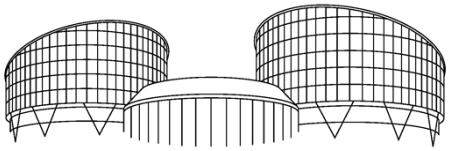

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ZAGHINI v. SAN MARINO

(Application no. 3405/21)

Art 1 P1 • Confiscation of sum of money and applicant's inability to recover it, following criminal proceedings against third parties for money laundering • Confiscation measure proportionate to legitimate aim of fighting money laundering • Impugned decision based on judicial assessment of evidence available • In the specific circumstances, applicant given reasonable opportunity to put his case for recovering confiscated funds to domestic authorities who examined his claims as circumscribed by him • No indication of arbitrariness

JUDGMENT

STRASBOURG

11 May 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zaghini v. San Marino,

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

Marko Bošnjak*, President*,
Péter Paczolay,
Alena Poláčková,
Lətif Hüseynov,
Ivana Jelić,
Gilberto Felici,
Raffaele Sabato*, judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 3405/21) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Gianluca Zaghini ("the applicant"), on 7 January 2021;

the decision to give notice to the San Marinese Government ("the Government") of the complaint concerning Article 1 of Protocol No. 1 and to declare inadmissible the remainder of the application;

the decision of the Government of Italy not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties' observations;

Having deliberated in private on 4 April 2023,

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

INTRODUCTION

1. The application concerns the confiscation of sums of money following criminal proceedings for money laundering against other persons but not the applicant, and the applicant's subsequent claim to recover that money.

THE FACTS

2. The applicant was born in 1966 and lives in Munich. He was represented by Ms L. Galletta, a lawyer practising in Bovalino, Italy.

3. The Government were represented by their then Agent, Mr L. Daniele.

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

I. BACKGROUND TO THE CASE

The criminal proceedings

1. The investigations in Italy and San Marino

5. In 2003 criminal proceedings were initiated against the applicant and others at the Court of Forlì, Italy, in relation to tax evasion and making unjust profits (of around fifteen million euros "EUR") at the expense of the State.

6. On 4 November 2003, a request for legal assistance by means of international letters rogatory from the Deputy Public Prosecutor at the Court of Forlì, Italy, was accepted by the competent Judge (CoL - *Commissario della Legge*) of the Court of San Marino. Thus, the latter ordered the execution of asset investigations against the applicant's father, and other persons, including G.A. and P.A., as well as the seizure of sums of money, and in any case of current account surpluses, securities, valuables and safe deposit boxes, which could be traced back to all the above-mentioned persons, as well as of safe deposit boxes possibly used by them.

7. The investigations carried out in the framework of the international letters rogatory revealed: that a bank account had been registered in the applicant's name with I.B.S. bank, Branch of Dogana, and that his father had been delegated by the applicant (at the time under house arrest) to withdraw from such account the amounts of EUR 939,500 on 1 December 2003 and of EUR 1,006,700 on 4 December 2003, both amounts having been withdrawn in cash; that a safety deposit box in the name of G.A. was kept at C.d.R. bank, Branch of Domagnano, which contained a total amount of EUR 1,892,700.

8. On 5 December 2003 the safety box containing the money was opened and seized by the police, who left it in the custody of the bank director.

9. On 21 January 2004 the CoL concluded the international letters rogatory proceedings and at the same time ordered the institution of criminal proceedings for the offence of money laundering, provided for by Article 199 *bis* of the Criminal Code of San Marino and punishable in accordance with Article 4 of Law of 15 December 1988, against the applicant's father, G.A. and P. A.

10. The investigating judge (in San Marino) questioned the applicant's father, G.A. and P.A. and obtained the criminal file in relation to the proceedings ongoing in Italy, including the applicant's statement released during the investigation in Italy (on the basis of evidence which had been set out before him). The applicant's pre-trial statements included an admission that he had deposited in San Marino around EUR 1,800,000 obtained from illegal activity. From the investigations of the investigating judge in San Marino it transpired that after withdrawing the sum of EUR 939,500 on 1 December 2003 and EUR 1,006,700 on 4 December 2003, the applicant's father had delivered the sum of EUR 1,903,700 to his son's former partner (P.A.), who received it. She was instructed to ask an acquaintance from San

Marino (G.A.) to open a safe deposit box, in his own name, where the money should be kept. Accordingly, G.A. opened the safe deposit box in his own name and deposited EUR 1,892,700, the applicant's father and P.A. having kept EUR 12,000 and EUR 11,000 respectively, sums they took back to Italy.

11. By order of 16 August 2005 the investigating judge in San Marino ordered the seizure of the sum of EUR 1,892,700 which had been deposited in the safety deposit box in the name of G.A. The day after he issued the indictment against the applicant's father, G.A. and P.A.

2. The trial for money laundering in San Marino

12. By a first-instance judgment of 29 November 2005, the first-instance judge found the three co-accused guilty, sentenced them to suspended sentences of imprisonment and ordered that the sum, which had been seized, was to be confiscated (leaving it for the execution judge to determine the share of the two States involved as per international agreements).

13. According to the judgment, this was the first money laundering case in San Marino following the introduction of the relevant law, namely Article 199 *bis* of the Criminal Code. The latter had been enacted to respond to the growing phenomenon of the use of money deriving from crime (*denaro proveniente da misfatto*) and the need to fight against such phenomenon in the light of international obligations. The judge considered that the accused persons' criminal responsibility was clear from their own statements, which in substance amounted to nothing less than confessions. In the judge's view both the applicant's father and P.A. were aware of the illicit origin of the funds, in respect of which they had made arrangements with the applicant to hinder the verification of the origin of those funds and hide them. To ensure that such aim was achieved P.A. had further solicited the assistance of G.A. as she had not wanted to get involved, knowing that the applicant was being investigated for crimes against the financial administration of Italy. G.A.'s pleas that he was in good faith could also not be upheld as, according to the judge, no person with average intellectual faculties would have accepted to do such a 'favour', without knowing its real purpose. As to confiscation, without specifying which sub-article was being applied, the judge referred to Article 147 (1) and (2) (see paragraph 31 below), both of which, according to the judge, provided for obligatory confiscation of the relevant items.

