432/22)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Proceeds of crime acquired by a company, which went bankrupt and ceased to exist, confiscated from its director and sole shareholder found guilty of the criminal offence of business fraud with the intent of acquiring illegal gain for the company's benefit • Penal Code did not provide for confiscation of proceeds of crime from the perpetrator if acquired for the benefit of another person (natural or legal) • Imposition of the confiscation measure not foreseeable under domestic law and inconsistent with the nature of the offence he was convicted of • Interference not "provided for by law"

Prepared by the Registry. Does not bind the Court.

STRASBOURG

13 May 2025

FINAL

15/09/2025

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Radelić v. Croatia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Arnfinn Bårdsen, *President*,

Saadet Yüksel,

Jovan Ilievski,

Anja Seibert-Fohr,

Davor Derenčinović,

Stéphane Pisani,

Juha Lavapuro, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 12432/22) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Dražen Radelić (“the applicant”), on 24 February 2022;

the decision to give notice to the Croatian Government (“the Government”) of the complaint concerning the confiscation of proceeds of crime and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 4 March and 1 April 2025,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns a situation where proceeds of crime had been acquired by a company but were ordered to be confiscated from the individual perpetrator of the criminal offence – the sole shareholder and director – because the company had gone bankrupt and ceased to exist.

THE FACTS

2. The applicant was born in 1973 and lives in Split. He was represented by Mr T. Vukičević, a lawyer practising in Split.

3. The Government were represented by their Agent, Ms Š. Stažnik.

4. The facts of the case may be summarised as follows.

5. The applicant was the sole shareholder and director of a limited liability company, Radelić d.o.o. (hereinafter “the company”).

6. On 12 November 2010 the Split Commercial Court (*Trgovački sud u Splitu*) opened bankruptcy proceedings against the company, which were concluded on 12 December 2010. On 4 March 2011 the company was struck off (removed from) the register of commercial companies and thereby ceased to exist.

I. CRIMINAL PROCEEDINGS

7. On 4 March 2011 the Split Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Splitu*) indicted the applicant before the Split Municipal Court (*Općinski sud u Splitu*) for the criminal offences of business fraud and forgery of documents (see paragraph 22 above). The indictment alleged that between 27 August 2003 and 26 February 2004 he had – intending to obtain significant pecuniary gain for the company – presented thirty-six cheques from foreign banks to a bank to be cashed, falsely claiming that they had been issued as payment for services rendered by it abroad.

8. By a judgment of 1 April 2014 the Split Municipal Court found the applicant guilty of forgery of documents and sentenced him to one and a half years' imprisonment. The court suspended the sentence (*uvjetna osuda*) for four years on condition that he committed no further offences during that period. It acquitted him of the charge of business fraud.

9. Following appeals by both parties, the Split County Court (*Županijski sud u Splitu*), by a judgment of 7 October 2014, dismissed the applicant's appeal and upheld the first-instance judgment in the part concerning his conviction for forgery of documents. It allowed the appeal by the Municipal State Attorney's Office, quashed the first-instance judgment in the part concerning the applicant's acquittal for business fraud and remitted the case to the Split Municipal Court for a retrial.

10. By a judgment of 13 April 2017 the Split Municipal Court found the applicant guilty of business fraud and sentenced him to one year's imprisonment, suspended for four years on condition that he committed no further offences during that period. In addition, the court ordered that 854,743.39 Croatian kunas (HRK – equivalent to 113,440 euros (EUR)) be confiscated from him as proceeds of crime and paid into the State budget within six months of the judgment becoming final. If he failed to do so, his suspended sentence would be revoked and replaced with imprisonment. The relevant part of the judgment reads as follows:

“Article 77 of the 2011 Penal Code prescribes that no one may retain the proceeds of crime, so the proceeds must be confiscated. Bearing in mind that the company Radelić d.o.o. has in the meantime been struck off the register of commercial companies and has no legal successor, the said proceeds must be confiscated from the accused, who was the sole founder and shareholder of the company and also the person authorised to represent the company individually and independently and thus to dispose of the funds from the company's account. Therefore ... the court imposes on the accused the obligation to pay the proceeds of the crime into the State budget ... as a particular condition, for which the suspended sentence may be revoked if he fails to comply with this obligation without good reason.”

11. The applicant lodged three appeals against that judgment. In his appeal of 29 May 2017 he complained, *inter alia*, about the imposition of the confiscation order in the following terms:

“... the contested judgment is also unlawful in the part concerning confiscation of the proceeds of crime from the accused and the imposition of an obligation on him to pay HRK 854,743.39 into the State budget.

It is undisputed that that amount was paid into the account of the commercial company Radelić and not for the benefit of the accused as a natural person.

The company paid all taxes and duties on that amount and used it for [its] day-to-day operations.

The accused did not benefit from that amount. Therefore, there is no basis to return that ‘benefit’, that is, to pay it into the State budget.”

12. In its response, the Municipal State Attorney’s Office opposed the applicant’s appeals and argued that the first-instance judgment should be upheld.

13. On 28 September 2017 the applicant’s appeals and the response of the Municipal State Attorney’s Office were examined by a panel of the Split County Court. At the hearing, a representative of the Split County State Attorney’s Office (*Županijsko državno odvjetništvo u Splitu*) argued that the applicant’s appeals should be allowed and the first-instance judgment quashed for serious breaches of the rules of criminal procedure.

14. By a judgment adopted the same day, the Split County Court dismissed the applicant’s appeals and upheld the first-instance judgment. It held as follows:

“... the decision on the confiscation of the proceeds of crime and the decision [that the suspended sentence would be revoked if the accused did not pay the amount subject to confiscation into the State budget] ... are correct and lawful and based on correctly established facts and on the undisputable fact that the accused, based on the cashed forged cheques, kept for his company Radelić d.o.o. ... the total amount of HRK 854,743.39, thus damaging the unidentified holders of the right to collect the amounts of the cheques in question.

The accused incorrectly points out in the appeal that the court should not have decided to confiscate this amount from him personally because he had never cashed the cheques for his own benefit, and that this was instead done by the company Radelić d.o.o., and that the illegal pecuniary gain should thus only be confiscated from that company and not from him personally. At the same time, the accused points out that, according to the charges, everything had been done through the company’s account and for the benefit of the company Radelić d.o.o.

