

Civil Recovery vs Recovery through Criminal Courts



French Law



Stephen Almaseanu

Ministry of Justice (France)

Division of Criminal Affairs and Pardons



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I. - Unavailability of non-conviction based confiscation (1/5)

1. The conflict with two principles

1.1. The principle of presumption of innocence

- ✓ Article 9 of the Declaration of the Rights of Man and of the Citizen (1789) :
"As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law";
- ✓ Preliminary article of the code of criminal procedure :
"III. Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established. Attacks on his presumption of innocence are proscribed, compensated and punished in the circumstances laid down by statute";



I. - Unavailability of non-conviction based confiscation (2/5)

1. The conflict with two principles

1.1. The principle of presumption of innocence (*continued*)

✓ Article 9-1 of the civil code :

"Everyone has the right to respect of the presumption of innocence".

1.2. The constitutional right of property

✓ Article 17 of the Declaration of the Rights of Man and of the Citizen :

"Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified".



I. - Unavailability of non-conviction based confiscation (3/5)

1. The conflict with two principles

1.2. The constitutional right of property (continued)

- ✓ Article 544 of the civil code :
"Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations";

- ✓ Article 545 of the civil code :
"No one may be compelled to yield his ownership, unless for public purposes and for a fair and previous indemnity".



I. - Unavailability of non-conviction based confiscation (4/5)

2. The French *in personam* approach

- ✓ In France, confiscation is a criminal sanction and may only occur after a verdict of guilt by a criminal court;
- ✓ But French courts recognize and execute foreign non-conviction based confiscations (**Cour de cassation, 13 November 2003, n° 03-80371, case Crisafulli**) : on 17 December 1999, a Tribunal of Milano, Italy, ordered the preventive confiscation of a building located in France. The Italian authorities requested the execution of this decision pursuant to the 1990 Convention of the Council of Europe.



I. - Unavailability of non-conviction based confiscation (5/5)

2. The French *in personam* approach (continued)

The Cour de cassation recognized the value of this decision in the French domestic order, under two conditions :

- i. At first, the evidence establishing that the building was the product of a criminal offence must be sufficient to be assimilated to a criminal decision;
- ii. Secondly, the consequences on the patrimony of the person must be similar to a criminal penalty.



II. – French solutions in order to "follow the money" (1/9)

1. Confiscations of properties owned by other persons than the offender

Confiscations ordered against an offender as an additional penalty may involve properties owned by other persons, whether they had contributed to commission of the offence (the offender having the free disposal thereof, and the owner being in bad faith) or were acquired with the profits from the offence :

- ✓ **Article 131-21 §2** of the criminal code : "*confiscation can be effectuated with respect to all personal or real properties, regardless of the nature thereof, and whether or not jointly owned, that contributed to commission of the offence or were so intended, which the offender owns or has free disposal with respect thereto, subject to the owner's good faith rights*";



II. – French solutions in order to "follow the money" (2/9)

1. Confiscations of properties owned by other persons than the offender (*continued*)
 - ✓ **Article 131-21 §3** : "*confiscation can also be effectuated with respect to all properties that are the subject or the direct or indirect product of the offence, except for properties subject to restitution to the victim*".

Confiscation of these properties is incurred in the cases specified by law or the regulations and, as a matter of law, for criminal offences punishable by imprisonment for more than one year, except for press infractions (**article 131-21 §1**).



II. – French solutions in order to "follow the money" (3/9)

2. Confiscations after a verdict of guilt of relatives

Relatives of the perpetrator (family, other people in regular contact with the perpetrator or other persons involved in a criminal organization) may also be sentenced, and confiscation of their assets may be ordered.

Four offences are useful to achieve such a result :

- ✓ Complicity;
- ✓ Receiving of stolen goods;
- ✓ Money laundering;
- ✓ Inability to justify the income corresponding to one's lifestyle.



II. – French solutions in order to "follow the money" (4/9)

2.1. Complicity

Relatives of an offender can be prosecuted and convicted under the criminal offence of complicity according to **article 121-7** of the criminal code.

Complicity is defined as the fact of knowingly facilitating the preparation of an offence by aiding and abiding the preparation or commission of an offence, or by giving instructions.