14. By an appeal judgment of 9 May 2008, confirming in part the first-instance judgment, the applicant's father and former partner's guilt as well as the confiscation were confirmed. The proceedings in respect of G.A. were discontinued, them having become time-barred following the application of mitigating circumstances as a result of his spontaneous confession. In so far as relevant, the Court of Appeal noted that the evidence provided by the Italian authorities was more than sufficient to prove that the sum of EUR 1,946,200 (the laundering of which was imputed to the appellants), was all, or in the most part, obtained from the commission of the crimes with

which the applicant was charged in Italy, and a final judgment in that respect was unnecessary. The fact that the applicant had asked the accused to hide that money, precisely while he was under home arrest in connection with those offences, was further evidence of this. The accused persons' plea that the predicate offence which generated the money was not punishable in San Marino was also rejected given that fraud (*truffa*) against the State was clearly also punishable in San Marino. Lastly, the Court of Appeal considered that the applicant's father was aware that he had been asked to hide the money because of the investigation ongoing in Italy and thus, he was fully aware of the illicit origin of the funds. Similar considerations applied to P.A. who had also tried to hide any connection with G.A. when stopped by the Police, there had therefore been no doubt that she was aware of the significance of the actions she had been asked to undertake.

15. By means of an execution order of 19 December 2008 (without prejudice to the possibility of the two States involved to share the money as per international agreements) the Enforcement Judge having seen the appeal judgment, ordered the confiscation of the sum of money equal to EUR 1,892,700, which had been found in the safety deposit box and had already been seized following the decree of 16 August 2005, plus the interest accrued in the meantime. The Enforcement Judge had regard to Article 147 (3) of the Criminal Code (as amended in 2004) according to which "in the event of a conviction it is always mandatory to confiscate the things that served or were intended to commit the crimes referred to in articles ... 199 *bis*, precisely money laundering, as well as things that are the price, the product or the profit".

3. The applicant's trial for tax evasion and unjust profits in Italy

16. After a first-instance judgment finding the applicant guilty in 2012, by a judgment of 22 November 2016, the proceedings against the applicant were declared time-barred and the Court of Appeal of Bologna ordered the restitution of the money preventively seized.

II. THE PROCEDURES PURSUED BY THE APPLICANT IN SAN MARINO

A. Before the judge of international cooperation

17. As of 16 November 2017, by means of three subsequent unsuccessful requests, the applicant asked the judge for international cooperation (*Giudice per le rogatorie*) to release the sums seized, to him as legitimate owner, as ordered by the Court of Appeal of Bologna. His requests were rejected on 17 November 2017, 19 January 2018 and 1 February 2018, *inter alia*, as those sums had in the meantime been confiscated as a result of the criminal judgment against the applicant's father and other third parties. In the

circumstances of the case the applicant could not be considered as an extraneous third party (him being only spared charges for money laundering, as author of the predicate offence, due to the exemption provided by domestic law in such cases). The decision of the Italian authorities to lift the seizure (which had since then become a confiscation for the crime of money laundering in San Marino) could only amount to renunciation by the Italian State of their share of that money.

18. The applicant's appeal was dismissed by the Judge of Appeals on 23 April 2018, as it had been filed outside the grounds permitted by law (*al di fuori dei casi consentiti*).

19. The applicant lodged a further appeal to the Highest Judge of Appeal, namely the third instance judge (*Giudice per la Terza Istanza*) who on 29 June 2018 rejected the appeal for lack of jurisdiction as the law did not provide the applicant with access to the third instance judge to challenge preventive measures arising from international cooperation.

B. Before the Enforcement Judge and the relevant appeal bodies

1. Before the Enforcement Judge

20. On 13 August 2018 the applicant lodged a request (*incidente di esecuzione art. 203 bis CCP*) with the Enforcement Judge, asking him to annul the confiscation (resulting from the execution order of 19 December 2008) on the basis of the judgment delivered in the criminal proceedings in Italy.

21. By a judgment of 13 September 2018 the request was rejected and the confiscation confirmed, it being noted that the confiscated funds concerned the *corpus delicti* of the crime of money laundering, i.e. the money generated from the previous perpetration of another offence. Indeed, the illicit origin of the funds had been established by the San Marino criminal courts, and such findings were not dependent on a finding of guilt in respect of the predicate offence in the criminal proceedings in Italy. The outcome of the latter, which moreover was that the crime was time-barred and not the lack of commission of the crime, was therefore irrelevant.

22. The applicant challenged (*reclamo ex art. 203 ter et seq. CCP*) this decision claiming it had been based on irrelevant reasons and in total disregard for the principles established in *G.I.E.M. S.R.L. and Others v. Italy* ([GC], nos. 1828/06 and 2 others, 28 June 2018).

23. On 26 October 2018 the Enforcement Judge rejected the challenge reiterating that the illicit origin of the funds had been established and, reviewing the entire evidence, reiterated that this had been acknowledged by the applicant's father and the applicant himself – in this connection the judge referred to the applicant's own replies to questioning during the investigations in Italy. According to the Enforcement Judge, given his own statement, the applicant could not be considered a third party in good faith, quite the

contrary, the applicant had been fully aware of the movement of the money which he himself had instigated. Thus, the applicant could have been co-accused in the laundering, had it not been for the law in San Marino [at the time], which barred an individual who committed the predicate offence from being prosecuted for money laundering. Indeed, in his request the applicant had not even attempted to show the licit origin of the funds so to substantiate his alleged good faith.

2. Before the appeal bodies

24. The applicant appealed (*reclamo di seconda istanza*), requesting the return of his money plus interest and inflation, and claiming violations of his right to be presumed innocent, to adversarial proceedings, and to a tribunal established by law in respect of the proceedings before the Enforcement Judge. He insisted that he should have been given the right to put forward his case firstly during the criminal proceedings, and secondly in the procedure before the judge for international cooperation (which he considered the only competent judge to deal with his request – however, the judge for international cooperation had dismissed his claim "acting as an investigating judge") (see paragraph 17 above). The applicant pointed out that he had not been a party to the criminal proceedings in San Marino, as he had not been called to participate in those proceedings. Thus, he had not had the opportunity to prove the licit origin of the funds determined in the appropriate forum. In the applicant's view, it was at that time that he should have been given the opportunity to put forward his case and not before the Enforcement Judge who could not decide whether or not the money had a licit origin. He, however, considered that it was not for him to prove such licit origin, him not being an investigated person. While admitting that the Enforcement Judge had been the only one who examined the merits of his case, according to the applicant, the Enforcement Judge had had no competence to do so. Moreover, in doing so he had relied on statements made at pre-trial stage in the absence of adversarial proceedings. In his appeal the applicant further argued that while the authorities insisted on applying Article 147 (2) of the Criminal Code to the confiscation, this could not apply as money was not dangerous in itself unless it was held by the money launderer, but this was not his case.