Contrary to the accused’s appeal arguments, the first-instance court correctly relied on the fact that the company Radelić d.o.o. had been struck off the register of commercial companies in 2011 or 2012 after which, in 2008, as he states, the accused founded a new company, which he still uses today for business purposes and which also founded another new company.

In such circumstances, from which it follows that the company Radelić d.o.o. has been struck off the register of commercial companies and has no legal successor, the first-instance court correctly decided that the pecuniary gain illegally obtained by the company Radelić d.o.o. through the criminal actions of the accused should be confiscated from the accused, as the sole founder and shareholder of that company. In particular, this type of obligation of the accused is derived, *mutatis mutandis*, from

section 252(5) of the Commercial Companies Act ... according to which a member of a company's management board who grossly violates the duty of care and diligence of a prudent businessman is held liable to the creditors of that company for the damage if they cannot satisfy their claims against the company, a provision which was in force at the time of the commission of the criminal offence and has not been substantially changed by subsequent amendments ...

Since the accused's obligation to compensate the injured parties is prescribed by law in such instances, the first-instance court's decision to confiscate from the accused the proceeds obtained for his company through the criminal offence committed by the accused ... is justified by analogy."

15. In a letter dated 6 November 2017 the Split County State Attorney's Office proposed to the Principal State Attorney that a request for the protection of legality (*zahtjev za zaštitu zakonitosti*) be lodged with the Supreme Court (*Vrhovni sud Republike Hrvatske*) for the benefit of the applicant because the first-instance and appellate courts had misapplied the law to his detriment. It argued that he should not have been convicted of either of the two offences of which he had been found guilty (see paragraphs 8-10 and 14 above) and that, in any event, the confiscation order was contrary to the law. The relevant part of the letter concerning the confiscation of the proceeds of crime reads as follows:

"... if in the indictment the accused was charged with obtaining an illegal pecuniary gain for his commercial company through business fraud, then it was against the law to order that the proceeds of crime be confiscated from him as a natural person because he was not put on trial for having obtained the gain for himself, and no evidence was presented in support of the conclusion that this gain was transferred to him directly.

In a situation where the company Radelić d.o.o. was in the meantime liquidated, [which means] that confiscating the proceeds of crime from the company [itself] is out of the question, the court should have ordered the perpetrator of the criminal offence to compensate the victims for the damage [sustained] ...

However, the court could not have ordered the accused to pay damages because in the present case it never had an injured party, and no one made a civil claim ...

This is precisely why the court, because there was no civil claim of the injured party ... unjustifiably sought to confiscate the proceeds of crime from the accused ... even though the proceeds were obtained for the ... company, which is a clear contradiction.

The County Court's arguments that the accused, as the founder of the company, had been paid the company's profits and thus benefited from the criminal offence are legally wrong because [he] was not accused of transferring any of the proceeds of crime to himself, either through the company's profits or in any other way. If the accused's company paid corporate income tax from those proceeds, is the State also unjustly enriched in the relevant part, and should it return that part to the 'unidentified' injured party? In addition, appellate courts do not have the right to establish facts beyond what was determined by the trial court and thereby save the first-instance judgments [from being quashed], as has happened here.

...

Had the accused been convicted of damaging his ... [own] company, which has since been liquidated and thus could not make a civil claim, or if he was convicted of ordinary

fraud ... with the argument that he used the company only as a cover for transferring illegal gains from [the company as] the injured party/victim to himself, then it would have been possible to order the confiscation of the proceeds of crime from the accused personally, but [in that case] ... he would have been tried for another criminal offence, such as embezzlement or abuse of trust in business operations ... to the detriment of the company, or for ordinary fraud ... to the detriment of banks or cheque drawers ...

The essential difference between business and ordinary fraud lies not only in the capacity of the perpetrator ... but also in for whom the proceeds of crime are being acquired. [Therefore,] the rules on the confiscation of proceeds of crime cannot be applied arbitrarily to the detriment of the accused.”

16. The Principal State Attorney never lodged the proposed request for the protection of legality.

17. On 28 November 2017 the applicant lodged a constitutional complaint against the Split County Court’s judgment of 28 September 2017. As regards the confiscation order, he repeated, verbatim, the arguments advanced in his appeal of 29 May 2017, and relied on Article 48 of the Constitution guaranteeing the right of ownership (see paragraphs 11 above and 21 below).

18. By a decision of 6 October 2021 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicant’s constitutional complaint, finding, *inter alia*, that the confiscation of the proceeds of crime from him personally was not in breach of his right of ownership. The applicant’s representative was notified of that decision on 25 October 2021.

II. ENFORCEMENT PROCEEDINGS

19. By letters of 26 October 2017 and 18 June 2021 the Split Municipal Court invited the applicant to pay the amount subject to confiscation into the State budget. On 21 November 2022 the Municipal Court informed the Split Municipal State Attorney’s Office that he had failed to do so.

20. On 17 January 2023 the Split Municipal State Attorney’s Office applied for enforcement of the confiscation order to the domestic payments agency FINA, asking it to collect an amount equivalent to the proceeds of crime (see paragraph 10 above) from the applicant’s bank accounts and transfer into the State budget. It would appear that the confiscation order has remained unenforced owing to insufficient funds in his bank accounts.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE CONSTITUTION

21. The relevant provisions of the Constitution (*Ustav Republike Hrvatske*, Official Gazette no. 56/90, with subsequent amendments) read as follows:

Article 48

“The right of ownership shall be guaranteed.

Ownership implies duties. Owners and users of property shall contribute to the general welfare.”

Article 50

“Ownership may be restricted or taken in accordance with the law, and in the interest of the Republic of Croatia, subject to payment of compensation equal to its market value.

The exercise ... of the right of ownership may, on an exceptional basis, be restricted by law for the protection of the interests and security of the Republic of Croatia, nature, the environment or public health.”

Article 31 § 1

“No one shall be punished for an act which, before it was committed, was not defined as a criminal offence by [national] law or international law, nor may a penalty be imposed which was not prescribed by law. If, subsequent to the commission of the offence, the law prescribes a more lenient penalty, such a penalty shall be imposed.”

