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RINSE

Research and INformation Sharing on freezing and confiscation orders in European Union

Online Database to systematise all the relevant EU legislative provisions on confiscation, asset recovery and reuse, best practices, and study cases in the four involved countries (Belgium, France, Greece, Italy)

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Confiscation

Legal Nature	Greece	Belgium	France	Italy
Penalty	Article 68 par. 1 Criminal Code	Articles 42 - 43bis Penal Code	Article 131-21 Penal Code; Article 131-6 of the Penal Code; Article 131-14 of the Penal Code	Articles 240, para. 2, no. 1 bis, 270 septies, 466 bis, 603 bis.2 c.p. and more
Measure for equivalent	Articles 68 par. 3 Criminal Code, 40 par. 2 L. 4557/2018	Article 43 bis, paragraph 2 Penal Code; Article 43 quarter		Articles 240, para. 2, no. 1 bis, 270 septies, 466 bis, 603 bis.2 c.p. and more
Measure towards parties	Articles 68 par. 5 Criminal Code, 40 par. 1 L. 4557/2018			Urban Confiscation by Art. 30 of d.D.P.R. No. 380/2001
Non-conviction-based	Articles 311 par. 3 and 373 par. 5 GCCP, 40 par. 3 L. 4557/2018			Article 24 of Legislative Decree No. 159/2011; Urban Confiscation by Art. 30 of D.P.R. No. 380/2001
Security measure	Article 76 par. 1 Criminal Code			Art. 240 Criminal Code
Extended confiscation			Art. 131-21, par. 5 Penal Code; Art. 131 – 21 par 6.	Art. 240-bis Criminal Code

Belgium

Reference Regulatory Framework

The Belgian legal system has implemented Directive 2014/42/EU by amending the Criminal Code and the Code of Criminal Procedure.

1) **Article 16 of the law of March 18, 2018**, amended Article 524bis, § 1, stipulating that: "This special investigation into financial benefits is, however, only possible if the public prosecutor demonstrates, based on serious and concrete evidence, that the convicted person has obtained financial benefits of any kind, either from the offence for which they were convicted, or from other offences that could lead, directly or indirectly, to an economic advantage, provided they are listed in Article 43quater, § 1 of the Penal Code."

2) **Additionally, Article 21 of the law of March 18, 2018**, amending Article 43quater, extended the scope of confiscation to other cases, specifically providing that: "Without prejudice to the provisions of Articles 43bis, paragraphs 3 and 4, the financial benefits referred to in paragraph 2, the assets and values that have replaced them, and the income derived from the invested benefits found in the assets or possession of a person may, upon request by the public prosecutor, be confiscated, or the person may be ordered to pay an amount that the judge considers to correspond to the value of these items if they have been found guilty of several offences."

The legislation on seizures.

1) **Article 35** of the Code of Criminal Procedure provides for the seizure of items forming the object of the offence and those that served or were intended to commit it when ownership belongs to the convicted person; - the things that were produced by the offence; - the patrimonial benefits derived directly from the offence, to the goods and values that were substituted for them and to the income from these invested benefits - additional pecuniary benefits when there are serious and concrete indications that these derive from the offence for which he was convicted and which serve to manifest the truth.

2) **Article 35 bis** of the Code of Criminal Procedure, on the other hand, provides for the seizure of immovable property that appears to constitute a patrimonial advantage derived from an offence. The seizure is classified as a preventive measure and is valid for 5 years, with the possibility of renewal.

3) **Article 35 ter** regulates the seizure for equivalent value and the seizure against third parties in bad faith. The seizable assets include patrimonial benefits derived directly from the offence, goods and values that were substituted for them, and income from these invested benefits or additional pecuniary benefits when there are serious and concrete indications that these derive from the offence for which the suspect was convicted. The items representing this pecuniary advantage cannot or can no longer be found as such in the assets of the suspect in Belgium or are mixed with legal items.

The legislation on confiscation.

1) **Articles 42 - 43bis Penal Code** provides a Special confiscation of the patrimonial benefits derived directly from the offence. It's classified **as a penalty** and may concern a) the things forming the object of the offence and those that served or were intended to commit it when ownership belongs to the convicted person; b) the things that were produced by the offence; c) the patrimonial benefits derived directly from the offence, to the goods and values that were substituted for them and to the income from these invested benefits.

2) **Article 43 bis, paragraph 2 Penal Code** provides the criminal sanction confiscation by equivalent. It is a condemnation of the payment of a sum of money, executable on the patrimony of the convicted person, which replaces the direct confiscation of the patrimonial advantages or the replacement goods which have been placed beyond the reach of justice.

3) **Article 43 quarter, paragraph 2 Penal Code** regulates extended confiscation for a series of offences provided for in Article 5.2 of Directive 2014/42

Best practices

Belgium is the country that, according to the data, has most widely disseminated among operators documents/guidelines regarding the implementation of Regulation (EU) 2018/1805 and Directive 2014/42/EU with a dissemination rate of 30%.

