

INTERNATIONAL COOPERATION FOR THE DETECTION OF CORRUPTION OFFENCES AND FOR IDENTIFICATION, FREEZING AND CONFISCATION OF ASSETS: THE ITALIAN SYSTEM OF NON- CONVICTION-BASED CONFISCATION

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I. FOREWORD

Confiscation of proceeds of crime plays a crucial role in the fight against any form of profit-making crime whatsoever. This has been repeatedly observed within the international community, and it is definitely agreed that confiscation prevents criminals from making use of their illicit wealth to finance other criminal activities, including organized crime and corruption.

In order to combat organized crime and other serious crimes, Italy, either in accordance to its ancient tradition and as follow up of international inputs, has shaped a comprehensive system that is the result of a strategy conceived for mafia-based organizations, according to which as mafias are in the end profit-oriented illicit associations, it is crucial not only to prosecute its main actors (leaders and supporters), but also to tackle those assets which were obtained through criminal acts.

After almost thirty years of experience, which has led to the confiscation of a significant amount of highly valuable assets, Italian legislation is now based on a multiple approach, based on various kinds of confiscation with the correspondent freezing measures.

This system may be sketched out by mentioning the following main instruments:

- a) *Ordinary confiscation*, aimed at confiscating assets linked to a specific crime, following a criminal conviction for that crime;
- b) *Value confiscation*, so that assets of equivalent value can be confiscated as well, where specific criminal assets are outside the reach of investigators;
- c) The so called “*extended*” *confiscation*, which can be ordered within a criminal proceeding, or as a consequence of a conviction for serious economic crimes, especially when organized crime is involved; that is the case when a criminal conviction is followed by the confiscation not only of the assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other, unspecified crime. Confiscation may be based on circumstantial evidence, e.g. balance between a person’s assets and the lawful source of income;
- d) *Third party confiscation*, so that assets can be confiscated from third parties to whom they have been transferred.
- e) ***Non-conviction-based confiscation, ordered through a separate proceeding aimed at recovering illicit assets, removing the need for a criminal conviction;***

In the Italian experience, extended confiscation and especially “preventive confiscation” (otherwise called non-conviction-based confiscation) do play a pivotal role.

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II. AN OVERVIEW OF THE ITALIAN LEGISLATION ON NON-CONVICTION-BASED CONFISCATION

Italy introduced in 1982 the so-called “preventive measures on assets”, that now are regulated by Legislative Decree n. 159/2011. The rationale behind their introduction was that the most effective way to combat criminals and criminal groups is to affect their finances and to recover the proceeds of their activities. In 1982 it was already clear that the quick accumulation of enormous assets is the common objective of any kind of criminal anywhere in the world (drug traffickers, corrupt persons, criminal organizations, traffickers in arms and human beings etc.), and that in some cases it is more appropriate to affect all those people accumulating illegal assets at the economic level, rather than starting lengthy criminal proceedings (i.e. the personal level).

In other words, it became evident that it is more effective to tackle the criminals’ assets rather than temporarily affecting their liberty, and that shifting the focus from the criminals to their assets is necessary. This led to the introduction of non-conviction-based confiscation in the Italian legal system, which allows every year for the confiscation of a significant amount of highly valuable assets.

Confiscation normally follows a criminal verdict, finding a person guilty of certain offences and, thus, making his/her assets suitable for confiscation. In addition, Italian law provides for a particular form of forfeiture and confiscation, working as non-conviction-based confiscation or *actio in rem* (“action against the asset itself”), which can be applied even in the absence of a criminal conviction. As said before, these instruments are called “*Misure di prevenzione patrimoniali*” (“Preventive measures on assets”).

Therefore, the Italian legislation regarding confiscation is based on a two-fold approach, whereas non-conviction-based confiscation represents one of the two tools employed to combat all forms of profit-oriented crimes, especially organized crime. The “preventive” measures (forfeiture and confiscation) are ordered and enforced through a specific proceeding, managed by the criminal Court in each district.

They can be applied, under certain conditions, to the assets of the following:

- 1) those suspected of belonging to mafia organizations;
- 2) those suspected of having committed one of the serious crimes listed by law (money-laundering, trafficking in human beings, smuggling of migrants, drug trafficking, kidnapping for ransom, organized trafficking in hazardous waste etc...);
- 3) those usually devoted to illegal dealings or usually living with proceeds from criminal activities (including corruption);
- 4) those who have committed preparatory acts of subversion or of terrorism;
- 5) natural and legal persons reported by the United Nations Sanctions Committee or any other international organization which is competent to freeze economic resources when they might be dissolved, concealed or used to support international terrorist organizations or activities.

