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## **Executive summary**

### *Problem definition*

Legal reform to date has failed to take account of some specific characteristics of high-level corruption, whether in the context of ordinary confiscation or in the context of more novel forms of confiscation, such as extended and civil confiscation regimes. These main characteristics are the following:

- 1) While the goal of high impact high-level corruption is often monetary gain, it is also frequently aiming at maintaining political office and privileged position which don't easily relate to specific proceeds of a crime.
- 2) In countries ridden with systemic corruption, sustaining corrupt deals and relationships are by no means necessarily leading to personal gain for public officials rather represent the necessary minimum for retaining office and trust of colleagues. In such settings formal-legal channels of bureaucratic action are often used for perpetrating corruption while many participants to the deal simply and genuinely follow the orders of superiors. In sum, the State itself is used for corrupt purposes.
- 3) Corruption is often strictly speaking legal either because the corrupt group can craft laws to its own benefit or because corruption is conducted in public offices with ample discretion allowing for preferential treatment of cronies without breaking any law.

### *Main recommendations*

Understanding these peculiarities of high-level systemic corruption, ANTICORRP research provides policy pointers along three main dimensions, each of which plays a fundamental role in supporting asset confiscation as an anticorruption tool. Recognising the importance of supporting institutions calls for asset confiscation reform being combined with promoting reform in other areas simultaneously, as well as furthering political and popular initiatives that create the conditions for effective law enforcement.

**1) Acknowledge that high level corruption is primarily a State crime and design policies with such considerations at the forefront.**

The reliance on traditional legal tools, whether ordinary criminal confiscation or more preventative regimes may be, at worst, misguided, or at best may need to be accompanied by more systemic efforts to reform the State apparatus.

**2) Strengthen the asset confiscation regime only if the independence and meritocracy of judiciary are guaranteed. In their absence, strengthen the judiciary before asset confiscation reform.**

The independence and meritocracy of the judiciary is indispensable for any anticorruption reform to work effectively against members of a corrupt elite. In countries where the judiciary is under the firm control of a corrupt government, relaxing human rights constraints on asset confiscation may just lend corrupt elites more powerful tools to retain power and weaken their political enemies.

**3) Foster clean and fair political competition when laws are corruptly manipulated.**

When corruption is largely legal, it cannot be effectively combatted with legal means and proceeds of corruption cannot easily be confiscated. In such situations, an investigation even if leading to no guilty verdict can supply the public with crucial information about ethically questionable actions. Hence, work on fostering litigation by victims can support political competition which may eventually remove corrupt governments from office inflicting the high costs on them, probably much higher than confiscating the proceeds of corruption.

**4) Support civil society and use international pressure to guarantee the impartiality of asset confiscation work when traditional legal means of implementation are weak.**

When corrupt legislatures and governments have the option of changing legislation in order to ensure immunity from ongoing investigations, ordinary legal instruments are most likely to be ineffective against corruption. In such cases, relying on civil society support and international pressure (e.g. linking EU Funds to maintaining standards of good government) may prove to be crucial for asset confiscation to act as effective anticorruption tool.

## Introduction

Asset confiscation has been gaining increasing popularity as a tool to fight serious forms of crime, including corruption. The underlying logic is that serious crimes are primarily motivated by economic gain and that targeting criminal profits will remove the incentive for perpetuating these activities in the first place and reduce their occurrence within society. We see this kind of ‘virtuous circle’ most clearly in the UN Drug Convention 1998, which opens with a statement that it aims ‘to deprive persons engaged in illicit traffic of the proceeds of their criminal activities *and thereby eliminate* their main incentive for so doing’. The same rationale underscores several other provisions on asset recovery in international and European instruments on serious forms of crime, including the UN Convention against Corruption (UNCAC).