II. PENAL CODE

A. Relevant provisions

22. The relevant provisions of the Penal Code (*Kazneni zakon*, Official Gazette no. 125/11, with subsequent amendments), which was applied in the applicant’s case, read as follows:

**CHAPTER I
BASIC PROVISIONS**

Principle of legality

Article 2

“No one shall be punished for an act which, before it was committed, was not defined as a criminal offence by [national] law or international law, nor can a penalty or other criminal sanction be imposed which was not prescribed by law.”

Principle of the confiscation of proceeds of crime

Article 5

“No one shall be permitted to retain the pecuniary gain acquired through an unlawful act [proceeds of crime].”

**CHAPTER IV
PENALTIES**

Types of penalties

Article 40 § 1

“Penalties are fines, imprisonment and long-term imprisonment.”

CHAPTER VI
CONFISCATION OF PROCEEDS OF CRIME, CONFISCATION OF THE
OBJECTS OF THE OFFENCE AND PUBLICATION OF JUDGMENTS

Conditions and means of the confiscation of proceeds of crime

Article 77

“(1) Proceeds of crime shall be confiscated by a court decision establishing that an unlawful act has been committed. Proceeds of crime shall also be confiscated from the person to whom they were transferred, if they were not acquired in good faith.

(2) If the injured party has been awarded a civil claim which, by its nature and substance, corresponds to the acquired proceeds of crime, the part of the proceeds of crime exceeding the awarded civil claim shall be confiscated.

(3) The court shall confiscate the proceeds of crime even if it has instructed the injured party to pursue his or her civil claim in civil proceedings.

(4) Where it has been established that full or partial confiscation of objects or rights acquired as proceeds of crime is impossible, the court shall order the perpetrator to pay an amount equivalent to their value. It may order payment in instalments.

(5) The confiscated proceeds of crime shall not be reduced by the amount of funds invested in the criminal activity.

(6) The court may decide not to confiscate the proceeds of crime if they are negligible.”

Statute of limitations for the execution of security measures, confiscation of proceeds of crime and confiscation of objects [of the offence]

Article 85 § 4

“The enforcement of ... [a decision on] the confiscation of proceeds of crime is not subject to the statute of limitations.”

Business fraud

Article 247

“(1) Whoever, in business transactions, with the intent of acquiring an unlawful pecuniary gain for a legal entity he or she is representing or for another legal entity, misleads another by misrepresenting or concealing facts, or keeps another in error and thereby makes him or her do or refrain from doing something to the detriment of his or her property or another’s property, shall be punished by imprisonment from six months to five years.

(2) If the criminal offence referred to in paragraph 1 of this Article resulted in considerable loss, the perpetrator shall be punished by imprisonment from one to ten years.”

Forgery of documents

Article 278

“(1) Whoever makes a false document or alters a genuine one with the aim of using it as genuine, or who obtains such a document for the purpose of using it or uses it as genuine, shall be punished by imprisonment of up to three years.

(2) The penalty referred to in paragraph 1 of this Article shall be imposed on anyone who misleads another as to the content of a document and has the latter sign this document believing that they are signing another document or different content.

(3) Whoever commits the criminal offence referred to in paragraph 1 or 2 of this Article with respect to a public document, testament, bill of exchange, cheque, payment card or public or official record required to be kept by law, shall be punished by imprisonment from six months to five years.

(4) An attempt to commit the criminal offence referred to in paragraphs 1 and 2 of this Article shall also be punishable.”

B. Relevant case-law

23. In a number of cases, the Supreme Court held that proceeds of crime could not be confiscated from the perpetrator if the unlawful pecuniary gain had not been acquired for the benefit of the perpetrator, but, for example, for the benefit of a company (see, for example, decision Kž 420/13-6 of 4 February 2016 concerning abuse of office in business transactions, and judgments Kzz 14/14-4 of 11 February 2016, Kž 2/2016-9 of 30 June 2020 and Kr 36/2021-6 of 23 December 2021, all of which concerned business fraud).

III. COMMERCIAL COMPANIES ACT

24. The relevant provisions of the Commercial Companies Act (*Zakon o trgovačkim društvima*, Official Gazette no. 111/93, with subsequent amendments), as in force at the material time, read as follows:

Liability of company members Section 10

“(1) ...

(2) Members of a limited liability company ... are not liable for the company’s obligations unless otherwise provided by this Act.

(3) Whoever abuses the fact that, as a member of a company, he or she is not liable for the company’s obligations, may not rely on not being liable for those obligations under the law.

(4) The requirement for the liability of members of the company referred to in paragraph 3 is considered to have been met, particularly if:

1. they use the company to achieve a goal that is otherwise prohibited to them;
2. they use the company to damage creditors;
3. contrary to the law, they manage the assets of the company as if they were their own;
4. they reduce the company’s assets for their own benefit or for the benefit of another person, even though they knew or must have known that the company would not be able to meet its obligations.”

Duty of care and liability of management board members
Section 252

“(1) Management board members shall run the company’s affairs with the care and diligence of a prudent businessman and keep the company’s business secrets. [They] shall not act contrary to [this] obligation ... if, when making a business decision, [they] can reasonably assume, on the basis of appropriate information, that [they are] acting for the benefit of the company.

(2) Management board members who breach their obligations shall be jointly and severally liable for the damage [caused] to the company. In the event of a dispute, [they] shall prove that they have acted with the care and diligence of a prudent businessman.

(3) Management board members shall, in particular, be liable for the damage if they, contrary to this Act:

1. return to the shareholders what they have invested in the company;
2. pay interest or dividends to shareholders;
3. register, acquire, pledge or withdraw the company’s own shares or those of another company;
4. issue shares before the amount for which they were issued is paid in full;
5. distribute the company’s assets;
6. make payments after the company becomes insolvent or overly indebted;
7. pay remuneration to members of the supervisory board;
8. give a loan;
9. in the case of a conditional capital increase, issue shares contrary to the purpose or before they are paid in full.

(4) ...

(5) A claim for compensation can also be made by the company’s creditors if they cannot satisfy their claims against the company. This applies in cases other than those referred to in paragraph 3 only if a management board member grossly violates the duty of care and diligence of a prudent businessman. With respect to the company’s creditors, the obligation to compensate the damage may not be removed by the company waiving the claim or by settlement of the claim, or by the fact that the action was based on a decision of the general meeting [of shareholders]. If bankruptcy proceedings have been opened against the company, the right of the company’s creditors against the management board members is, during the course of those proceedings, exercised by the bankruptcy administrator.