25. By a judgment of 2 January 2019 the Judge of Criminal Appeals rejected the appeal. The latter considered that the judge for international cooperation had correctly rejected the applicant's request since the preventive measure, applied *via* international cooperation, had been superseded by other measures including the judgment of the Court of Appeal (final as of 9 May 2008) confiscating the funds. As a result, from that date onwards, the judicial authority before whom the applicant could have and should have instituted his request for the return of the sums was the Enforcement Judge, who must be considered (*deve ritenersi*) competent to protect the interests *post rem iudicatam* of persons extraneous to the crime and third parties in good faith,

who consider they have rights on any confiscated object. Indeed, the Enforcement Judge's powers were not limited to assessing procedural aspects and could collect all relevant material to decide the claim put before him, as in fact happened. Thus, the applicant had had the possibility to be heard by a tribunal constituted by law, with all the relevant guarantees, such as being represented, having an adversarial hearing, and where the judge could take further investigative steps (*ulteriori approfondimenti istruttori*) if necessary. However, unlike extraneous third parties who do not contest the existence of the crime but only their involvement in it, the applicant was claiming that the funds had a licit origin, an allegation which was diametrically opposed to the reconstruction of facts leading to the relevant legal conclusions in the final appeal judgment of the San Marino criminal courts. It followed that the confiscation could not be annulled due to "the insuperable constraint deriving from the existence of a final criminal judgment". Since the Enforcement Judge could not frustrate the findings in such a judgment, he had not needed to enter into considerations as to whether or not the funds were licit – matters which had already been established.

26. The applicant's claim that he should have been called into the criminal proceedings to defend the licit origin of the sums, was also dismissed, given that San Marino procedural law did not provide for such an action in respect of a third party. Further, even assuming that the Enforcement Judge had upheld the argument that a person should have a right to challenge the deprivation of his possessions (as a result of someone else's wrongdoing), he could not in such circumstances remedy the situation under the relevant legal framework. Thus, the applicant's Conventional complaints (such as those in *G.I.E.M. S.R.L. and Others*, cited above) could only be raised in revision proceedings, which according to recent domestic case-law proclaimed to be an effective remedy prior to European Court of Human Rights proceedings.

27. The applicant appealed to the third instance judge complaining primarily that he had not had a fair hearing because he had never been notified of the confiscation and thus could not defend himself against it. He argued that the procedure before the Enforcement Judge could not be an effective remedy in this regard.

28. On another unspecified date he supplemented his appeal considering, this time, that both the Enforcement Judge and the third instance judge could order the revocation of the confiscation. He further raised complaints under Articles 6 and 7 of the Convention as well as Article 1 of Protocol No. 1 to the Convention.

29. By a partial decision of 10 February 2020 the third instance judge rejected his primary ground of appeal (about the non-existence of effective remedies), as it was contradicted by the procedural documents according to which his counsel had put forward all pleas in defence that he considered appropriate. Thus, the applicant had had the opportunity to make out his case

before the Enforcement Judge at both first and second instance, who thoroughly examined his case.

30. By a decision of 18 September 2020, notified to the applicant on 25 September 2020, the third instance judge rejected the remaining grounds raised in the supplementary appeal. Confirming his competence to decide the matter, he found the judgment on appeal irreproachable. He further noted that in the criminal appeal judgment of 14 March 2008 it had been established that the sum had been obtained by the applicant as a result of the crimes for which he had been charged in Italy and in respect of which he was on house arrest, indeed the defense had provided no alternative version of events. The fact that the applicant had also asked his father to hide the money while he had been on house arrest was one more proof of that. The Enforcement Judge at both first instance and on appeal had therefore been correct in rejecting the applicant's request. Contrary to the applicant's argument, Article 204 *bis* (15) of the Code of Criminal Procedure did not confer on the Enforcement Judge the power to revoke a measure ordered by the criminal court which had been ritually enforced.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

A. The Criminal Code

31. The provisions of the Criminal Code read, in so far as relevant, as follows[1]:

Article 199 *bis* (Money laundering)

"1. Apart from cases of participation in the commission of the offence, anyone who, for the purpose of concealing its true origin, conceals, substitutes or transfers money, or cooperates or intervenes in causing it to be concealed, substituted or transferred, knowing or suspecting that such money was obtained by others through an intentional criminal offence, commits a money laundering crime.

2. Also anyone who uses money, or cooperates or intervenes in causing it to be used in economic or financial activities, knowing or suspecting that such money was obtained by others through an intentional criminal offence, commits a money laundering crime.

3. The provisions of this Article shall also apply when the criminal offender from whom the proceeds were received is not indictable or punishable, or failing any of the conditions for the criminal offence to be proceeded against. Where the predicate offence was committed abroad, the fact shall be criminally prosecutable and punishable also in San Marino legal system."

[1] Translation provided by the Government

Article 147 (original text)

"1. The instrumentalities belonging to the criminal offender, which served or were destined to commit the crime, and the things being the price, product or profit thereof, shall be confiscated.

2. Regardless of conviction, confiscation shall also apply to the illegal making, use, carrying, holding, sale of or trade in property, even if not owned by the criminal offender, which constitutes a crime.

3. Confiscated properties shall be transferred to the State Treasury or, where appropriate, destroyed."

Article 147 (3) (as amended in February 2004)

"3. In case of conviction, the confiscation of the instrumentalities that served or were destined to commit the criminal offence referred to in Article 199 *bis* and the criminal offences for the purpose of terrorism or subversion of the constitutional order, as well as of the things being the price, product or profit thereof, shall always be mandatory. Where confiscation is not possible, the judge shall impose an obligation to pay a sum of money corresponding to the value of the instrumentalities and things referred above.

Confiscated properties or equivalent sums shall be transferred to the State Treasury or, where appropriate, destroyed."

B. The Code of Criminal Procedure

32. The relevant provisions of the Code of Criminal Procedure (CCP) read as follows[2]:

Article 200

"The revision of a final judgement of conviction or acquittal, which entails the application of security or confiscation measures, or of a final criminal conviction order, shall be admissible:

a) If new evidence has emerged or is discovered, which demonstrates, alone or together with evidence already obtained, that the convicted person shall be acquitted pursuant to Article 162, paragraph 1;

b) If the measure was issued as a consequence of false circumstances or of another offence;

c) If the facts upon which the measure is based are not compatible with those established in another final criminal ruling;

d) If the Court of Human Rights has ruled that the Judgement was rendered in violation of the provisions of the European Convention on Human Rights and Fundamental Freedoms or of its Protocols and the serious negative effects of this judgement can only be removed following a revision.

The following persons shall be entitled to submit an application for revision:

a) The person convicted or acquitted, either personally or through a special attorney, or one of his next of kin or heir if the person convicted or acquitted is dead;

[2] Translation provided by the Government

b) The prosecuting magistrate (*Procuratore del Fisco*).

The expiry of the limitation period for the offence at the time of the judgement shall not affect the revision proceedings and shall not be mentioned in the relevant judgement. However, the limitation period shall start to run again from the date of the declaration of admissibility of the application for revision and the relevant time-limits shall be extended by one year."

Article 201

"The application for revision shall be submitted in writing and shall indicate the details of the impugned measure and the relevant reasons, with specific indication of the evidence and reasons on which the application is based.

