109年度憲3字第27號
（辯論要旨）

臺灣臺北地方法院
刑事第十八庭寧股

不法利得沒收、追徵之性質（學說及實務）

- 國內有力學說均認：**「總額原則」**下之不法利得沒收、追徵已**類似於刑罰**。
  1. 薛智仁教授：考量不法利得沒收、追徵不得扣除犯罪成本，將使被沒收人「血本無歸」，含有**非難、譴責被沒收人將財產投入犯罪行為上，藉此提升對不法行為之嚇阻效力，明確傳達對不法行為的否定評價，故在目的及效果上與「刑罰」相同。**
  2. 謝煜偉教授：若只沒收、追徵超出犯罪成本之外的犯罪所得，當屬「不當利得返還」；**反之，若不能扣除犯罪成本，則有類似「財產制裁」的性質（即「總額原則」）**。
  3. 曾淑瑜教授：刑法修正將犯罪所得沒收定位為「非屬刑罰性質」，但又**採取「總額說」**，**既然效果及目的與刑事制裁手段相同，何以不受罪責原則拘束**？
- 量刑實務：**判決書量刑段落**多會審酌**「犯罪所得多寡」**，**可知犯罪所得與「法益侵害」有關，象徵著「行為責任之非難」屬性**（黃士軒教授專家諮詢意見書第37頁）。
- 實務意見：「..**犯罪所得之物**，如賄款、賭博、妨害風化罪之抽頭款等，**屬於刑罰**而非保安處分，均屬針對行為人不法利得之對應措施，**屬應報主義之產物，亦應有前述罪責原則之適用**（最高法院104年度台上字第2762號、105年度台上字第1625號判決等）。」

罪刑法定原則「不只」適用在刑事犯罪及刑罰！

- 釋字第384號解釋文：「憲法第8條第1項規定：『人民身體之自由應予保障。...。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。』其所稱『依法定程序』，係指凡限制人民身體自由之處置，**不問其是否屬於刑事被告之身分**，國家機關所依據之程序，須以法律規定，其內容更須實質正當，並符合憲法第二十三條所定相關之條件...。」可知：
  - 推導出罪刑法定原則之「**正當法律程序」之適用對象本不限於「刑事被告」！**
- 德國基本法第103條第2項之「罪刑法定原則」：可及於**「所有國家對於違法、有責行為，為了抵償罪責而施加惡害的高權行為」**：
  - **適用範圍：秩序罰、懲戒罰及職業法院之制裁決定**（理由：秩序罰或懲戒罰，對個人的禁止效果，與**刑罰不具本質上差異！**）
- 不法利得沒收：**不分價值多寡一律沒收**，對人民財產權造成**「重大侵害」**，理應有罪刑法定原則之適用。
- 罪刑法定原則在刑法領域外之實踐：行政罰法第4、5條、社會秩序維護法第2、3條之「沒入」。（**反省：刑事沒收比行政沒入對人民權利侵害程度小？何以得排除罪刑法定原則之適用？**）

法務部援引之歐洲人權法院裁判（一）

- 法務部援引CASE OF DASSA FOUNDATION v. LIECHTENSTEIN裁定主張歐洲人權法院認為「沒收只是為了吸收犯罪結果所生之利益，因此不以相關人負有刑事責任為必要；而且，對於犯罪行為之合法繼受者亦得為之。是以，只是犯罪行為不利的民法後果（言詞辯論意旨書第9頁）。惟歐洲人權法院認為本案**「第三人」沒收「類似民事不當得利返還」**之理由如下：

  1. 本案沒收僅針對**「實際利得」部分**。
  2. 本案並未推定被告先前所為之任何財產移轉為犯罪所得，除非有反正存在。
  3. 本案沒收與罪責輕重無關。
  4. 本案未有被告不能支付沒收金額即需入獄之規定。

  （以上理由整理自林超駿教授專家諮詢意見書第15頁）

法務部援引之歐洲人權法院裁判（二）

- 法務部援引CASE OF BALSAMO v. SAN MARINO 裁定主張歐洲人權法院認為：San Marino內國法規定此為預防性措施，旨在預防犯進一步的犯罪，故無法認定包括懲罰目的」（言詞辯論意旨書第9頁）。惟歐洲人權法院認為本案之**「被告本人」之沒收屬「避免不法使用犯罪所得之性質」**之主要理由如下（整理自法務部言詞辯論意旨書附件四）：