(6) The claims referred to in the previous paragraphs of this section shall become time-barred after five years.”

IV. OTHER LEGISLATION

25. The Government’s Decree of 25 April 2013 on the criteria, standards and procedure for the deferral of payments, repayment of debt in instalments and the sale, write-off and partial write-off of claims (*Uredba o kriterijima mjerilima i postupku za odgodu plaćanja, obročnu otplatu duga, te prodaju, otpis i djelomičan otpis potraživanja*, Official Gazette no. 55/13) sets out the

procedure and criteria under which the debts owed to the State or local authorities can be fully or partially written off, paid in instalments or have their payment deferred.

THE LAW

26. In his application to the Court, the applicant complained that the domestic courts' decision to confiscate the proceeds of crime from him personally had been unlawful and arbitrary because that decision had lacked any legal basis in domestic law. He relied on Article 6 § 1 of the Convention.

27. Being master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 124, 20 March 2018), and having regard to its case-law (see, for example, *Imeri v. Croatia*, no. 77668/14, 24 June 2021, and *Yaylali v. Serbia*, no. 15887/15, 17 September 2024), the Court considers that the application should be examined under Article 1 of Protocol No. 1 to the Convention. That Article reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

A. Admissibility

28. The Government submitted that the applicant had not exhausted domestic remedies and that he was not the victim of a violation of Article 1 of Protocol No. 1. In the alternative, they argued that the applicant had suffered no significant disadvantage on account of a violation of that Article.

1. *Exhaustion of domestic remedies*

(a) **The parties' submissions**

29. The Government argued that the applicant could have, under the Government Decree of 25 April 2013 (see paragraph 25 above), asked the relevant authorities to write off in full or in part the debt stemming from the confiscation order, or asked to pay it in instalments. However, he had not done so.

30. The applicant emphasised that in the criminal proceedings against him he had lodged appeals and a constitutional complaint against the confiscation order (see paragraphs 11 and 17 above), which were the only effective remedies he had been supposed to use. The “remedy” suggested by the Government was not a remedy at all, let alone an effective one, because it could have only alleviated the consequences of the violation complained of but would not have been capable of remedying the violation itself as it could not have set aside the confiscation order.

(b) The Court’s assessment

31. The Court reiterates that, if domestic law provides for several parallel remedies in different fields of law, an applicant who has sought to obtain redress for an alleged breach of the Convention through one of these remedies is not necessarily required to use others which have essentially the same objective (see, for example, *Zustović v. Croatia*, no. 27903/15, § 77, 22 April 2021).

32. In that regard, the Court notes that the applicant lodged appeals and a constitutional complaint against the confiscation order (see paragraphs 11 and 17 above). The Government did not argue that these remedies were ineffective. Therefore, even assuming the effectiveness of the remedies relied on by the Government, the applicant was not required to use them and pursue yet another avenue of potential redress (see the previous paragraph).

33. The Government’s objection regarding the exhaustion of domestic remedies must therefore be rejected.

2. The applicant’s victim status and the alleged lack of significant disadvantage

(a) The parties’ submissions

34. The Government emphasised that the applicant had never paid the amount he had been ordered to pay under the confiscation order (see paragraphs 19-20 above). Moreover, the relevant State authorities had never instituted proceedings to revoke his suspended sentence, even though his failure to pay the debt in question had constituted a breach of that sentence (see paragraph 10 above). In the circumstances, the Government argued, the applicant could not claim to be a victim of the violation alleged or, at least, could not claim to have suffered a significant disadvantage.

35. The applicant pointed out that enforcement proceedings to enforce the confiscation order had been instituted against him and that the order had remained unenforced only because he had not had enough funds as he was unemployed and did not own any property. The mere fact that the enforcement proceedings had not yet resulted in the confiscation of any funds from his bank accounts – which remained frozen – did not mean that he was

not a victim of the violation complained of and that the resultant damage he had suffered had not been significant.

(b) The Court's assessment

36. The Court notes that enforcement proceedings were instituted against the applicant, and that the confiscation order has thus far remained unenforced only because of a lack of funds in his bank accounts (see paragraph 20 above). It further notes that, under Croatian law, the confiscation of proceeds of crime is not subject to any statute of limitations (see Article 85 § 4 of the Penal Code, referred to in paragraph 22 above).

37. In these circumstances, the Court finds it evident that the applicant may claim to be a victim of the violation complained of and that the disadvantage suffered cannot be considered insignificant. The Government's objection in that regard must therefore be rejected.

3. Conclusion as to admissibility

38. The Court further notes that the present application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

39. In his application to the Court, the applicant repeated the same arguments as in his appeal of 29 May 2017 and his constitutional complaint (see paragraphs 11 and 17 above) as well as the points made by the Split County State Attorney's Office in its letter of 6 November 2017 to the Principal State Attorney (see paragraph 15 above).

40. In his observations, he again relied on those arguments and stressed that the State Attorney's Office rarely intervened in favour of the accused and only when there had been a serious breach of the law to the accused's detriment.

41. The applicant added that Article 77 of the Penal Code, which had been applied in his case and which provided for the confiscation of proceeds of crime, was not a referencing provision, that is, a provision referring to a legal provision outside the scope of criminal law. Therefore, contrary to what the domestic criminal courts had done in his case (see paragraphs 10, 12 and 22-24 above), that Article could not be read in conjunction with any provisions of the Commercial Companies Act.

42. Lastly, section 252(5) of the Commercial Companies Act, which had been applied in his case, and section 10(3), to which the Government had

referred (see paragraphs 24 above and 45 below), were provisions governing civil (tort) liability towards company creditors and could not have been applied in criminal proceedings for the confiscation of proceeds of crime.

(b) The Government

43. The Government admitted that the domestic courts' decision ordering the confiscation of the proceeds of crime from the applicant had interfered with his property rights. They argued, however, that the interference had been lawful, that it had been in accordance with the general interest of combating crime and acting as a deterrent to potential perpetrators of punishable offences, and that there had been a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

44. As regards, in particular, the lawfulness of the interference, the Government submitted that the domestic courts had based the confiscation measure on Article 77 of the Penal Code, read in conjunction with section 252(5) of the Commercial Companies Act (see paragraphs 10, 12 and 22-24 above), the provisions of which complemented each other. Those courts had done so in reasoned decisions in which they had explained in detail why the proceeds of crime had been ordered to be confiscated from the applicant himself.