Upon submission of the application for revision, or subsequently, the parties entitled thereto may appoint a counsel of their own choosing.

The application shall be filed with the Court Registry, together with any supporting documents, within one year from the discovery of the new evidence or facts referred to in the first paragraph of Article 200, letters a) and b), from the date on which the ruling referred to in the first paragraph of Article 200, letter c) has become final, or from the date on which the judgement of the European Court of Human Rights has become final under the circumstances referred to in the first paragraph of Article 200, letter d).

[The Judge of Appeal in criminal matters shall be competent to decide on the application for revision, provided that he has not rendered the judgement against which the application is submitted].

The application for revision shall be inadmissible if it is submitted in a case other than those provided for by law, by a person not entitled thereto, or in case of noncompliance with the prescribed forms, time-limits and requirements. However, when the Judge declares the application inadmissible on the ground of noncompliance with the prescribed forms, he may, by way of exception and by virtue of the particular nature of the revision procedure, allow the person concerned to submit again the application in a correct way within a reasonable time.

If the application is found to be manifestly inadmissible, the Judge of Appeal shall declare its inadmissibility by means of a reasoned decree. Alternatively, he may suspend, pursuant to the procedure established in Article 198, the enforcement of the sentence or of the security measure by means of a reasoned decree and may apply, if necessary, a precautionary measure.

If the application for revision is admitted, the Judge of Appeal shall establish the effects of the admission by revoking the impugned measure and expressly adopting any consequent decision.

If the application is rejected or declared inadmissible, the Judge of Appeal may order the private individual submitting the application for revision to pay the costs of the proceedings. In case of suspension of the sentence or of the security measure, the Judge of Appeal may order that its enforcement be resumed."

Article 203 *bis*

"The Enforcement Judge provides on a request by means of a decree, after having heard, if necessary, the submissions of the prosecutor and the convicted person (...)"

Article 203 *ter*

"All measures issued by the Enforcement Judge can be challenged by the Prosecutor, the person convicted or by anyone else who has an interest in the measure. The Enforcement judge decides on the challenge at first instance, while the Judge for criminal matters [of first instance for ordinary cases] decides at second instance. The challenge does not suspend the execution."

Article 203 *quater*

"At first instance, the Enforcement Judge, having received the complaint, sets the day for the hearing for the purposes of discussion and deliberation and orders the notification to the parties, who have the right to attend the hearing.

The parties have the right to be assisted by a lawyer.

...

The deadline to challenge the measure before the second instance is 10 days from having acquired knowledge, according to law, of the decision of the enforcement judge. The latter, before ordering the transmission of documents, may set the time-limits for the presentation of briefs."

Article 204 *bis*

"Apart from that stated in the preceding articles, it is for the Enforcement judge to:

...

14) provide for the enforcement of the obligations arising from the crime and other criminal consequences;

15) take all the other measures foreseen by the law in matters of execution, modification and extinction of penalties, and preventive measures."

II. RELEVANT INTERNATIONAL INSTRUMENTS

33. On 12 October 2002 the Republic of San Marino ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg 1990 – ETS No. 141). The Convention aimed to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. Parties undertake in particular to criminalise the laundering of the proceeds of crime and to confiscate instrumentalities and proceeds (or property the value of which corresponds to such proceeds).

34. On 27 July 2010 the Republic of San Marino ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw 2005 – CETS No.198). This Convention covers both the prevention and the control of money laundering and the financing of terrorism. State parties to the Convention are asked to adopt legislative and other measures in order to assure that they are able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used for the

financing of terrorism; and to provide co-operation as well as investigative assistance to each other.

35. According to these instruments confiscation means "a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property". In particular in relation to confiscation measures, in so far as relevant, CETS No. 198 provides that:

Article 3

"1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.

2. Provided that paragraph 1 of this article applies to money laundering and to the categories of offences in the appendix to the Convention, each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies

a) only in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year. However, each Party may make a declaration on this provision in respect of the confiscation of the proceeds from tax offences for the sole purpose of being able to confiscate such proceeds, both nationally and through international cooperation, under national and international tax-debt recovery legislation; and/or

b) only to a list of specified offences.

3. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.

4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law."

Article 5

"Each Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass:

a) the property into which the proceeds have been transformed or converted;

b) property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds."

III. RELEVANT REPORTS

36. According to the MONEYVAL (Committee of experts on the evaluation of anti-money laundering measures and the financing of terrorism) Third Round Detailed Assessment Report on San Marino, adopted on 15 September 2008, concerning the situation of Money laundering in San Marino:

> "According to previous reports, laundering in San Marino almost always related to transactions conducted by non-residents who attempted to use the national financial system to launder proceeds obtained from crimes perpetrated abroad. Investigations in such cases proved difficult, both due to the need to rely on co-operation with foreign authorities and the fact that a connection between the money deposited in San Marino and the predicate offence committed abroad was difficult to establish.
>
> ...
>
> Since the last evaluation and until the end of 2006, there were four investigations and one conviction for money laundering."

37. According to the MONEYVAL Report on the Fourth Assessment Visit of San Marino adopted on 29 September 2011:

> "13. The money laundering risks, according to the authorities continue to derive from the foreign predicate offenses (primarily offences of fraud, usury and bankruptcy), with proceeds being invested or transferred through San Marino, with the banking and fiduciary sectors being the areas with the greatest vulnerability. The authorities indicated that one of the main challenges remains the high level of sophistication achieved by the interposition of a series of legal entities, often located in different countries, however in most cases, there is involvement (real or fictitious) of at least one San Marino national. Money laundering is often committed by making use of fictitious business operations to justify movements of capital. No significant changes to patterns or methods appear to have been identified. However, the evaluation team noted that several Italian media articles and TV reports issued in the period before the evaluation visit raised concerns of cross linked investments to launder in San Marino proceeds from tax evasion and from the Italian mafia, possibly exploiting the vulnerabilities of San Marino's financial system.
>
> 14. The San Marino authorities have placed a greater emphasis on developing its AML/CFT [anti money-laundering/combating the financing of terrorism] system, through a deep reform of its legislative and institutional framework, and an increased focus on training and resources. These initiatives have led to an increase in the number of money laundering investigations, with annual numbers rising 4 in 2007 to 13 in 2008, and with the development of jurisprudence on money laundering, with convictions reached in 4 judgements. This was also reflected in an increase of international co-operation with foreign authorities on money laundering cases, with predicate offences identified being inter alia fraud, usury, bankruptcy, international trafficking in narcotics, and having led to a number of seizure orders of important amounts."

