

NEWSLETTER n. 4

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PhD DEFENCE

LA CONFISCA SENZA CONDANNA DIRITTO VIVENTE EUROPEO: PROFILI NAZIONALI E SOVRANAZIONALI

Samuel Bolis



Samuel Bolis is a member of the research Project ConfiscEU (University of Ferrara). On the 27th of March 2019, Dr Bolis defended his dissertation on Non Conviction-based Confiscation (NCBC), titled *La confisca senza condanna nel diritto vivente europeo. Profili nazionali e sovranazionali*.

The thesis of Dr Bolis starts from a brief historical excursus of NCBC: this type of confiscation rooted in the middle of the XIX century in Italy as a security measure aimed at neutralizing the intrinsically dangerous assets, but it was immediately extended to the price of the crime whose repayment, in the event of extinction, could lead to the commission of new offenses of the same nature.

Over the time, the field of application of NCBC has been extended by both legislators and case-law.. NCBC has been applied in the absence of a formal conviction even when the law provides for mandatory confiscation. It was provided, both in the general part of the penal code for intrinsically dangerous assets and the price of the crime and in the special part of the criminal code (as well as in complementary dispositions) for the products and the profits of the crime.

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The interpretation of the jurisprudence concerning NCBC has been twofold: on the one hand, judges have set limits to this extensive interpretation, for example by requiring a substantial assessment of the materiality and the subjective element of the crime via the adversarial method; on the other hand, the case-law has greatly extended the scope of application of NCBC, allowing confiscation of goods which are available to the offender but owned by third parties, such as legal persons. The analysis then focused to the extended confiscation and to value confiscation. The first measure may be considered as a particular form of confiscation without *post delictum* condemnation which requires a final conviction, but in which the link of pertinence between the thing and the crime is defined presumptively. The second cannot be imposed in the absence of a formal condemnation; however the case-law tends to erode this limit, for example considering as direct confiscation - and not “for equivalent” - the ablation of fungible assets, such as money, in the availability of third parties unrelated to the crime (or the proceeding).

A particular focus was dedicated to the minimum standard of fundamental guarantees in the light of the case-law of the European Court of Human Rights (ECtHR). In fact, NCBC can be in tension with certain fundamental rights and, in particular, with the principle of legality, the presumption of innocence, the protection of private property and the prohibition of *bis in idem*. In this regard, the issue concerning the extension of the *matière pénale* has been highlighted, as the recognition of effective fundamental rights requires that their application is extended to those confiscations that the legislator has labeled as formally administrative but that in reality are substantially criminal. The protection of fundamental rights is subsequently tested in relation to two Italian norms that contemplate a confiscation without condemnation: the urban confiscation and the “antimafia” prevention confiscation. Both regulations – for different reasons as well enumerated by ECtHR respectively in *G.I.E.M. v. Italy* case (2018) and in *De Tommaso v. Italy* case (2017) – require legislative intervention as they are not compatible with some of the principles mentioned above.