45. The Government added that the confiscation order also had another legal basis in national law, namely section 10(3) of the Commercial Companies Act (see paragraph 24 above), which provided for the piercing of the corporate veil. They pointed out that the Court had held that in situations where a limited liability company had been used merely as a façade for fraudulent actions by its shareholders or managers, piercing the corporate veil might be an appropriate solution to defend the rights of its creditors, including the State (the Government cited *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 877, 25 July 2013).

46. The Government submitted that the above-mentioned provisions satisfied the qualitative criteria of accessibility and foreseeability. Therefore, it must have been foreseeable to the applicant, who had been represented by an advocate, that, as the sole shareholder and director of the company, the proceeds of crime would be confiscated from him after it had been struck off the register of commercial companies.

47. As regards proportionality, the Government argued that no measure other than confiscation could have been applied that would have interfered less with the applicant's rights and still achieved the aim sought. Moreover, no excessive burden had been imposed on him: during the entire course of the criminal proceedings and even afterwards he had been free to dispose of the illegally obtained proceeds of crime as his property had never been frozen and because he had never complied with the confiscation order.

2. *The Court's assessment*

48. It is not in dispute between the parties that the domestic courts' decision to confiscate the proceeds of crime from the applicant constituted an interference with his right to the peaceful enjoyment of his possessions. The Court sees no reason to hold otherwise.

49. As to which of the rules of Article 1 of Protocol No. 1 applies, the Court considers that the confiscation measure in the present case falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties. It further considers that it is not necessary to determine whether the confiscation order constituted a "penalty" or if the resultant interference should be examined from the standpoint of the State's right "to control the use of property" (see, for example, *Frizen v. Russia*, no. 58254/00, § 31, 24 March 2005, and *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, §§ 128-29, 20 January 2009).

50. The Court must further examine whether the interference in question was lawful, in the general interest, and struck a fair balance between the demands of the general interest and the applicant's rights (see *Yordanov and Others v. Bulgaria*, nos. 265/17 and 26473/18, § 98, 26 September 2023).

51. As to the lawfulness of the interference, the Court notes that the domestic courts based the confiscation measure imposed on the applicant on Article 77 of the Penal Code, read in conjunction with section 252(5) of the Commercial Companies Act (see paragraphs 10, 12 and 22-24 above).

52. The Government, in addition to those provisions, referred to section 10(3) of the Commercial Companies Act, a provision on piercing the corporate veil, which they also considered to be of relevance (see paragraphs 24 and 45 above). However, the Court cannot take that provision into account because the domestic courts did not refer to it.

53. The Court further reiterates that the existence of a legal basis is not in itself sufficient to satisfy the principle of lawfulness. When speaking of "law", Article 1 of Protocol No. 1 alludes to a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see, among many other authorities, *Imeri*, cited above, § 69, and *Yaylali*, cited above, § 43). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries which, *inter alia*, means that offences and the relevant penalties must be clearly defined by law (*ibid.*).

54. In particular, the law is "foreseeable" when an individual is able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and when it affords a measure of protection against arbitrary interferences by the public authorities and against the extensive application of a restriction to any party's detriment (see, for example, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 141 and 143, ECHR 2012).

55. In the present case, the confiscation measure was imposed on the applicant in relation to the criminal offence of business fraud, an offence for which one of the constitutive elements is the acquisition of an unlawful pecuniary gain for the company that the perpetrator is representing (see paragraphs 10, 12 and 22 above). This means that the proceeds of crime were acquired for the benefit of the company, of which the applicant was the director and sole shareholder, and not for his own benefit. Moreover, those courts took no evidence with a view to establishing whether the proceeds of crime had at any time been transferred to the applicant or that he had benefited from them financially (see paragraphs 10 and 14 above).

56. The Penal Code contains no specific provisions allowing proceeds of crime to be confiscated from the perpetrator if they had been acquired for the benefit of another person (natural or legal). On the contrary, doing so would have been contrary to the long-standing case-law of the Supreme Court (see paragraph 23 above).

57. It would therefore appear that the only reason why the domestic criminal courts in the present case ordered the confiscation of the proceeds of crime from the applicant himself was because the company for which he had acquired the unlawful pecuniary gain had in the meantime ceased to exist. Had it been otherwise, the proceeds would have been confiscated from the company itself.

58. In order to justify the confiscation in those particular circumstances, and in the absence of any specific provision in the Penal Code, the Split County Court relied on section 252(5) of the Commercial Companies Act, which it found applicable by analogy (see paragraphs 14 and 24 above).

59. In this connection, it is significant that the Government were unable to provide the Court with any relevant examples of case-law to demonstrate that the criminal courts had applied section 252(5) of the Commercial Companies Act in the context of the confiscation of proceeds of crime. While they provided several examples of cases in which the domestic courts had applied that provision, only one of those examples concerned its application by the criminal courts but was not relevant because it concerned the award of damages to the victim of the criminal offence (injured party) and not the confiscation of proceeds of crime.

60. Naturally, the Court cannot exclude the possibility that it was for the first time in the applicant's case that the domestic courts applied the above-mentioned provision of the Commercial Companies Act in the context of the confiscation of proceeds of crime. The requirement of foreseeability cannot be read as outlawing the gradual clarification of the rules through judicial interpretation from case to case, provided that the resultant development remains consistent with the essence of the provision in question and could reasonably be foreseen (see *The J. Paul Getty Trust and Others v. Italy*, no. 35271/19, § 297, 2 May 2024, and *Kopytok v. Russia*, no. 48812/09, § 34, 15 January 2019).

61. However, under Croatian law (see paragraphs 22-23 above), the confiscation of proceeds of crime is limited to individuals who have directly or indirectly received financial benefits from them. This includes the person into whose property the proceeds have entered, the perpetrator of the crime, or any individual to whom the proceeds have been transferred or who has otherwise derived financial gain from them. This means that, as in many other jurisdictions, the measure is more akin to unjust enrichment rather than to tort liability under civil law (see *Ulemek v. Serbia* (dec.), no. 41680/13, § 53, 2 February 2021, and *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007).