1. 沒收標的：非屬犯罪行為人（該案犯罪行為人是原告A、B之「母親」，其犯竊盜罪、贓物罪後，將犯罪所得登記在原告A名下，且B有授權之現金帳戶、債券帳戶及保險箱內）。
2. 內國法之特性：依據San Marino內國法，該沒收是預防措施。
3. 沒收之本質及目的：
   1) 該國上訴法院於認定原告A、B不具洗錢罪主觀犯意，而**改判洗錢罪無罪後，為了避免原告A、B使用、移轉帳戶內之款項，會會構成「新的洗錢罪」，故維持一審判處有罪下之不法利得沒收（即由帳戶內提領之49萬9,000歐元）。**
   2) **準此，上開沒收乃為預防原告A、B犯下新洗錢犯行，故屬預防性措施。**
4. 採用及執行程序：本案由刑事法院為之，但非決定性因素。
5. 措施之嚴重性：非決定因素。非刑罰措施也可能對當事人有重大影響。

歐洲人權法院對不法利得沒收性質之看法-被告本人（CASE OF WELCH v. THE UNITED KINGDOM）

26. The Court first observes that the retrospective imposition of the confiscation order is not in dispute in the present case. The order was made following a conviction in respect of drugs offences which had been committed before the 1986 Act came into force (see paragraph 11 above). The only question to be determined therefore is whether the order constitutes a penalty within the meaning of Article 7 para. 1 (art. 7-1), second sentence.

27. The concept of a "penalty" in this provision is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6 para. 1 (art. 6-1), an autonomous Convention concept (see, inter alia, - as regards "civil rights" - the X v. France judgment of 31 March 1992, Series A no. 234-C, p. 98, para. 28, and - as regards "criminal charge" - the Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, pp. 15-16, para. 31). To render the protection offered by Article 7 (art. 7) effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see, mutatis mutandis, the Van Droogenbroeck v. Belgium judgment of 24 June 1982, Series A no. 50, p. 20, para. 38, and the Duinhof and Duijf v. the Netherlands judgment of 22 May 1984, Series A no. 79, p. 15, para. 34).

28. The wording of Article 7 para. 1 (art. 7-1), second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

歐洲人權公約第7條2句之「懲罰」（penalty）係「自主的集合概念」

歐洲人權公約第7條2句之「懲罰」（penalty）須考量：

1.措施是否是在定罪後施加
2.措施的本質及目的
3.內國法之特性
4.決定及執行措施之程序
5.措施之嚴重性

歐洲人權法院對不法利得沒收性質之看法-被告本人（CASE OF WELCH v. THE UNITED KINGDOM）

section 1 (1) of the 1986 Act at paragraph 12 above). This link is in no way diminished by the fact that, due to the operation of the statutory presumptions concerning the extent to which the applicant has benefited from trafficking, the court order may affect proceeds or property which are not directly related to the facts underlying the criminal conviction. While the reach of the measure may be necessary to the attainment of the aims of the 1986 Act, this does not alter the fact that its imposition is dependent on there having been a criminal conviction.

30. In assessing the nature and purpose of the measure, the Court has had regard to the background of the 1986 Act, which was introduced to overcome the inadequacy of the existing powers of forfeiture and to confer on the courts the power to confiscate proceeds after they had been converted into other forms of assets (see paragraph 11 above). The preventive purpose of confiscating property that might be available for use in future drug-trafficking operations as well as the purpose of ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation (see paragraph 11 above). However it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.

31. In this connection, confiscation orders have been characterised in some United Kingdom court decisions as constituting "penalties" and, in others, as pursuing the aim of reparation as opposed to punishment (see paragraphs 16 and 17 above). Although on balance these statements point more in the direction of a confiscation order being a punitive measure, the Court does not consider them to be of much assistance since they were not directed at the point at issue under Article 7 (art. 7) but rather made in the course of examination of associated questions of domestic law and procedure.

1.系爭措施是以定罪為前提。

2.系爭措施是以懲罰為目的：
（1）不排除立法授予法院廣泛沒收權力是為了「懲罰被告」。
（2）「預防」、「賠償」與「懲罰」目的一致，且可能為「懲罰」的要素）

3.內國法特性：偏向「懲罰」措施。

歐洲人權法院對不法利得沒收性質之看法-被告本人（CASE OF WELCH v. THE UNITED KINGDOM）

32. The Court agrees with the Government and the Commission that the severity of the order is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned.

33. However, there are several aspects of the making of an order under the 1986 Act which are in keeping with the idea of a penalty as it is commonly understood even though they may also be considered as essential to the preventive scheme inherent in the 1986 Act. The sweeping statutory assumptions in section 2 (3) of the 1986 Act that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise (see paragraph 12 above); the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit (see sections 1 and 2 of the 1986 Act in paragraph 12 above); the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused (see paragraph 13 above); and the possibility of imprisonment in default of payment by the offender (see paragraph 14 above) - are all elements which, when considered together, provide a strong indication of, inter alia, a regime of punishment.