2.2. Receiving of stolen goods

Pursuant to **article 321-1** of the criminal code, possession of stolen goods « *consists of receiving, retaining, concealing or transferring ill-gotten items, or acting as an intermediary therein, knowing that the items were obtained by a felony or misdemeanour* ». The criminal offence of receiving is typically applied to relatives of a perpetrator who own property that was stolen or acquired with the profits from a felony or misdemeanour.



II. – French solutions in order to "follow the money" (5/9)

2.3. Money laundering

Article 324-1 of the criminal code provides punishment for :

- ✓ « *facilitating by any means the false documentation of the origin of property or income of the perpetrator of a felony or misdemeanour which has brought him direct or indirect benefit*» (paragraph 1),
- ✓ or for « *providing assistance in investing, concealing or converting the direct or indirect profits from a felony or misdemeanour*» (paragraph 2).

These provisions, which punish simple laundering with five year's imprisonment and a fine of 375,000 euros and allow the confiscation of all the convicted persons' assets, are particularly effective for prosecuting and convicting relatives of offenders who have aided them in concealing or converting unlawfully acquired assets.



II. – French solutions in order to "follow the money" (6/9)

2.4. Inability to justify the income corresponding to one's lifestyle

- ✓ Prior to the Act of 2006, the inability to justify the income corresponding to one's lifestyle was limited to specific offences : inability to justify the income corresponding to one's lifestyle in relation with drug traffickers (former article 222-39-1 of the criminal code), with persons involved in trafficking in human beings (former article 225-4-8 of the criminal code), and criminal associations (former article 450-2-1 of the criminal code).
- ✓ The **Act of 23 January 2006** introduced the general offence of inability to justify the income corresponding to one's lifestyle.



II. – French solutions in order to "follow the money" (7/9)

2.4. Inability to justify the income corresponding to one's lifestyle (*continued*)

- ✓ Since the enactment of **article 321-6** of the criminal code by the Act of January 2006, a person can be convicted because his "*inability to justify an income corresponding to his lifestyle or the origin of a property, while maintaining regular relationships with one or more persons involved in felonies or misdemeanours punishable by at least five year's imprisonment and from which they drew a direct or indirect benefit, or who are the victims of these offences*".
- ✓ This offence is punishable by three to seven years' imprisonment, and allows the confiscation of the convicted person's entire assets. The offence was designed to prosecute relatives of offenders taking advantage of criminal activities without participating to their commission.



II. – French solutions in order to "follow the money" (8/9)

2.4. Inability to justify the income corresponding to one's lifestyle (*continued*)

- ✓ For the prosecution, this offence provides the significant advantage of a simple dual presumption: when a person maintains regular relationships with an offender who commits misdemeanours or felonies punishable by more than five year's imprisonment, and fails to justify the difference between his lifestyle and his official income, the commission of an intentional offence is presumed.
- ✓ The defendant, therefore, bears the burden of proving that his lifestyle can be otherwise explained, and any such explanations must be supported by documents and be credible.



II. – French solutions in order to "follow the money" (9/9)

2.4. Inability to justify the income corresponding to one's lifestyle (*continued*)

- ✓ Hence, in a case judged in the Criminal Division of the Court of Cassation on 24 May 2006, one of the accused, who was unemployed but had bank accounts showing significant credit balances, claimed he had received an inheritance from Algeria. The Court of Cassation affirmed the judgment rendered by the Grenoble Court of Appeal on 22 September 2005, which held "*that his explanation that he inherited funds from his father who died in Algeria [was] unpersuasive since no documentation was provided regarding the estate or the transfer of the money from Algeria to France*";
- ✓ Therefore, in the praxis, legal means of confiscation of criminal assets, even if possessed by relatives of offenders, in fact exist under French law, as confirmed by judicial decisions.



Contact Information

Stephen Almaseanu

Ministry of Justice

Division of Criminal Affairs and Pardons
Office for the fight against organised crime,
terrorism and money laundering

13, place Vendôme
75042 Paris Cedex 01

Telephone : +33 1 44 77 65 70

Fax. : +33 1 44 77 63 27

Email : stephen.almaseanu@justice.gouv.fr