France

Reference Regulatory Framework

The French Code of Criminal Procedure establishes various rules regarding seizure during the investigation phase of identity checks (*Des enquêtes et des contrôles d'identité - Articles 53 à 78-7*)

The legislation on seizures.

a) Article 56 of the Code of Criminal procedure (Articles 53 à 74-2 – *Des crimes et des délits flagrants*)

- If the nature of the crime is such that evidence can be obtained by seizing papers, documents, computer data, or other objects in the possession of individuals who appear to have participated in the crime or hold pieces, information, or objects related to the alleged facts, the judicial police officer proceeds without delay to the residence of these individuals to carry out a search, for which he draws up a report. The judicial police officer may also go to any location where property likely to be confiscated under Article 131-21 of the Penal Code may be found, to conduct a search for the purpose of seizing this property. If the search is conducted solely to seek and seize property for which confiscation is provided for in the sixth and seventh paragraphs of the same article, it must be authorized in advance by the public prosecutor. When the investigation concerns violent offences, the judicial police officer may, on his own initiative or at the request of the public prosecutor, seize weapons held by the suspect or that the suspect has free access to, regardless of where these weapons are located.

b) Article 76 of the Code of Criminal procedure (*Articles 75 à 78 – De l'enquête préliminaire*)

- Searches, home visits, and the seizure of evidence or property subject to confiscation under Article 131-21 of the Penal Code require the explicit consent of the individual involved, documented through a written declaration or noted in the minutes if the individual is unable to write.
- In cases involving offences punishable by custodial sentences of at least three years, the judge of liberties and detention may authorize such actions without consent, at the request of the public prosecutor, through a written and reasoned decision. This decision must indicate the classification of the offence and the location of the operation, and the actions must be conducted under the judge's supervision.
- The competence for such decisions lies with the judge of the judicial court where the public prosecutor is directing the investigation, regardless of the territorial jurisdiction of the search. The prosecutor may also contact another competent judge in the territory where the search is to take place.

c) Article 97 of the Code of Criminal procedure (*Des juridictions d'instruction, Chapitre Ier: Du juge d'instruction: juridiction d'instruction du premier degré – Section 3: Des transports, des perquisitions, des saisies et des interceptions de correspondances émises par la voie des télécommunications – Sous-section 1: Des transports, des perquisitions et des saisies*) - *(Articles 79 à 230)*

- During the investigation, when it is necessary to search for documents or computer data, the investigating judge or the delegated judicial police officer has the right to examine them

before seizure. All objects and data seized must be inventoried and sealed; if there are difficulties in inventorying, the procedure outlined in Article 56 is followed.

- The seizure of computer data can occur through the physical medium or a copy made in the presence of assisting individuals. The judge may order the deletion of illegal data on the non-seized medium.
- With the judge's agreement, only the seizure of items useful for the investigation is retained. The seals may only be opened in the presence of the accused and their lawyer, unless the judge decides otherwise. Interested parties may request copies of the seized documents at their own expense.
- In the case of the seizure of money or assets, the judge may authorize the deposit in financial institutions. For banknotes or coins suspected of counterfeiting, it is mandatory to send samples to the national analysis centre for identification. The analysis must be documented in a report submitted to the clerk of the competent jurisdiction. The same rules do not apply if only one specimen is suspected of counterfeiting.

The French Code of Criminal Procedure also includes specific provisions aimed solely at the application of confiscation (*Livre IV: De quelques procédures particulières – Titre XXIX: Des saisies spéciales, Articles 706-141 à 706-158*). Article 706-141 states that "this title applies, in order to ensure the enforcement of the complementary penalty of confiscation according to the conditions defined in Article 131-21 of the Penal Code, to seizures carried out under this code that concern all or part of the assets of a person, a real estate asset, an incorporeal movable asset or right, or a credit, as well as to seizures that do not entail the deprivation of the asset"

a) Articles 706-148 and 706-149
   - These provisions regulate the seizure of assets subject to confiscation under the sixth and seventh paragraphs of Article 131-21 of the Penal Code, when the law that penalizes the crime or offense provides for it, or when the origin of these assets cannot be established.

b) Articles 706-150 to 706-1572
   - These provisions deal with real estate seizures for which confiscation is provided for under Article 131-21 of the Penal Code.

c) Articles 706-153 to 706-157
   - These provisions concern seizures related to specific assets or incorporeal movable rights for which confiscation is provided under Article 131-21 of the Penal Code.

d) Article 706-158
   - This provision establishes a special case of seizure without dispossession (*saisie sans dépossession*)

The legislation on confiscation.