This ‘asset recovery strategy’<sup>1</sup> makes a number of assumptions that are not unproblematic, particularly when it comes to using confiscation as an anti-corruption tool. The first concerns the nature and purpose of corruption. To the extent that it sees corruption primarily through the lens of ‘profit’, it misses crucial aspects of how systemic corruption works such as its aim of trading influence for retaining political power rather than monetary profit strictly speaking or corruption constituting a societal norm making profit only a secondary motivating factor. The second assumption concerns the nature and purpose of confiscation. The underlying justification for confiscation is either that ‘crime should not pay’ (orthodox approach) or, as we mentioned, that it could be a useful tool to prevent serious forms of crime like corruption (modern preventative approach). But both of these justifications appear to assume that the criminal activity in question is external to the state. In the case of high-level corruption, by contrast, what is at stake is not only the State’s ability to deter crime or punish illegal enrichment, but to prevent the State apparatus itself from being used for corrupt purposes. This problem also links to the third assumption which concerns the role of the law as a tool to combat corruption and which raises one of the most substantive challenges to traditional law-based asset confiscation. From a formal perspective, many forms of corruption are strictly speaking legal, such as cases when a corrupt political leader or the political elite specifically modifies legal provisions in order to escape judicial proceedings.<sup>2</sup> In such instances the law

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<sup>1</sup> M Fernandez-Bertier, ‘The Confiscation and Recovery of Criminal Property: a European Union State of the Art’ (2016) ERA Forum.

<sup>2</sup> On Berlusconi’s case against Italian judiciary see for example: Quigley, B. (2011). Immunity, Italian Style: Silvio Berlusconi Versus the Italian Legal System. *Hastings Int’l & Comp. L. Rev.*, 34, 435. Or Dallara, C.

only provided limited prospects for confiscation and its effectiveness would depend on other factors being present such as pressure from civil society or a judiciary that is prepared to take on a more activist role and challenge the corruption of law itself (e.g. blocking legislative change on constitutional grounds).

In the light of this, this policy paper aims to revisit the issue of the confiscation of proceeds of corruption and highlight some of the problems that have characterised anti-corruption efforts in the last few years. Our aim is to show not only that legal asset confiscation reform over the last couple of decades has failed to take sufficient account of the specific dimensions of corruption, but that a successful response to corruption depends on a number of synergies at the political, legal and social levels. To that end, section one first explores in greater depth the systemic aspects of corruption. Section two then moves on to legal reform. It analyses how such reforms have failed to take account of the systemic aspects of corruption and the problems to which this gives rise for anti-corruption efforts. The last section outlines some policy recommendations which could inform policy development and provide a more holistic approach to asset confiscation as an anticorruption tool.

## **1. Understanding Systemic Corruption**

### **(a) Towards a suitable definition of corruption**

Confiscation of proceeds of corruption require a thorough understanding of what corruption means, who are the actors participating in corrupt deals, what sort of organisational goals and resources they have and what kinds of assets may represent their proceeds. The term corruption is used to cover diverse phenomena in many contexts which differ in the prevailing norms of good conduct. Hence, many characterisations of corruption are normatively charged and context-dependent.<sup>3</sup> A common definition of corruption is “*the misuse of public office for private gain*”<sup>4</sup>. This definition clearly sets out that corruption is an activity undertaken by those holding public office and implies that codes of conduct for public officials are well-defined along with an established separation between the public and private spheres. Furthermore, the scholarship based on this definition predominantly

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(2015). Powerful resistance against a long-running personal crusade: the impact of Silvio Berlusconi on the Italian judicial system. *Modern Italy*, 20(1), 59-76.

<sup>3</sup> Johnston, M. (1996). The search for definitions: the vitality of politics and the issue of corruption. *International Social Science Journal*, 48(149), 321-335.