38. The MONEYVAL Fifth Round Mutual Evaluation Report on San Marino of April 2021, in relation to the risks and general situation, found as follows:

> "The level of ML [money laundering] risk varies from "medium" to "medium-high" depending on whether the proceeds had derived from domestic or foreign crimes. The

> criminal proceeds derived from predicate offences committed domestically are mainly deposited at FIs [financial institutions] and reinvested in financial instruments and/or used for personal needs. The proceeds of crimes committed abroad and laundered in San Marino derive mainly from swindling/fraud (including tax evasion), misappropriation, (fraudulent) bankruptcy and the "ancillary" offence of criminal association (criminal conspiracy and a mafia-type criminal association). As noted in the 2019 NRA [national risk assessment] during the analysed period (2015-2019) the proceeds of crime generated by foreign predicate offences constituted over 90% of all ML convictions in San Marino."

THE LAW

I. PRELIMINARY REMARKS

39. The Court notes that the complaint communicated to the Government concerned solely Article 1 of Protocol No. 1 to the Convention, the remainder of the application having been declared inadmissible by the then President of the Section acting as a Single Judge at communication stage. In consequence, any repeated or new submissions by the parties in relation to Articles 6 and 7 of the Convention fall outside the scope of the current case.

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

40. The applicant complained that the imposed measure had not been legal or justified and that he had no effective means to challenge the confiscation contrary to Article 1 of Protocol No. 1 to the Convention, which 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."

A. Admissibility

1. The parties' submissions

41. The Government submitted that the applicant had failed to exhaust domestic remedies in so far as he had not instituted proceedings under Article 200 of the Code of Criminal Procedure (CCP) as indicated by the Judge of Criminal Appeals (see paragraph 29 above). The latter's indication had in the Government's view undoubtedly resulted from a "constitutionally and conventionally oriented interpretation" of Article 200 of the CCP in order to grant an effective remedy and "avoid the setting in motion of an

international complaint mechanism before the Strasbourg Court". Such a finding had been made in the light of recent jurisprudence of the Judge for Extraordinary Remedies competent to decide on revision requests under Article 200 of the CCP who had of his own motion extended the interpretation of the provision and made himself competent to decide human rights complaints so as to fulfil the requirements of Article 13 of the Convention. It was the Government's view that it would have been possible to submit to the Judge for Extraordinary Remedies the judgment of the Bologna Court of Appeal and to request, on that basis, the revision of the judgments of conviction adopted by the San Marino court in the criminal proceedings against third persons. In this way, it could have been possible to 'reverse' the outcome of the latter proceedings and obtain the acquittal of the defendants previously sentenced by a final judgment and, consequently, the revocation of the confiscation previously ordered together with the restitution of the confiscated property to the applicant.

42. The applicant submitted that Article 200 of the CCP set out an exhaustive list of subjects entitled to request revision and Article 201 of the CCP provided that the request for revision was to be declared inadmissible if it was presented by a subject not legitimised to do so. The applicant not being one of those subjects, such proceedings in his case could not be pursued.

2. The Court's assessment

43. The Court reiterates that the rule on exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body until they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

44. The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 71, 25 March 2014 and *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009). There is no obligation to have recourse to remedies which are inadequate or ineffective (ibid.). It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available both in theory and in practice at the relevant time, that is to say, that

it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Vučković and Others*, cited above, § 77, and *Molla Sali v. Greece* [GC], no. 20452/14, § 89, 19 December 2018).

45. The Court notes that in previous cases against San Marino it has held that revision proceedings under Article 200 of the CCP amounted to an extraordinary remedy which need not be exhausted (see, for example, *Ercolani v. San Marino* (dec.), no.35430/97, 28 May 2002 and *Oddone and Pecci v. San Marino*, nos. 26581/17 and 31024/17, § 69, 17 October 2019). However, in *Balsamo v. San Marino* (nos. 20319/17 and 21414/17, §§ 47 and 53, 8 October 2019) the Court held that the situation may be different in the light of the fact that the Judge for Extraordinary Remedies had established his competence to examine human rights issues. However, in that case it left the matter open as it was not necessary to decide whether the revision proceedings were still to be considered an extraordinary remedy, or whether such proceedings were a remedy for the purposes of Articles 13 and 35 § 1 of the Convention in a given situation.

46. In the present case, it is also not necessary to examine whether the revision proceedings were in general a remedy to be exhausted because, in any event, that procedure was not open to the applicant who had not been a party to the criminal proceedings. Indeed, as clearly stated in the law (see paragraph 32 above) the revision procedure is only open to the convicted or acquitted person, or the prosecutor. The mere fact that the Enforcement Judge made the suggestion that the applicant should have attempted such a remedy cannot of itself counteract the wording of the law which limited its application to the guilty/acquitted or the prosecutor (see paragraph 32 above). Similarly, the mere fact that the Judge for Extraordinary Remedies had extended his jurisdiction ('*ratione materiae*') to include cases where there had been a "substantive injustice relating to a final judgment which was in contrast with fundamental human rights" (see *Balsamo*, cited above, §§ 36-37), that is, beyond the specific situations mentioned in the law, does not suffice to consider that he would also have extended his competence ('*ratione personae*') to include subjects not entitled to bring such proceedings, beyond the explicit terms of the law. Indeed, the Government have not submitted any example where the Judge for Extraordinary Remedies took cognizance of a claim brought by a different subject than those established by law. In these circumstances, revision proceedings, even assuming they were not to be considered an extraordinary remedy as established in previous cases, cannot

be considered as a remedy the applicant should have pursued in the present case. The Government's objection in this respect is therefore dismissed.

47. Further, the Court points out that it is not open to it to set aside the application of the six-month rule (as applicable at the time of lodging the present complaint, that is, before the new four month time-limit came into effect on 21 February 2022) solely because the respondent Government in question have not made a preliminary objection to that effect (see, for relevant principles, *Pasquini v. San Marino*, no. 50956/16, § 78, 2 May 2019). The Court reiterates that an applicant is not obliged to have recourse to remedies which are inadequate or ineffective. It follows that the pursuit of such remedies will have consequences for the identification of the "final decision" and, correspondingly, for the calculation of the starting point for the running of the six-month rule (see *Toniolo v. San Marino and Italy*, no. 44853/10, § 34, 26 June 2012 and the case-law cited therein). In other words, Article 35 § 1 allows only remedies which are normal and effective to be taken into account as an applicant cannot extend the strict time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Convention (see *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 132, 19 December 2017). However, the provision cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached (ibid. § 131, and *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 260, ECHR 2014 (extracts)).

