

## **“Confiscation acquitted” (EU law drops criminal charges)**

**Francesco Clementucci**

Confiscation of illicit funds represents an essential instrument for deterring and effectively combatting corruption, including the recovery of funds and reparation for victims. Typically, confiscation happens following a wrongdoer’s conviction or indictment. However, for more than one reason<sup>1</sup>, finding and successfully convicting criminals (i.e. opening investigations, collecting clear and convincing evidence for the indictment and conviction), is hard, especially in international corruption cases.

In this difficult situation, non-conviction based (NCB) confiscation shows all its utility, greatly facilitating the tasks of prosecutors, while protecting the fundamental rights and expectations of justice. More than a decade ago, the Stolen Asset Recovery initiative (StAR)<sup>2</sup> was already advocating the NCB asset forfeiture as a tool considered “critical for recovering the proceeds and instrumentalities of corruption”.

Italy, the country I come from (like other countries bound by the Council of Europe’s criminal<sup>3</sup> and civil law<sup>4</sup> Conventions on corruption), criminalizes both “public corruption” (i.e. with the participation of a public administration officer or civil servant) and “private corruption” (among certain categories of private citizens). The Italian criminal code lists public corruption among the crimes against the public administration, together with embezzlement, extortion and abuse of office. Indeed, public corruption is included in title two (crimes against the public administration), chapter one (crimes of public officials against the public administration). Such crimes can be further segmented into proper (article 318, acts contrary to the duties of the office), and improper corruption (article 319, acts due but delayed or omitted for a fee), including during civil, criminal or administrative trial (article 319-ter), as well as corruption with the participation of “a person performing a public function” (article 320<sup>5</sup>). Irrespective of the sub-categories, public corruption can be prosecuted *ex officio*, in other words it is investigated regardless of the existence of a report filed by the victim.

On the other hand, corruption between (some categories of) private individuals, is regulated by the civil code (articles 2635 and 2635-bis). These articles refer to the conduct of directors, managers and in general top-representatives of corporations or associations who, directly or indirectly, unduly receive or accept, immediate or future goods or favors, for performing or omitting to perform their duties<sup>6</sup>. Private corruption is investigated following a report filed by the victim.

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<sup>1</sup> For example, the wrongdoer is dead, has fled the jurisdiction, is immune from prosecution, or when the proceeds are transferred abroad.

<sup>2</sup> StAR is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets. StAR provides platforms for dialogue and collaboration and also facilitates contact among different jurisdictions involved in asset recovery. Since its establishment ten years ago, StAR has assisted many countries in developing legal frameworks, institutional expertise, and the skills necessary to trace and return stolen assets. See more at <https://star.worldbank.org/>

<sup>3</sup> <https://rm.coe.int/168007f3f5>

<sup>4</sup> <https://rm.coe.int/168007f3f6>

<sup>5</sup> Under Italian law, a public official or a public service employee is one who exercises a legislative, judicial or administrative public function. A public official: a) contributes to forming the will of the Public Administration; b) has decision-making powers; c) performs a certification role in the name of the State; d) has attestation power. For example, magistrates, notaries, law enforcement agencies and all public employees are public officials. For article 320 a formal mandate by the public administration is not always necessary; it is enough that the person actually exercises the public “function” (duty, competence or task).

<sup>6</sup> The penalty for private bribery is imprisonment for one to three years, which is doubled for companies listed on the stock market..

Confiscation is a strong instrument for securing and recovering illicitly acquired funds, usually the proceeds of corruption. Confiscation in Italy is regulated by both the criminal code (articles 240<sup>7</sup>, 240-bis<sup>8</sup>, 322-ter<sup>9</sup>, 335-bis, 644<sup>10</sup>, 722<sup>11</sup> and 733<sup>12</sup>) and the civil code (article 2641)<sup>13</sup>. According to Italian criminal law, confiscation consists in the expropriation of goods that were (or were about to be) used to commit the crime or that are the product, profit or price of the crime<sup>14</sup>. Confiscation is also the only “material” security measure provided by the penal code. It relates to things, objects or property, and it is applicable both optionally and obligatorily, depending on the type of nexus between the objects/asset and the crime. Optional confiscation can be applied following an assessment of the judge on the risk of having a criminal holding on that object<sup>15</sup>. On the contrary, when the danger or the illegality is implicit in the object itself<sup>16</sup>, the judge shall simply declare the confiscation of the asset.