35. Taking into consideration the combination of punitive elements outlined above, the confiscation order amounted, in the circumstances of the present case, to a penalty. Accordingly, there has been a breach of Article 7 para. 1 (art. 7-1).

4.措施之嚴重性：措施嚴重性不具決定性。

5.其他考量：（1）1986年法案推定6年間被告經手之利益均為販毒所得，除非被告能舉證推翻；

（2）**犯罪所得沒收不限於「純益」（即「總額原則」）**；
（3）法院對沒收數額之裁量可以考量被告之責任程度等

結論：本案之沒收措施具懲罰性質（penalty），故溯及沒收被告財產違反歐洲人權公約第7條第1項。

歐洲人權法院對不法利得沒收性質之看法-第三人（CASE OF G.I.E.M. S.R.L AND OTHERS v. ITALY）

211. The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a "penalty" is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. However, other factors may also be taken into account as relevant in this connection, namely the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Kafkaris*, cited above, § 142; *M. v. Germany*, no. 19359/04, § 120, ECHR 2009; *Del Río Prada v. Spain* [GC], no. 42750/09, § 82, ECHR 2013; and *Société Oxygène Plus v. France* (dec.), no. 76959/11, § 47, 17 May 2016).

重申：措施是否為歐洲人權公約第7條之懲罰（penalty），必須考量：

1.措施是否是在定罪後施加
2.措施的本質及目的
3.內國法之特性
4.決定及執行措施之程序
5.措施之嚴重性必須考量

(i) Whether the confiscations were imposed following convictions for criminal offences

215. As to whether the confiscations in question were imposed following convictions for criminal offences, the Court has generally found that this is only one criterion among others to be taken into consideration (see *Saliba v. Malta* (dec.), no. 4251/02, 23 November 2004; *Sud Fondi S.r.l. and Others* (decision cited above); *M. v. Germany* (cited above); and *Berland v. France*, no. 42875/10, § 42, 3 September 2015), without it being regarded as decisive when it comes to establishing the nature of the measure

1.措施是否在定罪後施加：只是參考要素之一

歐洲人權法院對不法利得沒收性質之看法-第三人（CASE OF G.I.E.M. S.R.L AND OTHERS v. ITALY）

(iii) The nature and purpose of the confiscation measure

222. As to the nature and purpose of the confiscation measure, the Grand Chamber confirms the Chamber's findings in the *Sud Fondi S.r.l. and Others* (merits) and *Varvara* judgments (both cited above) to the effect that the confiscation of the applicants' property for unlawful site development was punitive in nature and purpose and was therefore a "penalty" within the meaning of Article 7 of the Convention. Three reasons may be put forward to justify that finding.

223. Firstly, the punitive ("*afflittivo*") and deterrent nature of the impugned measure has been emphasised by the Italian Court of Cassation (see paragraph 121 above). As emphasised by the Government in their observations (see paragraph 203 above), the domestic courts have accepted the principle whereby the Article 7 guarantees apply in confiscation cases.

224. Secondly, the Government acknowledged in their observations that the confiscation was compatible with Article 1 of Protocol No. 1, in particular because it pursued the purpose of "punishing" those responsible for the illegal transformation of the land (see the Government's observations of 5 June 2015, § 119). In other words, the Government themselves emphasised the punitive nature of the confiscation.

225. Thirdly, the Court notes that confiscation is a mandatory measure (see paragraphs 41 and 119 above). Its imposition is not subject to proof of a situation of actual danger or of concrete risk for the environment. Confiscation may thus be imposed even in the absence of any actual activity with the aim of transforming land, as in the cases of the company G.I.E.M. S.r.l. and Mr Gironda.

(iv) The severity of the effects of the confiscation

227. As to the severity of the measure in question, the Court observes that a confiscation measure for unlawful site development is a particularly harsh and intrusive sanction. Within the boundaries of the site concerned, it applies not only to the land that is built upon, together with the land in respect of which the owners' intention to build or a change of use has been demonstrated, but also to all the other plots of land making up the site. Moreover, the measure does not give rise to any compensation (see *Sud Fondi S.r.l. and Others*, decision cited above).