48. The Court observes that the confiscation at issue in the present case resulted from the first case of money laundering in San Marino, following the introduction of the relevant law (see paragraph 12 above). The confiscated sum coincided with the sum previously preventively seized both on request of another jurisdiction (where it was suspected that the predicate offence occurred; see paragraph 8 above) and in the context of the criminal investigations in San Marino (see paragraph 11 above). The foreign jurisdiction lifted its seizure order more than a decade after it had been put in place. It would appear that this was the first time such a scenario occurred in San Marino, and therefore no relevant examples existed indicating with certainty which avenues could be pursued by someone in the applicant's position. On the basis of the Court of Appeal of Bologna's judgment, the applicant attempted to obtain the release of the sums seized before the judge of international cooperation. The latter noted that it was not possible to uphold the request as such sums had since then been confiscated following a final criminal court judgment in San Marino (see paragraph 17 above). In consequence, the applicant attempted to challenge – before the Enforcement Judge – the confiscation which impeded the return of the seized sums. The

latter jurisdiction entertained the merits of his claim over several instances. Therefore, it would not appear that the latter avenue was sought outside of the relevant domestic time-limits to bring such actions. Indeed, the proceedings before the Enforcement Judge were not rejected as being out of time or as being repetitive. Nor does it appear that the Enforcement Judge lacked the competence to assess the applicant's request. In the absence of any guidance *via* judicial interpretation of the relevant domestic law as to what were the remedies to be pursued in such a situation, it cannot be said that the applicant deliberately tried to defer the time-limit set in Article 35 § 1 by making use of inappropriate procedures which could offer him no effective redress for the complaint in issue under the Convention (see, as another example, *Petrović v. Serbia*, no. 40485/08, § 60, 15 July 2014). Thus, in the specific circumstances of the present case, the applicant cannot be blamed for having attempted two subsequent avenues of redress with the respective appeals. It follows that the Court accepts that the last domestic decision given in the applicant's case, which settled his position at the domestic level, was that of 18 September 2020, notified to the applicant on 25 September 2020 (see paragraph 30 above), and having introduced his application on 7 January 2021, the applicant has complied with the six months' time limit.

49. The Court further notes that the 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' observations

(a) The applicant

50. The applicant submitted that the confiscation had no legal basis, nor did it pursue a legitimate aim. He also considered that it had not been proportionate and that he had no effective means to contest it.

51. Firstly, he argued that, contrary to the Government's erroneous submissions, it was clear from the execution order of 19 December 2008 that the confiscation had been issued on the basis of Article 147 (3) of the Criminal Code as amended in 2004 (see paragraph 15 above), and therefore a provision which had not yet been in force at the time of the commission of the offence by third parties. Indeed, while the Government erroneously relied on Article 147 (1) of the Criminal Code, even if that were so, such confiscation would not have been mandatory and more importantly, it was evident that the applicant could not be considered to be the criminal offender since he had not even been a party to the criminal proceedings in San Marino for the crime of money laundering. In the applicant's view, at the relevant time, no provision of law allowed for the confiscation of the applicant's belongings, given that they consisted of money, and not drugs or firearms,

thus, its "making, use, carrying, holding, sale of or trade in" could not constitute an offence.

52. In reply to the Government, the applicant submitted that the findings of the criminal court in the proceedings against third parties could not be used as a basis against him, in so far as he had not been a party to those proceedings and had never been heard in that ambit. Nor had he ever confessed to anything in the Italian trial (moreover, any pre-trial statements had not been repeated in adversarial proceedings), and the Italian first-instance judgment delivered in 2012 was of no relevance to the measure applied in 2008.

53. According to the applicant, relying on *G.I.E.M. and Others v. Italy* ([GC], nos. 1828/06 and 2 others, § 303, 28 June 2018), the mandatory nature of the confiscation made it automatically disproportionate in so far as it did not allow the judge to determine the appropriateness of the imposed measure in a given case. Moreover, the applicant had had no opportunity to be heard in the proceedings leading to the confiscation. As to any remedies pursued by the applicant thereafter, these had not been effective as the judicial determinations had been bound by the *res judicata* judgment. Thus, those bodies had not thoroughly examined his pleas, nor the compliance of the measure with the Convention.

(b) The Government

54. The Government submitted that the measure was lawful in so far as money laundering was a crime under the Criminal Code and Article 147 (1) of the Criminal Code, as in force at the relevant time, provided that "the instrumentalities belonging to the criminal offender, which served or were destined to commit the crime, and the things being the price, product or profit thereof, shall be confiscated". In any event, Article 147 (2) of the Criminal Code also provided for the confiscation of items which were not the property of the offender and in absence of a conviction, if their "making, use, carrying, holding, sale of or trade in" constituted an offence. In the light of both these provisions the measure had pursued a legitimate aim in so far as it prevented the placing on, and circulation in, the market of illicit funds, thus fighting organised crime in line with international obligations. The Government recalled that for the offence of money laundering to be proved it was not necessary to have a conviction judgment in relation to the predicate offences. In the present case it had been amply clear from the applicant's own statements to the Italian judicial authorities that the money was illicit – indeed, he had been found guilty at first instance of the predicate offences which generated such money. The same had been clear from the statements of the accused persons in the criminal proceedings in San Marino which, according to the appeal judgment of 29 November 2005, had amounted to proper confessions.

55. In the present case, the measure had also been proportionate given the public interest involved. The fact that the sum was substantial did not mean

that the fair balance between the competing interests had been upset given that the sum corresponded to the money generated *via* the predicate offences committed in Italy.

56. According to the Government, the applicant had had a real opportunity to submit his case to the San Marino courts in order to effectively challenge the confiscation order and the arguments he put forward to that end had been assessed on the merits. Indeed, the applicant had resorted to two separate remedies: the first one before the judge responsible for international cooperation, and the second one before the judge responsible for the enforcement of criminal law. The decisions were subsequently appealed against, both before the Judge of Appeal and before the Highest Judge of Appeal in criminal matters (the third-instance judge) for a total of six rulings. Before each court, the applicant had been allowed to express his reasons in support of the request for the restitution of the confiscated sum of money and such reasons had been examined and considered in detail at each instance. The applicant could also have availed himself of the revision procedure. In consequence, the State had fulfilled the procedural obligations arising under Article 1 of Protocol No. 1 to the Convention.

2. The Court's assessment

(a) General principles

57. The Court must establish whether the measure was lawful and "in accordance with the general interest", and whether there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Džinić v. Croatia*, no. 38359/13, §§ 61 and 62, 17 May 2016, and *Gogitidze and Others v. Georgia*, no. 36862/05, §§ 96 and 97, 12 May 2015). The character of the interference, the aim pursued, the nature of the property rights interfered with, and the behaviour of the applicant and the interfering State authorities are among the principal factors material to an assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicant (see *Karahasanoğlu v. Turkey*, nos. 21392/08 and 2 others, § 149, 16 March 2021, and *Ferhatović v. Slovenia*, no. 64725/19, § 43, 7 July 2022). Furthermore, the Court has, on many occasions, noted that although Article 1 of Protocol No. 1 contains no explicit procedural requirements, domestic proceedings must afford the aggrieved individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging measures interfering with the rights guaranteed by this provision (see *G.I.E.M. S.R.L. and Others*, cited above, § 302, and *Denisova and Moiseyeva v. Russia*, no. 16903/03, § 50, 1 April 2010). In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (ibid., and *Rummi v. Estonia*, no. 63362/09, § 104, 15 January 2015).