In general, confiscation tends to prevent new crimes, by freezing or expropriating things that keep alive the possibility of committing the crime<sup>17</sup>. Unlike other measures, confiscation is unrelated vis-à-vis the social danger of the offender, and it represents an irreversible action with immediate and permanent effects. This measure unrelated to the offender is exactly the idea behind the non-conviction based confiscation. Basically, the judgement (investigation, indictment and conviction) of the criminal person pursues a totally different goal than the confiscation of the criminal asset. The former aims at stopping the criminals from committing further crimes, through a mix of punishment and re-education. Confiscation, on the other hand, aims at securing the criminal asset, avoiding the use for furthering or initiating crimes, and possibly redress the damage, by allowing the victims to recover the asset.

Traditionally, under Italian criminal law, confiscation was only possible after the crime had been ascertained. In other words, criminal law confiscation (either discretionary or mandatory) was a consequence of the conviction of the wrongdoer. Only very recently (2019) and merely for tax crimes<sup>18</sup>, the Italian legislator has introduced an “extended” (aka disproportionate, or “*per sproporzione*” in Italian)

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<sup>7</sup> In the case of conviction (including plea bargain), the judge can order the confiscation of the things that served or were destined to commit the crime, and of the things that are the product or profit (...). Confiscation is always ordered for: 1) the things that make up the price of the crime; (...) as well as the assets that make up the profit or the product or sums of money, goods or other utilities of which the guilty party has the availability for a value corresponding to that profit or product, if it is not possible to confiscate the direct profit or product; 2) of the things, whose production, use, possession and disposal constitutes a crime, even if no sentence has been pronounced. The provision of item 2) does not apply if the thing belongs to a person unrelated to the crime and the manufacture, use, detention or alienation can be allowed by administrative authorization.

<sup>8</sup> Confiscation in special cases (basically for illicit enrichment linked to economic crimes).

<sup>9</sup> Confiscation for embezzlement (article 314) and corruption of person tasked of public service (article 320).

<sup>10</sup> Confiscation for usury (aka loans at extorting interests).

<sup>11</sup> Confiscation for gambling.

<sup>12</sup> Confiscation for ruining an asset of national archeological, historical or artistic value.

<sup>13</sup> In the event of conviction or application of the penalty at the request of the parties (aka plea-bargain) for one of the crimes provided for in this title, the judge can order the confiscation of the product or profit of the crime and of the goods used to commit it. When the identification or apprehension of the goods indicated in the first paragraph is not possible, the confiscation applies to a sum of money or to goods of equivalent value. For anything not established in the preceding paragraphs, the provisions of article 240 of the penal code apply.

<sup>14</sup> The product of the crime must be understood as the material thing that originates from the crime itself (e.g. counterfeit banknotes); for profit is the gain or economic advantage derived from the criminal offense (e.g. money resulting from robbery), while the price must be understood as the sum or utility obtained in order to commit the crime (e.g. money received as consideration for the commission of a murder).

<sup>15</sup> For objects that are subject to a license or certificate, for example a gun, or a vehicle without insurance.

<sup>16</sup> For example, when producing, using, carrying, detaining or disposing of certain things constitutes a crime in itself (for example dynamite or cocaine).

<sup>17</sup> In other words, confiscation is of a precautionary and non-punitive nature, thus it can well be applied retroactively, without unfair restriction of fundamental liberties.

<sup>18</sup> See Decree-law n.124 of 2019, turned into law n.157 of 2019, entered in force in December 2019, see in Italian at <https://www.gazzettaufficiale.it/eli/id/2019/10/26/19G00134/sg>

type of confiscation. To make it simple, this confiscation is applicable to grand tax evasion (of 100,000 euros and above), including illicit enrichment, also known as unreasonable or inexplicable wealth<sup>19</sup>. In this case, similarly to the NCB measure explained above, the Constitutional Court of Italy (sentence n. 33/2018<sup>20</sup>) stated that the extended confiscation is a tool aimed at securing the illicit asset of the criminals. The difference here is that the illicit funds are the money or objects whose origin is not legitimately explained by the criminal (convicted for tax evasion). The assumption is that all the funds belonging to criminals, including those not related to grand tax evasion, are assumed illicit, unless the person proves otherwise. In other words, the burden of proof is (atypically) shifted on the criminals. Here the confiscation is extended in the sense that it sheds effects on the entire patrimony of criminals, in so far as the legitimate origin cannot be justified. *A contrario*, the “abnormal” confiscation in tax law does not operate for assets whose legitimate origin is proven by the criminal.