<sup>4</sup> Rose-Ackerman, S. (1978). *Corruption: A Study in Political Economy*. New York: Academic Press.

understood corruption within a bureaucratic context and equated corruption with bribery of public officials. The problem is that a Weberian-type bureaucracy with an underlying rational-legal order may not be present to start with, rendering the definition useless. In addition, it is similarly inadequate to capture corruption in public positions with high degrees of discretion such as members of parliament or officials designing large public investment programmes.<sup>5</sup>

Nevertheless, the other components of the definition are similarly problematic: misuse and private gain. “Misuse” attempts to steer scholars away from excessive legalism, to consider technically legal but otherwise questionable practices. The obvious question, then, is how to characterise the border between use and misuse, the answer inevitably depending on the context. “Private gain” works well in the canonical case of a citizen or firm bribing a petty official to obtain some advantage, as the bribe goes in the official’s pocket, but for many other types of potentially corrupt exchanges, gains may benefit groups spanning through the public-private boundary rather than a single individual. Moreover, when formal bureaucracies are misused by their masters to implement corrupt decisions, it is unclear how implementing bureaucrats following formal-legal orders should be treated: corrupt or non-corrupt. Such situation arises for example when an unnecessary stadium construction contract is awarded to the crony of the local mayor at a hefty price allowing for corrupt rents to be extracted; while the municipal administration duly enforces the contract and makes sure that every invoice is appropriately filed and there is no formal error in the delivered construction project.

A commonly-employed conceptualisation of corruption is the *principal-agent framework* which explains the incidence and organisation of corruption.<sup>6</sup> While this framework informs us of the difficulties faced by a ‘clean’ principal in monitoring her agents in an effort to prevent their deviation to corruption, there are very few such principals in systematically corrupt countries such as some Central and Eastern European or Mediterranean EU Member States. In fact, obtaining public office is often the primary means of extracting rents and conducting corruption.<sup>7</sup> Hence, focusing only on this principal-agent relationship, to the

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<sup>5</sup> Warren, M. E. (2003). What Does Corruption Mean in a Democracy? *American Journal of Political Science*, 48(2), 328–343.

<sup>6</sup> Klitgaard, R. (1991). *Controlling Corruption*. Berkeley, CA: University of California Press.

Lambsdorff, J. G. (2007). *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy*. Cambridge, UK: Cambridge University Press.

Szántó, Z., Tóth, I. J., & Varga, S. (2012). The social and institutional structure of corruption: some typical network configurations of corruption transactions in Hungary. In B. Vedres & M. Scotti (Eds.), *Networks in Social Policy Problems*. Cambridge, UK: Cambridge University Press.

<sup>7</sup> Hellman, J. S., Jones, G., & Kaufmann, D. (2003). Seize the state, seize the day: state capture and influence in

neglect of the networks that support a corrupt principal in her position, misses the key contextual feature sustaining corruption, hence misses the opportunity to combat corruption effectively.<sup>8</sup>

Set in relation to the above understandings of corruption and building on more recent theoretical developments in the study of corruption synthesised by the ANTICORRP project, and also by recognising that systemic, institutionalised forms of corruption can prove to be much harder to prosecute, we will adopt a corruption definition which stems from the notions of equality before the law and impartial disbursement of public goods.<sup>9</sup> Hence,

*corruption is understood as a deliberate deviation from the norm of ethical universalism in order to benefit a particular group or individual in the exercise of public authority.*

This formulation of corruption can only be applied to contexts where universalism as a guiding principle is established throughout the whole society or at least in a given area of state action, that is the expectation of impartial treatment of citizens by the state is established in an area. The potential scope of corruption depends on the scope of the state. This definition of corruption is also closely related to the idea of social orders where open versus closed access to public resources plays a central role.<sup>10</sup> This also implies that corruption is crucially about power and access to the spoils of collective institutions; in other words, one can only talk about corruption if access should be, at least in principle, open to a wide group of actors, but it is limited to a few by breaking some established written or unwritten rules.

As in systematically corrupt environments many specific rules may be biased and constrain open access in spite of a general promise of open access, conflicting rules represent a major challenge to this understanding of corruption. The simple solution is that what matters is whether the general principles of universalism and open access are established irrespective of

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transition economies. *Journal of Comparative Economics*, 31(4), 751–773.

Mungiu-Pippidi, A. (2006). Corruption: Diagnosis and Treatment. *Journal of Democracy*, 17(3), 86–99.

Mungiu-Pippidi, A. (2015). *The Quest for Good Governance. How Societies Develop Control of Corruption*. Cambridge, UK: Cambridge University Press.