Confiscation as an additional penalty to imprisonment

a) The French Penal Code provides for numerous specific cases where an individual may be punished not only with the main penalties but also with the confiscation of an object or an animal as an additional penalty.

b) Furthermore, the Penal Code, when regulating the penalties applicable to individuals, dedicates a specific section to the content and the modalities of application of certain penalties (*Subsection 5 – On the content and modalities of application of certain penalties – Articles 131-19 to 131-36*). In this section, Article 131-21 states that the additional penalty of confiscation, provided for in the cases established by law or regulation, is also applicable by right for crimes and offences punishable by a custodial sentence of more than one year, with the exception of press offences.

Confiscation as an alternative penalty (*peines correctionnelles*) to custodial and monetary penalties (for *délits*)

a) Pursuant to Article 131-6 of the Penal Code, when an offence is punishable by a custodial or monetary penalty (in the form of a fine, under Article 131-7 of the Penal Code), the court may impose a penalty depriving rights as an alternative to detention. Among these figures is confiscation in three specific forms:
   - Confiscation of one or more vehicles belonging to the convicted individual.
   - Confiscation of one or more weapons possessed by or freely accessible to the convicted individual.
   - Confiscation of the object used or intended to be used to commit the offence, or the object that constitutes the product of the offence. However, such confiscation cannot be pronounced in cases of press offences.

b) Pursuant to Article 131-14 of the Penal Code, for all fifth-class contraventions, whether against natural or legal persons, one or more penalties may be imposed that consist of the deprivation or restriction of certain rights. Among these penalties are two forms of confiscation:
   - Confiscation of one or more weapons possessed by or freely accessible to the convicted individual (n. 3).
   - Confiscation of the object used or intended to be used to commit the offence or the object that constitutes the product of the offence. However, such confiscation cannot be ordered for press offences (n. 6).

Extended confiscation

a) Art. 131-21, par. 5

- In this case, the link between the asset and the crime is legally presumed. The provision states that in the case of a crime or offence punishable by at least five years of imprisonment that results in direct or indirect profit, confiscation may include movable or immovable property of any nature, whether divided or undivided, belonging to the convicted individual or, subject to the rights of the bona fide owner, over which the convicted individual has exclusive control, provided that neither the convicted individual nor the owner, having had the opportunity to justify the asset subject to potential confiscation, can account for its origin.

b) Art. 131-21, par. 6

- When the law governing the crime or offence provides for it, confiscation may include all or part of the assets belonging to the convicted individual or, subject to the rights of the bona fide owner, over which the convicted individual has exclusive control, regardless of their nature, whether movable or immovable, divided or undivided."
- This penalty is applicable to the more serious offences expressly listed by law.
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Case study

The judgments on Article 131-21 of the Criminal Code

a) *Décision n° 2010-66 QPC du 26 Novembre 2010*

- The Constitutional Council nonetheless declared Article 131-21 of the Penal Code to be compliant with the Constitution: first, it recalled its case law that the existence of an additional penalty applicable to certain crimes, offences, or contraventions does not, by itself, violate the principle of necessity of penalties. Regarding contraventions, this does not exempt the regulatory authority from respecting the principle of necessity of penalties; second, it ruled that the cases established by law for the penalty of confiscation of assets used in the commission of an offence are not disproportionate. This is particularly true for the mandatory confiscation of objects classified as dangerous or harmful by law.

b) Cour de cassation, Pourvoi n° 20-86.529, 5 Mai 2021

- The questions raised, so far as they challenge the constitutionality of the interpretation of Article 131-21, paragraph 9, of the Penal Code, according to which the repressive judge is not required to control the necessity and proportionality of the impact on the right of property by the confiscation measures concerning the value of the direct or indirect proceeds of the offence, nor to individualize this additional penalty, are, however, not serious.
- Indeed, on one hand, when the judge orders a confiscation measure concerning the value of the direct or indirect proceeds of the offence, he is required to first ensure that the value of the confiscated asset does not exceed the amount of the proceeds of the offence, so that the

impact on the property right of the convicted individual cannot exceed the economic advantage derived from the criminal offence, which constitutes the patrimonial consequence of its commission, and to justify this with sufficient reasons, free from contradictions, and responding to the compelling arguments of the parties conclusions. This implies that neither the principle of necessity of penalties nor the principles of individualization and motivation of penalties are violated.