(b) Application of the general principles to the present case

(i) The applicable rule

58. As regards the question under which rule of Article 1 of Protocol No. 1 the impugned interference should be examined, the Court reiterates its case-law that a confiscation measure, even though it does involve a deprivation of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Air Canada v. the United Kingdom*, 5 May 1995, § 34, Series A no. 316-A, § 34; *Silickienė v. Lithuania*, no. 20496/02, § 62, 10 April 2012, § 62; *S.A. Bio d'Ardennes v. Belgium*, no. 44457/11, § 48, 12 November 2019, § 48; and *Markus v. Latvia*, no. 17483/10, § 70, 11 June 2020). However, in some cases, where the confiscation involved a permanent transfer of ownership and the applicant had no realistic possibility of recovering its possessions, the Court considered that the measures in question amounted to a deprivation of property (see, for example, *Andonoski v. the former Yugoslav Republic of Macedonia*, no. 16225/08, § 30, 17 September 2015, where the confiscation of the applicant's car used in committing a criminal offence was considered to have entailed a conclusive transfer of ownership, without the possibility of recovery, and thus amounted to a deprivation of property; *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia*, no. 42079/12, § 38, 17 January 2017, where the confiscation involved a permanent transfer of ownership and the applicant company had no realistic possibility of recovering its lorry used in drug trafficking; and *Yaşar v. Romania*, no. 64863/13, § 49, 26 November 2019, concerning the permanent confiscation of the applicant's vessel which had been used for illegal fishing). In the instant case, it is clear that there is little room for the applicant to recover the confiscated sums. Nevertheless, the Court decides to leave this question open as it is unnecessary to decide it in the present case (see, for a similar approach, *Denisova*, cited above, § 55, and *Aktiva DOO v. Serbia*, no. 23079/11, § 78, 19 January 2021).

(ii) Lawfulness

59. The applicant argued that the measure was not lawful as Article 147 (3) of the Criminal Code as relied on by the Enforcement Judge had not been in force at the time of the offence (see paragraph 51 above). The Court notes that the confiscation ordered at first instance, made reference to Article 147 (1) and (2) of the Criminal Code (see paragraph 13 above). In the Court's view, at that stage, both could have been applicable either in so far as the sums of money could be considered as "belonging" to G.A. in which case sub-article (1) applied (at least at first instance), or in so far as (contrary to that argued by the applicant, see paragraph 51 above) irrespective of conviction or ownership, the use of such money in itself would have constituted an offence, namely the perpetration of the money laundering (see

Balsamo, cited above, §§ 73 and 89) and thus sub-article (2) applied. The Court of Appeal, while discontinuing the proceedings in respect of G.A. as being time-barred, confirmed the confiscation order without further specification, there is therefore little doubt that the lawful basis was Article 147 (2) of the Criminal Code. The same was confirmed by the applicant himself in the domestic proceedings (see paragraph 24, *in fine*, above) although he has submitted a different argumentation before this Court. It follows that the measure had a lawful basis, and the mere fact that the Enforcement Judge relied on the amended sub-article (3) does not alter that conclusion in the circumstances of the present case.

(iii) Legitimate aim

60. The Court observes that money laundering directly threatens the rule of law as is also evident by the action of the Council of Europe and other international bodies in this field. In particular, the Council of Europe Conventions on the matter have bound States to criminalise the laundering of the proceeds of crime and provide for other measures aimed at having a strong criminal policy to combat this growing national and international phenomenon the complexities of which are unprecedented (see *Podeschi v. San Marino*, no. 66357/14, § 181, 13 April 2017). Indeed, depriving a person of the product and the profits of the laundering or other crimes, is in line with the powers conferred on courts as a weapon in the fight against money laundering (see *Sofia v. San Marino*, (dec.) no. 38977/15, 2 May 2017). Moreover, confiscating laundered money is also intended to prevent re-offending (as, in San Marino, the use or transfer of laundered money is in itself an offence) and to eliminate such funds from circulating further into the economy, both measures in line with the international standards mentioned above (see *Balsamo*, cited above, § 93). There is therefore no doubt that the measure in the present case pursued a legitimate aim, in the general interest, namely the fight against money laundering.

(iv) Proportionality

61. As to whether the measure was proportionate, the Court observes that the applicant's main arguments are that the measure had been mandatory and that he had not had a reasonable opportunity of putting his case to the authorities.

62. The Court observes that, while it is true that the CoL considered the confiscation to be obligatory, it was for the judge to make an assessment of what was to be confiscated, that is, what property the "use, carrying, holding, sale of or trade in" which constituted the crime, for the purposes of sub-article (2). In the present case those 'items' were identified as being the EUR 1,892,700, which had been seized by the police and constituted the profit made as a result of the illegal activity investigated in Italy. In this

connection, the Court recalls that, in relation to confiscation of property linked to serious offences, the Court does not require proof "beyond reasonable doubt" of the illicit origins of the property. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1 (see a series of examples set out in *Gogitidze and Others*, cited above, §§ 107-08). The Court reiterates that it is not its task to take the place of the domestic courts, which are in the best position to assess the evidence before them, establish facts and interpret domestic law. The Court should not act as a court of fourth instance and will not therefore question the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see, *mutatis mutandis*, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015).

63. It follows from the above that the circumstances of the present case are entirely distinguishable from those in *G.I.E.M. S.R.L. and Others*, cited above, relied on by the applicant, concerning site development, where other measures apart from confiscation could have been applied to achieve the aim pursued, namely the protection of the environment. Nor can the present case be compared to those concerning mandatory confiscation in connection with custom offences in relation to concealed or illegally exported goods (not dangerous in themselves) (see, for example, *AGOSI v. the United Kingdom*, 24 October 1986, § 54, Series A no. 108, and *Krayeva v. Ukraine*, no. 72858/13, § 32, 13 January 2022) or undeclared cash (see *Gyrlyan v. Russia*, no. 35943/15, § 31, 9 October 2018), or mandatory confiscations related to vehicles used for crime (see, for example, *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi*, cited above, § 45, and *Andonoski*, cited above, § 35). Indeed, none of these cases concerned items being harmful, or a source of further reoffending, in themselves (see also *Rummi*, cited above, § 104), such as would be the case with, for example, illegal narcotics and as is the case with laundered money.