<sup>8</sup> Rothstein, B. (2011). Anti-Corruption: The Indirect “Big-Bang” Approach. *Review of International Political Economy*, 18(2), 228 — 250.

<sup>9</sup> Rothstein, B. (Ed.). (2014). *D1.1 State-of-the-art report on theories and harmonised concepts of corruption*. Gothenburg: Quality of Government Institute, University of Gothenburg.

<sup>10</sup> Mungiu-Pippidi, A. (2015). *The Quest for Good Governance. How Societies Develop Control of Corruption*. Cambridge, UK: Cambridge University Press.

North, D. C., Wallis, J. J., & Weingast, B. R. (2009). *Violence and Social Orders. A Conceptual Framework for Interpreting Recorded Human History*. Cambridge, UK: Cambridge University Press.

Rothstein, B., & Teorell, J. (2008). What Is Quality of Government? A Theory of Impartial Government Institutions. *Governance*, 21(2), 165–190.

some lower-order, specific regulations. For example, if a public procurement law backed by an international treaty stipulates competition and open access to tenders for all bidders, which is the case for every EU member state, then using administrative regulations or courts for closing access to otherwise eligible bidders is considered to be corruption. In this respect, we can talk about legal corruption in a narrow sense, but often conflicting with wider European and international legal norms. In a similar vein, if the norm of ethical universalism is not established in a country in general, for example in most developing country contexts, but development funding is expected to be spent in an open and transparent way, then corruption can be established with regards to conditions attached to spending the money rather than the given country's particularistic traditions at large. However, if no violation of access occurs, as for example in many health care systems of Central and Eastern Europe where gratuity payments are pretty much automatic and expected by both parties, the above definition doesn't confer the label of corruption.

#### (b) Types of corruptions

As corruption is a highly diverse phenomenon, its adequate understanding and measurement requires it to be broken down into types or kinds with distinct logics and actor constellations. For the below discussion three characteristics are key: 1) government function affected (e.g. rule-making or implementation); 2) level of government engaging in corruption (e.g. low or high); and 3) degree of institutionalisation (e.g. irregular and occasional or recurrent and institutionalised).

At the broadest level, the exercise of public authority requires to fulfil three functions at a most basic level: make decisions, implement them, and reach consent from the governed (even if it is forced consent).<sup>11</sup> By implication, three government functions can be corrupted: particularistic collective decisions (e.g. selling laws); particularistic implementation of laws (e.g. unfairly favouring a friend's company over others in public procurement); and particularistic consent to public action (e.g. selling one's vote in a local construction permit application procedure).<sup>12</sup> As public action, controls, and forms of corrupt rents differ in each of these cases, it is expected that these three types of corruption would follow divergent logics, hence would need to be analysed with different tools.

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<sup>11</sup> Jann, W., & Wegrich, K. (2007). Theories of the policy cycle. In F. Fischer, G. J. Miller, & M. S. Sidney (Eds.), *Handbook of public policy analysis: theory, politics, and methods* (pp. 43–62). London: Taylor & Francis.

<sup>12</sup> Karklins, R. (2005). *The System Made Me Do It: Corruption In Post-communist Societies*. New York: M.E. Sharpe.



In terms of level of government affected, typically low-level and high-level corruption are differentiated, where the former refers to the actions of street-level bureaucrats who deliver public services such as issuing work permits, while the latter refers to decision making and managerial roles with wider ramifications such as awarding public procurement contracts.<sup>13</sup> While the distinction between these two may not always be clear, they display largely different logics primarily driven by the potential size of rents and different kinds of monitoring mechanisms. High-level or grand corruption usually involves fewer people and larger sums offering greater potential for corrupt organisations to evolve.