62. Thus, applying section 252(5) of the Commercial Companies Act, which provides for tort liability of management board members of a commercial company to creditors, in conjunction with Article 77 of the Penal Code, which provides for the confiscation of proceeds of crime, is inconsistent with the nature of that measure and thus impossible to foresee, even by analogy. Doing so in the applicant's case was also inconsistent with the nature of the offence of which he was convicted (see paragraph 55 above).

63. The foregoing considerations are sufficient to enable the Court to conclude that that imposing the confiscation measure on the applicant himself, was not foreseeable. Consequently, the interference with his property rights was not "provided for by law" as required by Article 1 of Protocol No. 1 to the Convention.

64. This finding obviates the need to further examine whether that interference pursued an aim in the general interest and whether it was proportionate to that aim.

65. There has accordingly been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

67. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

68. The Government contested this claim.

69. The Court reiterates that a judgment in which it finds a breach of the Convention imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences (see, for example, *Trgo v. Croatia*, no. 35298/04, § 75, 11 June 2009). It further reiterates that

the confiscation order in respect of which it has found a violation of Article 1 of Protocol No. 1 to the Convention in the present case has not yet been enforced (see paragraph 20 above).

70. In the circumstances, the Court considers that the respondent State must ensure that the applicant's property is not subject to enforcement of the confiscation order and that he be compensated for any sums that might have been taken from his bank accounts by way of such enforcement (see, *mutatis mutandis*, *Dolenc v. Slovenia* (just satisfaction), no. 20256/20, § 23, 20 October 2022). It further considers that, in the circumstances, this is the most appropriate way of repairing the consequences of the violation found, and that, therefore, a finding of the violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage he might have sustained.

B. Costs and expenses

71. The applicant also claimed EUR 6,467.50 for the costs and expenses incurred before the domestic courts. He also claimed an unspecified amount for the costs and expenses incurred before the Court.

72. The Government contested these claims.

73. As regards the costs and expenses incurred before the domestic courts, the Court notes that the applicant incurred those costs in relation to the criminal charges brought against him and that he did not incur any separate or additional costs in relation to the confiscation order in respect of which it has found a violation of the Convention. It therefore rejects this claim.

74. As regards the costs and expenses incurred before it, the Court reiterates that pursuant to Rule 60 § 1 of the Rules of Court an applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention must make a specific claim to that effect. Since the applicant did not specify the amount claimed, it does not award him any sum on that account (see *Kavala v. Turkey*, no. 28749/18, § 237, 10 December 2019).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by four votes to three, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds*, by four votes to three, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Holds*, by four votes to three,
- (a) that the respondent State must ensure that the applicant's property is not subject to further enforcement of the confiscation order contained in the Split Municipal Court's judgment of 13 April 2017, which did not comply with the Convention;
 - (b) that the respondent State must compensate the applicant for any pecuniary loss he might have incurred as a result of enforcement of the confiscation order contained in the Split Municipal Court's judgment of 13 April 2017, which did not comply with the Convention;
5. *Dismisses*, unanimously, the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 May 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Arnfinn Bårdsen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Concurring opinion of Judge Derenčinović;
- (b) Dissenting opinion of Judge Seibert-Fohr, joined by Judges Ilievski and Pisani;
- (c) Dissenting opinion of Judge Pisani.

CONCURRING OPINION OF JUDGE DERENČINOVIĆ

1. I agree with the finding of a violation of Article 1 of Protocol No. 1 to the Convention and with the reasoning given for that violation.

2. However, I disagree with the majority position not to examine the application from the perspective of Article 7 of the Convention despite the fact the case was re-communicated under that provision.

3. I have no doubt whatsoever that Article 7 of the Convention would be applicable in this case. Namely, given the mixed nature of confiscation of crime proceeds in Croatian legislation, this measure could be considered a penalty under Article 7 of the Convention. Despite the fact that confiscation as a measure to prevent unjust enrichment and to demonstrate that crime does not pay is not formally a type of penalty under Croatian criminal legislation (only imprisonment and fines are considered penalties under the Penal Code), there are many features of the confiscation order that would indicate that it falls within the autonomous concept of “penalty” for the purposes of Article 7 of the Convention.

4. First and foremost, a confiscation order in Croatia is applied in criminal proceedings pursuant to the provisions of the Penal Code and Code of Criminal Procedure, after the judgment/decision on the merits, i.e. having established the criminal liability of the defendant. Furthermore, it is the criminal court that decides in a criminal judgment on a confiscation order, which is always subsidiary to a victim’s claim for damages.

5. Moreover, in this case, and given the correct finding of the majority that interference with the applicant’s property was not lawful in the sense of Article 1 of Protocol No. 1 to the Convention, the issuance of the confiscation order outside the conditions prescribed by the Penal Code indicates that the real intent of the authorities in this unprecedented case was to punish and that the effect of its application was punitive, thus in the nature of a penalty, rather than preventive, in the nature of confiscation.

6. In this regard, I regret that the unprecedented but above all unforeseeable and arbitrary application of domestic legislation in this case, amounting to an analogy that is strictly forbidden in substantive criminal law (*poenalia sunt restringenda*), has not been examined also from the perspective of Article 7 of the Convention, in addition to that of Article 1 of Protocol No. 1 to the Convention.

DISSENTING OPINION OF JUDGE SEIBERT-FOHR,
JOINED BY JUDGES ILIEVSKI AND PISANI

1. To our regret, we are unable to agree with the majority's finding that the confiscation in the present case was unforeseeable under Croatian law and therefore violated Article 1 of Protocol No. 1. The applicant was convicted for business fraud and forgery of documents and was ordered to pay the proceeds of those offences into the State budget. The sentence was based on the fact that he had cashed the forged cheques and kept the resulting amounts for his company, of which he was the sole founder and shareholder and which in the meantime had been struck off the register of commercial companies, leaving no legal successor (see paragraphs 10 and 14 of the judgment).

2. The question whether the confiscation order was foreseeable by the applicant needs to be assessed in the context of the applicable law. As noted by the Constitutional Court in its judgment of 6 October 2021, the decision to seize the applicant's property as proceeds of the crime for which he had been convicted was based on Article 77 of the Penal Code in conjunction with section 252(5) of the Commercial Companies Act. Furthermore, the Constitutional Court explained in its judgment that the applicant had not disputed that the decision to confiscate the proceeds of crime had been based on the aforementioned provisions, nor had he called those provisions into question.