- On the other hand, if certain offences are likely to expose their author to, in addition to the confiscation concerning the value of the direct or indirect proceeds of the offence, the confiscation of all or part of their assets defined by Article 131-21, paragraph 6, of the Penal Code, and if the repressive judge ordering such a measure is required to control, if necessary ex officio, the proportionality of the impact on the property right of the convicted individual, this option does not violate the principles of equality before the law and justice, as this difference in treatment is justified by the fact that the confiscation incurred on the basis of the aforementioned text, unlike that which is based on the text whose constitutionality is contested, is likely to affect, without limitation, all assets constituting the convicted individual's estate.

c) ECHR, Case of Aboufadda v. France (application no. 28457/10)

- In its decision in the case of Aboufadda v. France (application no. 28457/10), the European Court of Human Rights has, by a majority, declared the application inadmissible. The decision is final.
- The case concerned the confiscation of a building that belonged to the applicants and in which they lived, with the courts having determined that most of their assets had been obtained through the proceeds of drug trafficking engaged in by their son.
- Pointing out that States have room for manoeuvre ("wide margin of appreciation") in controlling the use of property in accordance with the general interest, the Court interpreted the French court's decision to confiscate the applicants' residence as demonstrating a legitimate wish to punish severely offences that were akin to concealing illegally-obtained assets, and which, in addition, had occurred in the context of large-scale drug trafficking at the local level.
- Given the ravages caused by drugs, the Court understood that the authorities of the Member States should wish to treat those who contributed to the propagation of this scourge with great firmness. It also reiterated that the confiscation of assets obtained from the proceeds of crime had assumed a significant role both in the legal systems of several member States of the Council of Europe and internationally.

Best practices

France has developed guidelines to support the French authorities in the drafting and transmission of freezing certificates.

Implementation of the positive impact of legislative changes on mutual judicial cooperation.

Eurojust facilitates the asset recovery process by providing legal and practical support to judicial authorities throughout the different stages of asset recovery, by helping practitioners to resolve issues and answer questions, and by facilitating effective cooperation and communication between the involved States.

France is also involved in international initiatives to promote best practices and facilitate international cooperation, including the STAR (Stolen Asset Recovery Initiative), the CARIN Network (Camden Asset Recovery Interagency Network), and the Global Focal Point Network on Anti-Corruption and Asset Recovery.

Greece

Reference Regulatory Framework

The regulations implementing the Directive 2014/42/EU, as well as Council Framework Decisions 2003/577/JHA, 2006/783/JHA and 2005/212/JHA can be found in

- the new **Criminal Code (GCC) and Code of Criminal Procedure (GCCP) adopted in 2019**,
- **as well as in Law 4557/2018** against money laundering.

The legislation on confiscation.

Confiscation as a **criminal sanction**:

1) **Article 68 par. 1 GCC** stipulates that following conviction, objects or assets, which i) derive from an offence (felony or misdemeanour committed with intent), as well as their value or any assets acquired directly or indirectly through them, or ii) were used or intended to be used, in any manner, as a whole or in part, to commit such an offence, are subject to confiscation, provided that they belong to the perpetrator or any of the participants.
2) **Articles 68 par. 3 GCC, 40 par. 2 L. 4557/2018** regulates the value confiscation. In case the objects or assets, which should be confiscated following the conviction of the defendant, no longer exist, **have not been found** or are impossible to confiscate, the court may decide to confiscate assets **of equal value** belonging to the convicted defendant.
3) **Articles 68 par. 5 GCC, 40 par. 1 L. 4557/2018** regulates the confiscation towards third parties who, at the time of purchasing the asset, were aware that the asset originated from a crime committed with intent, and that the purpose of the transfer was to obstruct the confiscation

Non-conviction-based confiscation

Articles 311 par. 3 and 373 par. 5 GCCP, 40 par. 3 L. 4557/2018 provides that in cases where prosecution is terminated due to prescription of the offence, death of the defendant, withdrawal of the criminal complaint or lack thereof, granting of amnesty, ne bis idem, the judicial council (article 311 par. 3 GCCP) or the court (article 315 par. 5 GCCP) may order the confiscation of the proceeds.

Confiscation as a security measure

Article 76 par. 1 GCC stipulates that confiscation of objects, which derive from an offence (felony or misdemeanour committed with intent) or were used or intended to be used, in any manner, as a whole or in part, to commit such an offence, are subject to confiscation, even if the defendant is not convicted of the offence, if they pose a risk to public order due to their nature.

The legislation on freezing measures

1) Freezing of assets during the preliminary investigation (art. 36 par. 2-3 GCCP)
2) Freezing of assets during the main investigation (art. 261-262 GCCP)

3) Freezing of assets during the investigation of the Financial Intelligence Unit-FIU (art. 42 par. 7 L. 4557/2018). Even before the opening of a criminal investigation, the President of the FIU, when conducting its own investigation, may order the freezing of assets for which there are reasonable suspicions that they relate to money laundering activities and there is real danger that they may dissipate. The freezing order may extend to any type of asset.

4) The provisional freezing of assets (art. 48 par. 2d Law. 4557/2018). In urgent cases, when it is suspected that an asset or transaction is related to money laundering or terrorist financing, the President of the FIU has the power to order the provisional freezing of the asset or the suspension of execution of the specific transaction, in order to investigate the validity of the suspicions as soon as possible.