In terms of the degree of institutionalisation, there are two extremes along this imaginary scale, one where corrupt transactions occur sporadically between isolated individuals without any expectation of a repeated transaction, and the other one where corrupt transactions are recurrent and highly institutionalised with the expectation of continuation. The point here is not only the number of transactions between actors, but also the nature of those transactions with their established rules, roles, and mutually shared expectations. Highly institutionalised corruption borders with organised crime,<sup>14</sup> may partially appropriate the state (state capture), blur the public-private boundary, and create powerful informal institutions<sup>15</sup> often by manipulating policy implementation such as public procurement<sup>16</sup> and making corruption look legal.<sup>17</sup>

## 2. Legal efforts

Legal reform has been one of the key vehicles through which the ‘asset recovery strategy’ has been pursued. But while such reforms have had the general aim of increasing confiscation levels across Europe, these have for the most part failed to seriously engage with the specific characteristics of corruption discussed in section one. Section 2.1 will first summarise the

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<sup>13</sup> Pardo, I. (2004). Where it hurts: an Italian case of graded and stratified corruption. In *Between Morality and Law: Corruption, Anthropology and Comparative Society* (pp. 33–52). Cornwall, UK: MPG Books.

<sup>14</sup> von Lampe, K. (2008). Organized Crime in Europe: Conceptions and Realities. *Policing*, 2(1), 7–17. <http://doi.org/10.1093/police/pan015>

<sup>15</sup> Grzymala-Busse, A. (2008). Beyond Clientelism: Incumbent State Capture and State Formation. *Comparative Political Studies*, 41(4/5), 638–673.

Hellman, J. S., Jones, G., & Kaufmann, D. (2003). Seize the state, seize the day: state capture and influence in transition economies. *Journal of Comparative Economics*, 31(4), 751–773.

Wedel, J. R. (2003). Clans, cliques and captured states: rethinking “transition” in Central and Eastern Europe and the former Soviet Union. *Journal of International Development*, 15(4), 427–440.

<sup>16</sup> Piga, G. (2011). A fighting chance against corruption in public procurement? In S. Rose-Ackerman & T. Soreide (Eds.), *International Handbook on the Economics of Corruption, Volume Two* (pp. 141–181). Cheltenham, UK: Edward Elgar.

<sup>17</sup> Kaufmann, D., & Vicente, P. C. (2005). *Legal Corruption*.

main direction legal reform has taken over the last few years, showing how it has either focused on strengthening ordinary confiscation law tools for ordinary crimes or treated corruption in the same way as any other serious form of criminal activity. Section 2.2 explores the concrete problems that this approach has created. A final section examines whether the emphasis (or over-reliance) on legal reform as a tool to fight corruption may not be altogether misguided and argues that many of the problems highlighted in this section could be explained (and hence potentially overcome) if corruption, especially high-level corruption, was properly recognised as a form of State crime.

### **2.1. Focus of Legal Reform**

Several countries in Europe have amended their existing laws or adopted new legislation dealing directly with the issue of freezing and confiscation of proceeds of crime in the last few years.<sup>18</sup> Some of these changes were prompted by EU legislation and other international instruments negotiated under the auspices of the UN and the Council of Europe, most recently the new EU Directive on the freezing and confiscation of proceeds of crime,<sup>19</sup> whose implementation deadline expired in October 2016. But they were also informed by a wider underlying idea that ‘better’ or ‘more extensive’ legal tools were part of the answer to tackling low confiscation levels and combatting crime. This seemed to gain particular credence in the 90s and early 2000s after a number of European countries – namely Ireland,<sup>20</sup> Italy,<sup>21</sup> and the UK<sup>22</sup> – introduced more stringent confiscation regimes modelled to a greater or lesser extent on the US regime of civil forfeiture and dispensing, again to varying degrees, with some of the requirements of the criminal process, including the need to link the assets to a particular criminal conviction. This episode also began a wider and controversial debate about whether the criminal law alone was sufficient, or whether ‘better’ and ‘more extensive’ legal tools should be sought *outside* the traditional criminal justice system, under a new paradigm that still remains to be fully defined.

Although it is hard to fully rationalise the developments that have characterised the last couple of decades, legal reform in this field appears to have taken two main directions, each

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<sup>18</sup> E.g. Belgium (2014); Spain (2010 & 2014), Romania (Laws nos 144/2007, 286/2009 176/2010 and 63/2012).