The status of “suspected” implies (first condition), the considerable probability of guilt. In the Italian “preventive” proceedings, criminal offences must be established on a balance of probabilities standard of proof, as the judge must ascertain the existence of “sufficient clues” of one of the above-mentioned crimes. Criminal lifestyle and criminal relationships, previous convictions, information provided by cooperative defendant, interceptions and documents from criminal proceedings and trials may all constitute a reasonable ground for the application of the preventive measures.

The same will happen when the indicted person has been acquitted in a criminal proceeding because he/she was not found guilty “beyond any reasonable doubt”, when the proceeding has been terminated because the defendant has died, or the statute of limitations has been applied.

Towards the aforementioned groups of people (second condition), the Court may order seizure and

confiscation of those assets which the suspect, directly or indirectly, is found to own or have at his disposal for whatever purpose, when their value appears to be out of all proportion to his income, as reported in the income tax return, or to his own economic activity, or when it can be reasonably argued, based on the available evidence, that said assets are the proceeds of unlawful activities or the use thereof.

It is also possible to seize and confiscate assets from third parties when it is proved that they belong to suspected persons. The illicit purchase of assets also justifies the seizure and confiscation of those goods which are passed to the heirs when the suspected person dies either during the confiscation proceedings or if such proceedings have been initiated within five years from his or her death.

III. ITALIAN NON-CONVICTION BASED-CONFISCATION AND THE PRINCIPLE OF DUE PROCESS

The criminal proceedings/trials follow the usual procedure, but the Italian prevention proceedings also ensure the highest standard of guarantees and fully respect the principle of *due process*, as the Italian Constitutional Court and the European Court of Human Rights have often recognized.

Hereinafter is a brief overview of the main features of the preventive confiscation process:

- a) Even though the person might have already received a criminal conviction for a related offence, the competent Court has to ascertain itself the degree of danger posed by the same person and, in particular, the high probability of being found guilty through a new fact-based inquiry. Hence, even a previous conviction for a related offence may not suffice to order the confiscation of his/her assets;
- b) Asset seizure/confiscation is decided, upon request of the public prosecutor, by a panel of three judges belonging to the criminal Court in each district;
- c) After the asset seizure, all involved actors (the suspected person and third parties) may file a complaint before the Court, should they consider their rights breached;
- d) In any case, a hearing is scheduled shortly after the seizure, and on that occasion (which, upon request, is public) cross-examination between the public prosecutor and third parties is ensured before the Court; in this hearing a wide range of requests and evidence can be presented by the parties;
- e) The Judges' panel provides written ruling of its decision, similar to that provided in criminal proceedings, and the decision can be challenged before the Court of Appeal;
- f) The Court of Appeal, consisting of a panel of three judges, decides after cross-examination and releases the explanation of its decision as for any other judgment;
- g) The decision of the Court of Appeal can be appealed before the Court of Cassation, which decides through one of its criminal sections;
- h) In case new and unknown elements are brought up after the final decision is released, the parties can also submit a request for revocation of the confiscation order;
- i) Since the seizure and confiscation of assets does not entail prison-related criminal sanctions, the proceedings against property can continue independently from the outcome of the criminal proceedings (e.g. in case the latter cannot continue because of the statute of limitations or the defendant's death).

The non-conviction-based confiscation seeks to remove from the legal economy those assets which were acquired illegally. The owner is not punished at the personal level since the objective is to prevent him/her from using the illicitly gained assets to commit further crimes or affect the market. Hence, **as established by the Italian Court of Cassation and by the European Court of Human Rights in several judgments**, confiscation is a preventive measure against criminal assets and does not aim at sanctioning the individuals themselves, thus not all the guarantees accorded to individuals are necessary.

To sum up, the proceedings fully ensure the respect of judicial guarantees to the parties, which can oppose the prosecution in a regime of cross-examination: a) third parties may put forward elements regarding the effective ownership of an asset and thus about his/her lack of involvement with the suspected person; b) the suspected person may prove the legitimate purchase of the seized assets.

It is also worth noting that the Italian non-conviction-based confiscation fits exactly, both in form and substance, to the provisions of articles 12 paragraph 7 of UNTOC and articles 53 and 54 of UNCAC.

According to article **12 paragraph 8 of UNTOC**, in fact, *“States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings”* (allows for the reversal of the burden of proof).

Article **54 paragraph 1 of UNCAC** (mechanisms for recovery of property through international cooperation in confiscation) states: “1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: [...] (c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.”

In Italy, the success of non-conviction-based confiscation can be explained because it requires a lower standard of proof (although fully ensuring the respect for the principle of due process) and is particularly effective for those areas of contiguity with criminal organizations, where a verdict at the end of a criminal proceeding is very difficult to achieve.

Due to the above-mentioned features, non-conviction-based confiscation can be seen as a facilitated (and facilitating) form of asset recovery which eases the burden of proof. Hence its legitimacy has been therefore repeatedly challenged in the relevant countries, assuming its inconsistency to the principle of due process and other fundamental rights.