The Constitutional Court also recalls that this interpretation is in full compliance with EU legislation<sup>21</sup>, which requires Member States to give legal recognition to “extended confiscation” of illicit funds<sup>22</sup>. It is worth mentioning that also the Financial Action Task Force (FATF) indicates non-conviction based confiscation among the preferred instruments for anti-money laundering and combating the financing of terrorism (AML/CFT). Indeed, FATF suggests (recommendation 4) that Countries consider adopting measures that allow laundered property, proceeds or instrumentalities to be confiscated without requiring a criminal conviction, to the extent that such a requirement is consistent with the principles of their domestic law. Likewise, FATF recommendation 38 requires that an authority take expeditious action in response to requests by foreign countries to identify property which may be subject to confiscation. Concerning NCB confiscations, while countries do not need authority to act on the basis of all such requests, they should nonetheless be able to do so, at least in circumstances when a perpetrator is unknown or unavailable by reason of death, flight or absence. In other words, countries must still guarantee instruments equivalent to the NCB confiscation, at least in some specific occasions.

In March 2020, the Court of Justice of the European Union has issued a judgment concerning NCB confiscation<sup>23</sup>, which will have strong and irreversible impact on the laws of EU member States. EU law does not preclude member States from establishing civil proceedings for confiscations unrelated to criminal conviction. In this instance, a top-manager of a financial institution based in an EU member State was indicted (not convicted yet) for an economic crime. The national anti-corruption agency found inexplicable wealth belonging to the suspect and his family members. Therefore, the agency submitted a request for confiscation in front of the local Court, independently of the (pending) criminal proceedings and decision.

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<sup>19</sup> Illicit enrichment is criminalized under Article 20 of the United Nations Convention against Corruption (UNCAC), which defines it as the “significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.” Illicit enrichment is also prescribed as an offense in the Inter-American Convention against Corruption (IACAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC) under comparable definitions. Despite such broad international recognition, the criminalization of illicit enrichment is not universally accepted as an anticorruption measure. Instead, it continues to generate extensive debate and controversy. For further information, see “On the Take Criminalizing Illicit Enrichment to Fight Corruption”, by the StAR initiative, 2012, at [https://star.worldbank.org/sites/star/files/on\\_the\\_take\\_criminalizing\\_illicit\\_enrichment\\_to\\_fight\\_corruption.pdf](https://star.worldbank.org/sites/star/files/on_the_take_criminalizing_illicit_enrichment_to_fight_corruption.pdf)

<sup>20</sup> See (in Italian) at [www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=33](http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=33)

<sup>21</sup> See Framework Decision of 24 February 2005, no. 2005/212/JHA of the Council (on the confiscation of assets, instruments and proceeds of crime), as well as the directive of 3 April 2014, n. 2014/42/EU of the European Parliament and of the Council (on the freezing and confiscation of capital goods and proceeds from crime in the European Union).

<sup>22</sup> Article 5 (1) of the aforementioned directive states, in particular, that Member States must take “*the necessary measures to be able to confiscate, in whole or in part, the assets belonging to a person convicted of an offense that could, directly or indirectly, bring an economic advantage, where the judicial authority, based on the circumstances of the case, including specific facts and available evidence, such as the fact that the value of the assets is disproportionate to the convicted person's legitimate income, is convinced that the goods in question derive from criminal activities.*”

<sup>23</sup> See judgment in Case C-234/18, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v BP and Others*, at <http://curia.europa.eu/juris/celex.jsf?celex=62018CJ0234&lang1=en&type=TEXT&ancre=>

The local court asked the CJEU to clarify the EU law on the matter. The CJEU held that the EU framework decision on the confiscation of property<sup>24</sup> aims at obliging member States to establish common minimum rules for the confiscation of “crime-related” instrumentalities and proceeds. The Court observed that the procedure for the confiscation of proceedings pending before the national Court is civil in nature because, regardless of the fact that it concerns allegedly illegal funds, it is conducted independently of any criminal proceedings. Thus, the situation falls outside the scope of the EU framework decision on the confiscation of property. Therefore, the Court concluded that EU law does not preclude national legislations to allow courts to order the confiscation of illegally obtained assets following proceedings which are not subject to a finding of a criminal offence.

As a consequence, we may well conclude that by the nudging action of the Court of Justice of the EU, both the EU law and the laws of EU Member States have made a step closer towards the full and correct compliance with the international standards and Conventions established for fighting corruption, money laundering and financing of terrorism.

April 2020

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<sup>24</sup> Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ 2005 L 68, p. 49)