5) Freezing of assets during the criminal pre-trial stage (art. 42 par. 1 L. 4557/2018)

6)

Best practices

During criminal pretrial investigations prosecuting and judicial authorities tend to use the European Investigation Order as a tool to gather information from other EU member states. In the case of a third country, Greek authorities may proceed with a mutual legal assistance request, which would be issued based on the provisions of the applicable bilateral or international treaty. Moreover, the Hellenic FIU is a member of the Egmont Group of FIUs and the FIU Platform. Also, SDOE's (Unit Against Financial and Economic Crime) D' Division on Recovery of Assets deriving from criminal offences and on mutual assistance collaborates with the CARIN network.

Case study

In the case **Paraponiaris vs. Greece**, the European Court of Human Rights (ECtHR) examined a matter concerning the compatibility of Greek confiscation provisions with the rights guaranteed by the European Convention on Human Rights (ECHR), specifically Article 6, paragraph 2, which establishes the principle of the presumption of innocence. The Court found that confiscating assets despite the termination of the criminal proceedings could constitute a punitive sanction that is inconsistent with the presumption of innocence.

Italy

The legislation on seizures.

a) Articles 253-265 of the Code of Criminal Procedure (evidentiary seizure)
   - It is a means of evidence collection aimed at securing movable or immovable property for evidentiary purposes. The reference provision is Article 253 of the Code of Criminal Procedure, according to which "the judicial authority orders, by means of a reasoned decree, the seizure of the corpus delicti and the things pertinent to the offence necessary for the ascertainment of the facts.

b) Art. 316 of the Code of Criminal Procedure (conservative seizure)
   - If there is a justified reason to believe that the guarantees for the procedural costs and any other amounts owed to the State Treasury are lacking or being dissipated, the public prosecutor, at any stage of the proceedings, requests the precautionary seizure of the movable or immovable assets of the defendant or of any sums or items owed to him, within the limits permitted by law for seizure.

c) Article 321 of the Code of Criminal Procedure
   - Finally, the precautionary seizure has a protective purpose. Also a real precautionary measure, it is regulated by Article 321 of the Code of Criminal Procedure, which states that when there is a danger that the free availability of an item pertinent to the offence may aggravate or prolong its consequences or facilitate the commission of other offences, upon request of the public prosecutor, the competent judge shall order its seizure by means of a reasoned decree.

The legislation on confiscation.

Art. 240 Criminal Code

- This rule regulates confiscation as a measure of property security. It includes both optional and mandatory confiscation scenarios.
- Optional confiscation is based on the social dangerousness of the person when they can be considered dangerous because they possess property that has been used or intended for committing the crime.
- Mandatory confiscation applies to property that is the product or profit of the crime; property that represents the "price" of the crime, or the compensation given or promised to induce, incite, or make someone else commit the crime, unless the asset belongs to someone not involved in the crime; electronic or digital tools used to commit various cybercrimes, and also property that is the profit or product of these crimes.

- Finally, confiscation is mandatory (even without a conviction) for all property whose manufacture, use, possession, or transfer constitutes a crime (Article 240, paragraph 2, no. 2 of the Criminal Code).
- Regarding its legal nature, most experts believe it is a property security measure. However, some scholars argue that it is actually a punitive measure.

The Extended Confiscation (art. 240-bis Criminal Code)

- Another form of mandatory confiscation, introduced in the 1990s in complementary legislation as part of a measure to combat organized crime (Article 12 sexies, paragraph 2 ter of Law Decree No. 306 of June 8, 1992, converted into Law No. 356 of August 7, 1992), and gradually extended to a wider range of particularly serious crimes, is now provided for in Article 240 bis of the Penal Code, inserted into the criminal code in implementation of the principle of legal reservation by Legislative Decree No. 21 of March 1, 2018
- This is the so-called "extended confiscation," which, in the case of a conviction or plea agreement, applies to crimes such as mafia association, crimes committed using the conditions described in Article 416 bis of the Penal Code, or crimes committed to facilitate the activities of a mafia association, certain aggravated forms of smuggling, corruption, other crimes against public administration, usury, and money laundering. The legislature's favour for this form of confiscation is further demonstrated by its extension to tax crimes when tax evasion exceeds a certain threshold, as set out in Article 12 ter of Legislative Decree No. 74 of March 10, 2000, introduced by Decree Law No. 124 of October 26, 2019, converted into Law No. 157 of December 19, 2019. Confiscation under Article 240 bis of the Penal Code applies to money, assets, or other valuables disproportionate to the convicted person's income — whether directly or through intermediaries — that the person cannot justify the origin of

Confiscation by equivalent

- In relation to certain specific types of crimes, the legal system has introduced "confiscation by equivalent," which targets money, assets, or other valuables that the offender has at their disposal, equivalent in value to the price, profit, or product of the crime. This form of confiscation is intended to be applied in cases where direct confiscation of the proceeds of the crime is not possible for various reasons. Therefore, the equivalent in money of the asset that should have been confiscated is seized.
- Confiscation by equivalent was introduced by Law No. 108 of March 7, 1996, and its scope of application was initially limited to the crime of usury (Article 644, paragraph 6, of the Penal Code).
- In the Criminal Code, confiscation by equivalent is now included in a wide range of cases, which continues to expand:

- Article 240, para. 2, no. 1 bis, c.p., regarding mandatory confiscation in relation to computer crimes;
- Article 270 septies c.p. for crimes committed with the purpose of terrorism;
- Article 322 ter c.p. for certain crimes committed by public officials against public administration (Articles 314 to 320 c.p.);
- Article 452 undecies, para. 2, c.p. for environmental crimes under Title VI bis of Book II of the Criminal Code, introduced in 2015 (Articles 452 bis et seq.);
- Article 452 quaterdecies, last paragraph, for the crime of organized activities for the illegal trafficking of waste;
- Article 466 bis c.p. for certain crimes involving counterfeiting of money (Articles 453-455 and Articles 460-461 c.p.);
- Article 474 bis c.p. for crimes involving the counterfeiting of trademarks (Articles 473 and 474 c.p.);
- Article 493 ter c.p. for the crime of improper use and falsification of credit cards;
- Article 600 septies c.p. for crimes against individual freedom (Articles 600 et seq. c.p.) and for certain sexual offenses against minors (Articles 609 bis et seq. c.p.);
- Article 603 bis.2 c.p. for the crime of illegal labor intermediation and exploitation (so-called "caporalato": Article 603 bis c.p.);
- Article 640 quater c.p. for crimes of fraud (Articles 640, para. 2, no. 1 and 640 bis c.p.) and computer fraud (Article 640 ter c.p.);
- Article 648 quater c.p. for crimes of money laundering, the use of money or assets from illicit sources, and self-laundering (Articles 648 bis, 648 ter, and 648 ter.1 c.p.).

- In special legislation, confiscation by equivalent is provided for in many other cases (only the main ones are listed here):
  - In Article 2641 of the Civil Code for corporate crimes;
  - in Article 187 of Legislative Decree No. 58 of February 24, 1998 (Consolidated Text on Financial Intermediation) for crimes of insider trading and market manipulation;
  - In Article 12-bis of Legislative Decree No. 74 of March 10, 2000, introduced by Legislative Decree No. 158 of September 24, 2015, for tax crimes (fraudulent or false declaration, failure to declare, fraudulent tax evasion, failure to pay VAT, etc.);
  - In Article 19 of Legislative Decree No. 231 of June 8, 2001, against entities held administratively responsible for crimes committed in their interest or benefit;
  - in Article 11 of Law No. 146 of March 16, 2006, for so-called transnational crimes (as defined by Article 3 of the same law);

- In Articles 73, paragraph 7-bis, and 74, paragraph 7-bis, of the Consolidated Text on Narcotics, for crimes related to the production, trafficking, and illegal possession of narcotics and association aimed at trafficking such substances.

- As for the nature of the confiscation for equivalent, the absence of a connection between the crime and the confiscated property, as opposed to confiscation under Article 240, leads to the absence of the presumption of the dangerousness of the confiscated property. Therefore, confiscation for equivalent cannot properly be considered a security measure but rather a penalty.

The non-conviction-based confiscation in the Italian legal system

The preventive confiscation

- Preventive confiscation (Article 24 of Legislative Decree No. 159/2011) takes place after the precautionary seizure (Article 20 of the same Legislative Decree).
- It applies not only to individuals to whom personal preventive measures are applicable, but also "to individuals or entities listed by the United Nations Sanctions Committee, or by any other competent international body responsible for freezing assets or economic resources, when there are well-founded reasons to believe that these assets or resources may be dispersed, hidden, or used to finance terrorist organizations or activities, including international ones" (Article 16)
- Confiscation can be applied separately from personal measures, and regardless of the social danger posed by the individual at the time of the request, even after the death of the person against whom the measure could be imposed (Article 18 of the aforementioned Legislative Decree).
- The conditions for the measure are essentially two: first, the social danger posed by the individual (as included in one of the categories outlined in Article 4 of the aforementioned Legislative Decree), even if this danger only existed in the past and is no longer present at the time of the request for the imposition of the asset forfeiture (the condition thus applies today to the past); second, the individual's inability to justify the ownership, either direct or indirect, of the seized assets, in terms of the legitimacy of their origin, or because they are disproportionate to the declared income or economic activities, or because the assets are the result of illicit activities or represent their reinvestment.
- Regarding the legal nature, the prevailing view holds that preventive confiscation is not punitive in nature but serves a preventive purpose. The established case law of the European Court of Human Rights also affirms that preventive measures do not imply a judgment of guilt but are intended to prevent the commission of criminal acts. They cannot be compared to a "penalty." Therefore, the related proceedings cannot address the "merits" of a "criminal charge."