64. The Court observes that the aim pursued in the present case was precisely to prevent re-offending (by means of the mere holding of that laundered money) and the further circulation of those funds into the economy with the harm that that brings. There is thus little room for any other measure than the mandatory confiscation of the sums identified as illicit funds. In this connection the Court, however, observes that the decision of the criminal courts to apply the confiscation measure to the sums which had already been seized (not less, not more) was the result of a judicial assessment on the basis of the evidence available. Indeed, nothing suggests that, had any of the accused been able to prove the licit origin of at least part of those funds the criminal courts would not have reduced the amount to be confiscated accordingly. Thus, while the confiscation was mandatory, an element of assessment still pertained to the judges in relation to what should be

confiscated. Indeed, there is no assertion, even less any evidence, that the trial of the accused leading to the confiscation had not been fair, or that it had been based on arbitrary considerations, and the mere fact that the confiscation related to a substantial sum of money does not make it disproportionate (see, *mutatis mutandis*, *Phillips v. the United Kingdom*, no. 41087/98, §§ 52-54 ECHR 2001-VII).

65. As to the applicant's opportunity of putting his case to the authorities the following considerations are of relevance. The Court has found violations of Article 1 of Protocol No. 1 in a number of cases where assets of the applicants had been confiscated after having been used by third parties for the commission of criminal offences. The Court has already referred to the differences between such cases and the present one above – namely in so far as the goods at issue in those cases concerned items which were not harmful, or a source of further reoffending, in themselves and therefore the possibility of their return could, in principle, be envisaged. Nevertheless, it is useful to point out that in those cases, no connection had been established between the owners of the assets and the respective unlawful action; in addition, often the owners had had no effective means at their disposal to oppose the confiscation (see, among others, *Bowler International Unit v. France*, no. 1946/06, §§ 44-46, 23 July 2009; *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi*, cited above, §§ 45-49; *Andonoski*, cited above, §§ 35-38; and *Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria*, no. 3503/08, § 45, 13 October 2015). Similarly, the Court found a violation of Article 1 of Protocol No. 1 in *Denisova and Moiseyeva* (cited above, §§ 59-64), where the applicants' assets (cash and other property) had been confiscated in the framework of criminal proceedings against a third party and the applicants had been given no meaningful opportunity to defend their rights and challenge the confiscation measure, which had included the spousal portion of the first applicant and the computer of the second applicant, contrary to Russian law. Conversely, in *Yaşar* (cited above) where the applicant's vessel had also been confiscated in the context of the criminal proceedings against a third party, the Court found no violation, as the applicant had had an opportunity to submit the evidence and arguments which he considered necessary to protect his interests, but he had been incapable of proving his good faith.

66. Turning to the present case, the Court observes firstly that, contrary to the case of *Denisova and Moiseyeva* (cited above, § 51), the instant case did not concern the issue of the ownership of the confiscated property, which the domestic courts had been by law obliged to examine. In the present case, the ownership of the money appears to have been undisputed and was rather irrelevant as the confiscation under Article 147 (2) of the Criminal Code had been intended to remove the money from circulation and prevent reoffending, irrespective of who the owner was.

67. Furthermore, the Court observes that the sum confiscated represented the sum seized, nevertheless at no point had the applicant challenged the

seizure (contrast *Denisova and Moiseyeva*, cited above, § 12). Secondly, while the applicant complained about the lack of his participation in the criminal proceedings, none of the individuals he had trusted with his money, and with whom he therefore must have had important emotional ties and regular contact, had opted to call him as a witness. Further, even though the San Marino domestic legal system does not as such provide for someone in the applicant's position to acquire a status as a party in the criminal proceedings *ex officio* (see paragraph 25, *in fine,* above), the applicant made no request to be heard in those proceedings. The Court considers that, contrary to that argued by the applicant (see paragraphs 24, 27 and 53 above), Article 1 of Protocol No. 1 does not require that "real owners" are given a reasonable opportunity to put their case during the criminal proceedings against perpetrators, that is, even before the measure is put in place. A reasonable possibility of putting the case before the authorities after the criminal proceedings have come to an end suffices for the purposes of Article 1 of Protocol No. 1 (compare *Denisova and Moiseyeva*, cited above, § 64). This is all the more so in the context of money laundering where the use of figureheads to hinder the verification of the origin of the sum of money and disguise its illicit origin is typical, and therefore the identification of "real owners" could prove difficult.

68. In the present case, when the confiscation order had become final, the applicant made no attempt to challenge that order in the seven months before it was enforced, nor any time soon after it had been enforced, in December 2008 (contrast *Denisova and Moiseyeva*, cited above, § 25, wherein the applicant challenged the confiscation within two months of its enforcement). It was only nine years after it had been enforced that he made such an attempt. Despite this delay on his part, various instances, including before the judge for international co-operation, but particularly before the Enforcement Judge and the subsequent appeals accepted to take cognisance of his requests and examined his claims. The Court observes that the applicant's argumentation before the domestic authorities – apart from that related to his absence from the criminal proceedings already dealt with in the preceding paragraph – was based on the fact that i) he had not been found guilty in Italy, the proceedings having been discontinued as being time barred and ii) the seizure order had been lifted. The Enforcement Judge and subsequent appeals (four levels of jurisdiction), engaging specifically with the applicant's request as set before them, replied on both grounds, finding that i) whether the applicant was found guilty or not was a matter irrelevant to the confiscation order which was not related to any such finding, and ii) that the decision of the Bologna Court of Appeal relied on by the applicant had been superseded by a criminal judgment in San Marino confiscating those sums. Indeed, the Court considers that, it stands to reason that the decision of the Bologna Court of Appeal lifting the seizure order had been made without engaging into any superseding judgment which could have been delivered by any other authority or jurisdiction, and

was confined to its powers and jurisdiction on the matter. The conclusions of the San Marino courts in this respect cannot therefore be considered arbitrary.

69. The Court further observes that, as duly noted by the domestic courts, despite the possibility of so doing, the applicant never claimed to be a third party in good faith (compare *Yaşar*, cited above, § 63 and contrast *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi*, cited above, § 45) or succeeded to prove that the funds had licit origins. To the contrary, he had argued that it was not for him to prove that at that stage (see paragraph 24 above). Thus, the case before the domestic courts as presented by the applicant, did not concern a situation where no connection had been established between the applicant as real owner of the assets and the unlawful action leading to the confiscation. The Court considers that in the absence of any evidence being put forward by the applicant that he was a third party in good faith or that the funds were licit, the Court cannot speculate as to what would have been the outcome of those proceedings otherwise.

70. In the specific circumstances of the present case, the Court considers that the applicant had been given a reasonable opportunity of putting his case to the responsible authorities who examined – and rejected – his claims as circumscribed by him.

71. It follows, that there has been no violation of Article 1 of Protocol No. 1 in the present case.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 11 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President