3. Nevertheless, the majority have decided to perform their own analysis of Croatian law and to assess whether the confiscation measure could indeed be based on those provisions (see paragraphs 62-63 of the judgment). They assert, without reference to any relevant Croatian case-law, that confiscation is "more akin to unjust enrichment rather than to tort liability under civil law" (see paragraph 61 of the judgment) and conclude that applying section 252(5) of the Commercial Companies Act – which provides for tort liability of management board members of a commercial company – to creditors, is "inconsistent with the nature of that measure and thus impossible to foresee, even by analogy" (see paragraph 62 of the judgment). They further maintain that applying that provision in the applicant's case was also "inconsistent with the nature of the offence of which he was convicted" (*ibid.*).

4. It is noteworthy that the majority's detailed analysis and the characterisation of confiscation as "more akin to unjust enrichment than to tort liability under civil law" are based neither on the applicant's submissions nor on any legal reasoning by the domestic courts (see paragraphs 10, 14, 18, 23 and 39-42 of the judgment). Moreover, the legal arguments put forward by the majority, in particular the legal characterisation of confiscations, according to which these measures relate to unjust enrichment and are thus restorative in nature, are difficult to reconcile with the Constitutional Court's holding that confiscation acts as a deterrent to those who might engage in criminal activity.

5. We believe that this kind of legal analysis of domestic law, which *proprio motu* seeks to determine the specific legal nature of a measure and then to evaluate whether the application of a domestic legal provision was consistent with that alleged nature, goes beyond the competence and proper role of the Court. This is not the type of analysis required, under Article 1 of Protocol No. 1, to determine whether an interference with the right to peaceful enjoyment of property was based on law.

6. According to the Court's established case-law, it is primarily for the national authorities, in particular the courts, to interpret, and assess compliance with, domestic law (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 186, 6 November 2018, and *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 251, 1 December 2020). The State may be held responsible for losses caused by such determinations only if the court decisions are not in accordance with domestic law, if they are flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1, or if a person has been arbitrarily and unjustly deprived of property in favour of another (see *Bramelid and Malmström v. Sweden*, nos. 8588/79 and 8589/79, Commission decision of 12 October 1982, Decisions and Reports 29, p. 76; *Dabić v. the former Yugoslav Republic of Macedonia* (dec.), no. 59995/00, 3 October 2001; and *Vulakh and Others v. Russia*, no. 33468/03, § 44, 10 January 2012). The Court's jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and it is not its function to take the place of the national courts. Rather, its role is to ensure that the decisions of those courts are not arbitrary or otherwise manifestly unreasonable (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I).

7. With regard to the foreseeability of the application of the law, the Court has previously explained that the relevant law must be formulated with sufficient precision to enable citizens to regulate their conduct, allowing them to foresee, to a degree that is reasonable under the circumstances, the consequences which a given action may entail. However, such consequences need not be foreseeable with absolute certainty, since excessive rigidity is undesirable (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 141, ECHR 2012).

8. On the basis of these general principles, we are unable to conclude that the application of Article 77 of the Penal Code in conjunction with section 252(5) of the Commercial Companies Act was not foreseeable for the applicant in the present case. We would first note in this regard that the applicant did not dispute before the Constitutional Court that the decision to confiscate had been based on those provisions, nor did he call those provisions into question (see paragraph 2 above). Therefore, his argument, raised now before the Court, that section 252(5) of the Commercial Companies Act could not be applied in criminal proceedings for the confiscation of proceeds of crime (see paragraph 42 of the judgment) and that

its application was unforeseeable for him does not seem plausible. We also note that the applicability of Article 77 of the Penal Code in conjunction with civil law has not been disputed by the domestic courts (see paragraph 14 of the judgement and paragraph 2 above), nor by the majority. Additionally taking into account the fact that section 252(5) of the Commercial Companies Act provides for the piercing of the corporate veil, by allowing claims against a management board member who has grossly violated the duty of care and diligence of a “prudent businessman”, we cannot agree with the majority that the confiscation decision against the applicant as the sole shareholder of the company, which had in the meantime been struck off the register of commercial companies, was unforeseeable for him.

9. Rather, we take the view that the law that the domestic courts relied on was accessible and sufficiently clear to enable the applicant to regulate his conduct, allowing him to foresee, to a degree that was reasonable under the circumstances, the consequences which the forgery and business fraud might entail. This is all the more true since the applicant was acting as the director of a company of which he was the sole shareholder (see also paragraphs 4-6 of the separate opinion of Judge Pisani). According to the Court’s established case-law, persons carrying on a professional or commercial activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can be expected to take special care in assessing the risks that such activity entails (see *Lekić v. Slovenia* [GC], no. 36480/07, § 97, 11 December 2018).

10. In the light of the foregoing arguments, we have decided to dissent from the majority in the present case.

DISSENTING OPINION OF JUDGE PISANI

1. I would like to start by thanking my esteemed colleagues in the majority for offering us this didactic illustration of a tale of two fictions. It is one of those stories that takes us back to our childhood – a world populated with myths and marvellous creatures, a world where you can hide behind your hands and pretend not to be seen. Or better still, just pretend to hide behind hands that do not even exist, or hands that might be otherwise occupied concealing some spoils behind your back in the hope of getting away with it. This is the realm of McArthur Wheeler, into which the wonders of law and human rights now offer us insight.

2. Our applicant had the misfortune of being the sole owner and director of a very nasty company which was unduly enriched by the issuance of forged cheques. I say “was enriched”, because it wasn’t this poor company’s fault. It was actually the victim of an even viler director (our applicant, as it happens), who apparently abused the naivety of this pitiable creature. But luckily for the common morals, crime does not pay. The so-unduly enriched company was unable to profit from this pocketed wealth as, many years later, it went bankrupt. Since the whole procedure, from forgery to bankruptcy and conviction, lasted a decade, no one knew where the proceeds of crime had gone. But, thought the national authorities, that does not matter; we all know who the bad guy is – the applicant/owner – so we’ll make him pay. How dare they?! This poor man appears to have been tricked into the whole affair by the evil company, maliciously acting through its director, who first forged documents to enrich it before plunging it into financial disarray.