Confiscation of property whose lawful origin the applicant is unable to prove constitutes a control of the use of property and is only a preventive measure. Articles 6 and 7 of the European Convention on Human Rights are not applicable, as the preventive measure does not involve a finding of guilt following a criminal charge (it does not constitute a penalty)[1].

Urban confiscation

- Urban confiscation, provided for by d.D.P.R. No. 380/2001 (Consolidated Law on Construction), is a direct patrimonial measure that applies in the case of the crime of illegal land subdivision, governed by Art. 30 of d.D.P.R. No. 380/2001. When it is established that a piece of land has been subdivided for construction purposes without the necessary permits, the municipal official, pursuant to Art. 30, paragraph 7, issues a work suspension order, registered in the land registry, rendering the area and any works undertaken on it unavailable. After 90 days without revocation of the order, the land is automatically acquired by the municipality, and the authorities are required to demolish any illegal constructions. Confiscation is then consolidated by art. 44, par. 2: the final criminal judgment directly orders the confiscation of the land and illegal works, thereby strengthening the effect of the measure and protecting urban planning.
- Legal Nature → before the judgment of the European Court of Human Rights (ECtHR), domestic case law classified confiscation as an administrative sanction, which could be imposed even in the case of an acquittal, with the sole limitation being a judgment of acquittal due to the non-existence of the fact. Therefore, it was applicable regardless of the outcome of the criminal trial and could also be applied to third parties (who had become owners of the property).

Case study

De Tommaso judgement of the ECtHR (Corte EDU, Grande Camera, 23 febbraio 2017, De Tommaso c. Italia)

- **In the case at hand, the European Court of Human Rights (ECtHR) recently – while continuing to affirm the non-criminal nature of such measures – identified significant elements of indeterminacy in the national system that conflict with the Convention's system of guarantees (even though the applicable standard is not the criminal one).** This reference pertains to the ruling in *De Tommaso v. Italy*, in which the Strasbourg Court found that the categories of dangerousness outlined in Art. 1(a) and (b) of Legislative Decree No. 159/2011

[1] *Riela and others v. Italy* (4 September 2001), § 2, aimed at specifying the previous approach expressed in the rulings *Guzzardi v. Italy* (6 November 1980), § 108, *Ciancimino v. Italy* (27 May 1991), and *Raimondo v. Italy* (22 February 1994), as well as *Cacucci and Sabatelli v. Italy* (17 June 2014), *Capitani and Campanella v. Italy* (17 August 2011), *Leone v. Italy* (2 February 2010), and *Bongiorno and others v. Italy* (5 January 2010).

are not in conformity with the principles of precision, determinacy, and foreseeability; principles whose observance is necessary to justify the legitimacy of any restriction on a conventionally protected right, whether personal or proprietary in nature.

- **The identification of a dangerous individual represents – through a complex system of statutory references – the common denominator of both personal and asset-based preventive measures.** In this regard, Italian legislation on preventive measures has been deemed inadequate due to the lack of determinacy in the statutory description of the so-called "generic dangerous individuals" identified in Art. 1(1) and (2) of Law No. 1423/1956, now Art. 1(a) and (b) of Legislative Decree No. 159/2011, which include among the subjects of preventive measures the so-called "generic dangerous individuals," namely: (a) "those who, based on factual elements, should be considered habitually engaged in criminal dealings" and (b) "those who, based on factual elements regarding their conduct and lifestyle, should be considered to habitually, even partially, subsist on the proceeds of criminal activities.

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- After the De Tommaso ruling, the Italian Constitutional Court declared unconstitutional, for violation of Articles 42 and 117, the first paragraph, of the Constitution, in relation to Article 1 of the Additional Protocol to the ECHR, Article 19 of Law No. 152 of 1975, as in force until the entry into force of Legislative Decree No. 159 of 2011, in the part where it establishes that the seizure and confiscation provided for by Article 2-ter of Law No. 575 of 1965 apply also to individuals referred to in Article 1, number 1), of Law No. 1423 of 1956.
- The provision is criticized only in the part where it allows the application of preventive measures to those who are "suspected," based on factual elements, of being habitually involved in criminal activities. This provision suffers from a fundamental lack of precision, which was not corrected by case law following the 2017 judgment of the European Court of Human Rights (De Tommaso). According to the Strasbourg Court, the preventive measures regulated by the Italian legal system are legitimate as they are based on a suitable legal foundation, serve a legitimate purpose, and the limitation is necessary in relation to the objectives pursued. However, the case law has not been able to provide a clear and reasonably predictable interpretation of the statutory provision in question, as two opposing interpretative approaches coexist on this point. These approaches define the concept of "criminal activities" in a generic and inconsistent manner, and therefore, they do not appear capable of selecting, even with reference to the specifics of the case examined by the judge, the crimes whose commission might constitute a reasonable basis for a judgment of dangerousness of the potential subject of the measure. Furthermore, such notions of "criminal activities," which are not limited to profit-producing crimes, could never constitutionally justify measures aimed at the confiscation of assets possessed by a person who

has committed such crimes in the past, as this would lack the very basis for the presumption of a reasonable criminal origin of the assets, which constitutes the rationale behind these measures.