It must be highlighted, on the contrary, **that the Italian non-conviction-based system has been always declared consistent with the presumption of innocence and the fundamental property rights, both from the European Court of Human Rights and from the supreme courts of Italy**. In particular, the reversal of the burden of proof (and the possible violation of the presumption of innocence) and the interference with property rights have been repeatedly considered **consistent with the provisions of European Convention on Human Rights (article 6, right to a fair trial) and to those of Article 1 of the First Protocol of the same Convention (protection of property)**.

IV. THE NEW EU DIRECTIVE 2014/42

At the European level, the new EU Directive (2014/42) on the freezing and confiscation of instrumentalities and proceeds of crime was adopted on 3 April 2014. The Directive establishes minimum rules on the freezing of property with a view to its subsequent confiscation for the serious crimes listed in Article 83(1) of the Treaty on the Functioning of the European Union. It maintains conviction-based confiscation as a general rule, but introduces non-conviction-based confiscation, even though as a residual hypothesis. Thus, non-conviction-based confiscations shall be introduced in the EU Member States' national legislation, but the scope of application of such confiscation is limited in the Directive to the cases in which a final conviction could not be obtained as a result, *inter alia*, of illness or flight of the suspected or accused person. It is also requested that a criminal proceeding be initiated for a criminal offence which is liable to give rise to economic benefit, and that such proceeding could have led to a criminal conviction.

V. INTERNATIONAL COOPERATION ON NON-CONVICTION-BASED CONFISCATION: THE ITALIAN EXPERIENCE

Italy can report a number of successful experiences on international judicial cooperation in the field of asset recovery. Some of the following cases are related to the execution of non-conviction-based confiscation

and have been managed through case-by-case agreements with the requesting/requested State.

A. Switzerland

Three agreements have been signed with Switzerland in order to share in equal parts assets confiscated by Swiss authorities in response to requests made by Italian judicial authorities.

a. The first case concerns the confiscation order issued by the Court of Appeal of Turin against an Italian citizen convicted of drug trafficking. Italy and Switzerland have shared equally assets amounting to **EUR 550.462,00**.

b. The second case concerns a non-conviction-based confiscation order issued by the Court for Preventive Measures in Santa Maria Capua Vetere (Caserta) in the course of the preventive proceedings against an individual suspected of money laundering and of financing the illegal activities of the criminal organization called "*Camorra*". Italy and Switzerland have shared in equal parts assets amounting to **13.8 million EUR**.

c. The third case concerns the execution of a confiscation order of sums issued by the Court of Milan on 12.10.2009, against an individual convicted of money laundering. Italy and Switzerland signed in August 2015 an agreement for the division of values confiscated in Switzerland, for an amount of **5.195.660,85 Swiss francs**. These sums have not been transferred to Italy yet.

B. United States of America

The United States of America transferred to Italy assets seized in execution of an order issued by the Court of Appeal of Bologna, at the request of the Attorney General's Office at Court of Appeal of Bologna, in the criminal proceedings against an Italian citizen. The total amount of the sums is **EUR 1.898.928,42**.

In a different case, the United States of America also transferred to Italy an amount of **USD 1.500.000,00** recognizing that the confiscation in the United States was made possible as a result of the wide cooperation given by the Italian authorities in connection with a criminal proceeding of the Anti-Mafia Prosecutor's Office of Rome.

C. France

In execution of a non-conviction-based confiscation order issued by the Court for Preventive Measures in Milan, France seized an apartment in Cap d'Antibes. Italy and France have agreed on the sale of the property and the allotment between the two States of amounts obtained through such sale.

It is worth noting that, in granting the enforcement of the confiscation order, the French Court of Cassation clearly valued the parallel criminal conviction, finding: that the Italian non-conviction-based confiscation could «in this context be seen as a criminal verdict»; that it was widely proved the illicit origin of the confiscated apartment; and that it would be confiscated under the French law (criminal confiscation).

D. Spain

In execution of a non-conviction-based confiscation order issued by the Court of Rome, Preventive Measures Section, within the prevention proceeding against an Italian citizen, the "Audiencia Nacional" ordered the registration in the "Register of corresponding Properties" of the prohibition of sale of a property in Spain. It was proposed by the Italian Ministry of Justice to the Spanish authorities to proceed with the sale of the property seized and the allotment of sums obtained through the sale.

In a different case, the Spanish authorities have also transferred to Italy amounts seized in execution of a seizure order issued by the Court of Rome in a criminal proceeding.

E. Austria

Italy has recently forwarded to the Austrian authorities a request for international cooperation, requesting the execution of a non-conviction-based confiscation order issued by the Court of Reggio Calabria, related to a prestigious property in Baden.