2.沒收措施具有「懲罰（puntive）、「威嚇」性質，且追求「懲罰」目的。此外，無庸證明對環境存在具體危險亦可沒收。

3.對違法區域開發之沒收是嚴厲的（harsh）、侵入性的制裁（亦即沒收範圍及於土地上建物、意圖建造或變更使用之土地），且沒收不會產生損害賠償。

歐洲人權法院對不法利得沒收性質之看法-第三人（CASE OF G.I.E.M. S.R.L AND OTHERS v. ITALY）

(v) Procedures for the adoption and enforcement of a confiscation measure

228. As regards the procedures for the adoption and enforcement of a confiscation measure, the Court observes that it is ordered by the criminal courts. This was the case for the applicants.

229. In addition, the Court does not find persuasive the argument that the criminal courts act in the place of the administrative authority.

230. Firstly, this is a matter of debate in domestic law, at least in cases of unlawful site development (the procedural material offence or contractual offence) in the absence of or in breach of planning permission, as there are two opposite approaches in the case-law (see paragraphs 123-27 above). In any event, once the criminal conviction has become final, the confiscation measure can no longer be lifted even in the case of subsequent regularisation of the development by the administrative authority (see paragraphs 128-29 above).

231. In addition, the fact that the criminal court does not take the place of the administrative authority is particularly clear in cases of the substantive material offence of unlawful site development. Where the administrative authority has authorised site development which is in breach of the planning regulations and is therefore unlawful, the court's power to confiscate the land and buildings thereon does not represent an act in which the court takes the place of the authority. On the contrary, it reflects a conflict between the criminal court and the administrative authority in the interpretation of the regional and national planning legislation. The criminal court's role is not simply to verify that no site development has been carried out in the absence of or in breach of planning permission, but also to ascertain whether the development, authorised or not, is compatible with all the other applicable rules.

(c) Conclusion

233. Having regard to the foregoing, the Court concludes that the impugned confiscation measures can be regarded as "penalties" within the meaning of Article 7 of the Convention. This conclusion, which is the result of the autonomous interpretation of the notion of "penalty" within the meaning of Article 7, entails the applicability of that provision, even in the absence of criminal proceedings within the meaning of Article 6. Nevertheless, and as the Italian Constitutional Court emphasised in its judgment no. 49 of 2015 (see paragraph 133 above), it does not rule out the possibility for the domestic authorities to impose "penalties" through procedures other than those classified as criminal under domestic law.

234. The Court further finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds and must therefore be declared admissible.

4.沒收措施之採用及執行程序：刑事法院不是再代替行政機關執行沒收。（1）一旦有罪確定，沒收措施即不會解除。

（2）即便行政機關許可違反計畫法之開發，法院仍然可以沒收土地及工作物。

結論：系爭沒收措施乃歐洲人公約第7條之「懲罰」（penalty）。

歐洲人權法院告訴我們：

1.沒收是不是「懲罰」（penalty），必須**「個案」**判斷，不可一概而論！

2上開兩個裁定認定沒收具「懲罰」性質之關鍵：（1）**「總額原則」**、（2）**「沒收之懲罰性」**及（3）**「沒收效果之嚴厲性」**等均與我國不法利得沒收具類似性！誠具參考價值！

德國聯邦憲法法院2021年2月10日裁定之檢討（一）

1. 爭點：犯罪行為人所犯業已罹於「追訴權時效」，可否溯及適用新法對受益第三人（即該案為公司法人）為不法利得沒收？
2. 其中「沒收、追徵並非刑罰」之論述（整理自法務部言辯論意旨書附件二）：

1) 附件二第2頁倒數第12行至第6行提及

「**2.犯罪者保有犯罪利益，會降低刑罰之制裁效果，但剝奪犯罪所得本身，不是從刑，而係類似不當得利之處分**。...**利得沒收係在除去可能誘使行為人繼續實施不法之利益，本質屬預防。**」。

2) 附件二第2頁倒數第5行至最末及第3頁第1行提及：

「德國近來大幅加強被害人保護，...如被害人已取得犯罪所得者，就不得再宣告或執行沒收，故利得沒收在回復財產之不當變動，不在科處刑罰。」

1.「保有犯罪所得會降低制裁效果」與「剝奪犯罪所得是類似不當得利之處分」不具邏輯上關聯！

2. 不法利得沒收固然有除去「犯罪誘因」及「保護被害人」之功能。但WELCH v. THE UNITED KINGDOM也明確提及：「**預防」、「賠償」也可能是「懲罰」的構成要素。**

綜上所述，不論是被告或第三人不法利得之沒收，均有類似刑罰或懲罰性質，而有「罪刑法定原則之禁止溯及既往原則」之適用。爰請求憲法法庭宣告刑法第2條第2項：「沒收...適用裁判時之法律」違憲！