The judgments of the ECHR on urban confiscation

- **ECHR Sud Fondi v. Italy** → In the Sud Fondi judgment, the European Court of Human Rights recognized that urban confiscation is actually a penalty according to the definition of criminal matters adopted by the case law of the European Convention on Human Rights. As a penalty, it cannot be applied without first establishing the guilt of the individual. Specifically, it was held that "Article 7 does not explicitly mention a moral link between the material element of the offence and the alleged perpetrator. Nevertheless, the logic of punishment and the concept of 'guilty' (in the English version) and the corresponding notion of '*personne coupable'* (in the French version) are understood in the sense of an interpretation of Article 7 that requires, for punishment, an intellectual link (awareness and will) that allows the identification of a responsibility element in the conduct of the material perpetrator, an element without which the imposition of a penalty would be unjustified" (see § 116).
- ***ECHR, Judgment of October 29, 2013 , Varvara vs. Italy*** → After Italy's conviction in the merits ruling Sud Fondi srl and others v. Italy, the Court of cassation has consistently reaffirmed the "administrative" classification of urban confiscation, thereby confirming its applicability even in the absence of a conviction (and, in particular, in cases of acquittal due to the statute of limitations for the crime). On the other hand, to avoid contradictions with the conclusions of the Sud Fondi judgment— which for the first time linked the principle of culpability to Article 7 of the ECHR (in a case where urban confiscation had been applied despite the acquittal of the defendants under Article 5 of the Italian Penal Code)—the need for a determination by the judge of the subjective element of the crime, alongside the objective "urban or building transformation of the land in violation of urban planning regulations" (illegal land subdivision as provided by Article 30 of the Consolidated Building Code), was emphasized. The Second Section of the European Court of Human Rights considered that the application of the alternative form of urban confiscation, as provided by Article 40, paragraph 2, of Presidential Decree No. 380 of 2001 in cases of acquittal due to extinction of the crime, constitutes a violation of the principle of legality established by Article 7 ECHR. The Strasbourg Court therefore states that urban confiscation can only be considered in compliance with the European Convention if it is imposed within the framework of a conviction.
- **ECHR, Grand Chamber, Judgment of June 28, 2018, G.I.E.M. and others v. Italy** → After the Varvara v. Italy judgment, the Italian Constitutional Court interpreted that decision to mean that, in addition to a formal conviction, a substantive conviction could also be considered. A substantive conviction refers to an acquittal (e.g., due to the statute of limitations) in which all

the elements of the crime have been established. This approach was confirmed by the Strasbourg Court in the G.I.E.M. case (appeal no. 1828/06). In this judgment, the Court held that the imposition of urban confiscation, even when the statute of limitations for the crime has expired, is compatible with the guarantees of Article 7 ECHR, provided that all the constitutive elements of the crime of illegal land subdivision have been substantially established (§§ 260-261)

Best Practices

- **Institutional promotion of networks that can facilitate the identification of assets, such as the Asset Recovery Office (A.R.O.) network, responsible for identifying and recovering assets subject to freezing and confiscation orders issued by the competent judicial authority.**
- In addition to the A.R.O., there are also some informal networks dedicated to Asset Recovery, including:
    - a) the C.A.R.I.N. (Camden Asset Recovery Interagency Network), an international information-sharing platform established in 2004 at the initiative of several European countries, comprising 54 countries, including all EU member states, and 9 international organizations, aimed at exchanging information among asset recovery offices;
    - b) the R.R.A.G. (Red de Recuperación de Activos del G.A.F.I.LAT.), a network managed by GAFILAT (Grupo de Acción Financiera de Latinoamérica), whose activation always occurs through the S.C.I.P;
    - c) the St.A.R. (Stolen Asset Recovery), an informal network managed by UNODC, INTERPOL, and the World Bank;
    - d) the Global Focal Point Network on Asset Recovery, established by INTERPOL, which provides a secure information exchange system for the recovery of illicit assets.
- To ensure comprehensive information exchange, the network is supported by regional networks called A.R.I.N (Asset Recovery Interagency Networks).
- Encouragement of the establishment of memoranda of understanding between the UIF (Financial Intelligence Unit), the National Anti-Mafia and Anti-Terrorism Directorate, the Special Unit for Financial Police of the Guardia di Finanza, and the Anti-Mafia Investigative Directorate.
    - With particular reference to the exchange of financial information between Member States, it should be noted that Council Decision 2000/642/JHA has been replaced by Directive 2019/1153, which provides that AROs (Asset Recovery Offices) are included among the authorities of each Member State authorized to access the centralized national bank account registry and to request information from the Financial Intelligence Units (FIUs).