3. When, about a generation ago, I saw the introduction of criminal liability for corporations, one of the aims of that mechanism was to prevent impunity for anonymous fault; to avoid the situation where stakeholders did not have to bear the consequences of a corporate policy they would otherwise have profited from. Although it was accompanied by the exception of the liability of physical persons, that provision only made it possible to attain concrete actors, generally directors or managers who, as in the present case, had committed fraudulent acts. Soon however, in an ever complexifying world of corporate constructs, it became necessary to stretch further to get to the physical persons behind the company, since nowadays corporations are often neither owned nor directed by physical persons but by a cascade of corporate entities. This induced a need to introduce additional concepts in order to effectively catch the instigators. The inherent limitations of criminal liability, which stem from the rule that punishment should be applied only to the offender, have thus led the authorities, both national and international, to reach out for the money, by searching for the ultimate beneficial owner and resorting to value-based confiscation by equivalent.

4. In this context, the European Union, of which the respondent State is a member, has recently adopted Directive (EU) 2024/1260 of the European

Parliament and of the Council of 24 April 2024 on asset recovery and confiscation (OJ L 2024/1260). Articles 13 and 14 of that legislation require nothing other than exactly what the respondent State did, namely confiscation of property of a value corresponding to the proceeds of crime – even if those proceeds have only been indirectly transferred to third parties – and confiscation of the property of the convicted person, regardless of the fact that only an indirect economic benefit has been gained. The assessment of the various elements has to be based on the concrete circumstances and facts, and thus implicitly not on purely legal constructs. I am aware that this directive is not applicable to the present case, and even its predecessor from 2014, which is not so diverse, may not have found application in the matter at hand. However, Article 12 of the United Nations Convention against Transnational Organized Crime (adopted on 15 November 2000, 2225 UNTS 209) provides for a similar approach. And that is not even to speak of two Council of Europe conventions, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (opened for signature on 8 November 1990, ETS 141) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (opened for signature on 16 May 2005, CETS 198). Both provide for the confiscation of direct or indirect proceeds of crime – and, in the case of the former, a value-based equivalent – without consideration as to where they may be found. The respondent State adheres to both conventions, and ratified the first one well before our applicant completed the commission of the offences. But that is not my point since, from our perspective, it is an issue of national law which should be left to the national authorities to apply correctly, as has rightly been pointed out by Judge Seibert-Fohr in her separate opinion, with which I concur. Nonetheless, one might argue that Article 1 of Protocol No. 1 could be interpreted in the light of those instruments. What matters most here is that what the national authorities did in the present case was not an absurd overstretching of legal concepts which came out of the blue. The applicant may have hoped to get away with his fraud by taking advantage of a legal loophole, and in the end he has succeeded. But by no means were the authorities' interpretation or his conviction unforeseeable.

5. Returning to our myth, we may dwell briefly on legal entities. I do not mean to rewrite the whole theory applicable to legal personality, nor am I in quest of Cartesian absolute truth, since with both concepts not even our own existence appears so obvious. Rather, I will content myself with that immediate reality that shapes our everyday lives. In line with this, and as sorry as I am to the purists of scholarly theories, legal entities do not actually exist. They are not real acting beings that run around or make things, but a convenient instrument created by humans who act through them in the pursuit of their own goals. This is true for the physical persons involved, but also more generally for human societies, which see them as a means of bundling

capital and enhancing entrepreneurship. The latter interest, not the former, is what justifies the status conceded to these entities. As, however, capital considerations are the driving force behind individual investment in such entities, they cannot be neglected, and must be accepted, even if occasionally the two interests conflict. This nonetheless holds true only in so far as there is a genuine corporate interest established within the boundaries and goals provided by society. If the entity is created or used with a view to piracy, it cannot be granted the privileges of existence, because otherwise the whole construct is undermining itself. To put it plainly, if you allow individuals to create corporate entities in order to defraud actual people of their possessions, whether directly or indirectly through other entities, or even through far-fetched schemes involving public monies, and to appropriate them, be it incidentally, you actually create an incentive for this activity, which will increase incrementally until the system cannibalises itself and collapses. This is not, and cannot be, the aim of those entities. That is especially obvious where, as in the present case, we are confronted with an entity under the private control of one person. In view of their limited existential right, corporations must be inherently transparent. They are not self-standing life. Taken out of their legal framework and made to serve fraudulent purposes, they fade away to nothing, as there is no longer any link between the actions “they” undertake and the laws in which they are rooted. The cutting of this umbilical cord implies their functional disappearance, for otherwise an overly rigid reading of a virtual Article 1 of Protocol No. 1 to our venerable instrument may essentially lead us to the brink of Article 17 in respect of our own equivalent right. Now, for larger corporations this abstraction might in turn be used by society as a way to attain the unrecognisable perpetrator through the capital bundled in the entity: this is the hypothesis of the anonymous fault. It does not, however, apply in the present case, as the perpetrator has been clearly identified and has used the subtleties of corporate existence to withdraw from the world in order to avoid conviction.

6. From all this I conclude that the national authorities applied the law in a perfectly foreseeable way, or at least, to paraphrase this Court’s frequent qualification, with the clear-sighted advice of a sensible professional.

7. Some nevertheless seem to consider it unfair or legally questionable to potentially deprive our unfortunate director/owner of his hard-earned belongings on account of the deceptive actions of this vile creature. Not only did it fraudulently appropriate the fortune of others itself, but then, like an ogre, it devoured that wealth with an insatiable appetite until its death, in the form of bankruptcy, thus not leaving a single penny in the hands of our misfortunate applicant. The issue of legality having been amply discussed, I’d like to focus more on justice, pointing out that, contrary to the prevailing view, one could argue that the outcry over the applicant’s sentence overlooks the fact that he used and abused the company throughout its existence by living with and through it. Be it by profit gained, role played, clients satisfied,

salaries and bills paid, goods consumed or any other facets of corporate life, an owner or manager can directly or indirectly reap the benefit of a corporation, whether for personal gain or that of his entourage. And if it weren't for the bankruptcy, wouldn't the applicant have been the successor, heir and beneficiary of the company? Can it be that the better you scheme and hide, the less likely you are to pay? Factually, that is true for sure. But should that be the goal of the law?