<sup>19</sup> Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU [2014] OJ L138/114.

<sup>20</sup> Proceeds of Crime Act 1996.

<sup>21</sup> E.g. Decree-Law No.306 of 1992

<sup>22</sup> Proceeds of Crime Act 2002.

reflecting two different sets of concerns. A first set of reforms has been directed at strengthening ordinary confiscation regimes. When such powers were lacking, several Member States introduced regimes to enable the preventative freezing of suspected criminal proceeds, as well as the recovery of assets in the possession of third parties or the confiscation of assets of equivalent value. Some procedural reforms also extended statutory limitations for confiscation and strengthened cross-border cooperation in cases involving more than one State. The latter has been distinctively seen as the domain of the EU, whose primary task has been to facilitate the recognition and enforcement of freezing and confiscation orders as between Member States.<sup>23</sup> These reforms do not fundamentally change the character of confiscation as a criminal sanction. Rather, they are seemingly driven by a concern to ensure the effectiveness of confiscation *as a criminal sanction*.

The second set of reforms have been more closely linked to developing asset confiscation as a tool for the prevention and combatting of more serious forms of criminal activity. Although different regimes were put in place in different Member States, three main techniques have tended to characterise this use of asset confiscation.

- (a) The aggravation of the punitive element of confiscation by enabling the confiscation of assets that are not necessarily linked to the crime for which the person was convicted (i.e. various forms of ‘extended confiscation’, which is generally seen as an additional sanction).
- (b) The use of the criminal law to confiscate notwithstanding legal barriers to prosecution, such as death or illness (various forms of ‘criminal non-conviction based regimes’).
- (c) The removal of confiscation from the criminal law altogether (‘civil’ or ‘administrative’<sup>24</sup> non-conviction based regimes and ‘unexplained wealth orders’).

These techniques, which are usually reserved for the more serious forms of crime only, reflect and contribute to a more fundamental process of transformation of the character and purpose of confiscation. Although only (c) formally takes place outside the criminal law, all these techniques mark a move away from a ‘*criminal law model*’ of confiscation, where confiscation constitutes primarily a criminal sanction, with the traditional deterrent function

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<sup>23</sup> To the extent that the EU has been involved in the harmonisation of national legislation in this area, this has tended to be with a view as part of its task of facilitating cross-border cooperation, the assumption being that Member States are more likely to cooperate with one another if their laws are roughly the same. Facilitating cooperation has also been a distinct feature of Council of Europe initiatives, particularly in areas where there is no clear EU consensus, such as the mutual recognition of non-conviction based judicial decisions

<sup>24</sup> The term ‘administrative confiscation’, although far less common than ‘civil confiscation’ is sometimes used to refer to the regime in place in Italy.

attached to them, and towards a '*preventative model*', where confiscation is no longer a sanction attached to a specific criminal conviction.<sup>25</sup> The result is also a move away from a '*personal model of confiscation*', where the emphasis is placed on the criminal guilt of the suspected or convicted criminal (also implicit in the concept of '*actio in personam*' i.e. against the person), towards a '*property or commodity model*' of confiscation, where the emphasis is placed on the illicit origin of the asset (also implicit in the concept of '*actio in rem*' i.e. against the thing).

Extended confiscation and criminal non-conviction regimes have been quite popular, not least because they are now prescribed by EU law for a number of crimes. But the removal of confiscation from the criminal law paradigm has been very controversial in some Member States, particularly those with a strong protection of the presumption of innocence or of property rights.<sup>26</sup> This also illustrates the fact that the move to a preventative property model of confiscation is far from uniform or complete, as many European State remain committed to a traditional criminal law model. The result is that more ambitious legal reforms that aim to go beyond ordinary confiscation are beset by conceptual and normative contradictions that inevitably create obstacles to asset recovery. These difficulties are often expressed in terms of human rights guarantees, including the right to property and procedural safeguards such as the presumption of innocence. But they are also linked to the broader move towards a preventative approach which challenges the nature of the criminal law as a reactive system of punishment.

## **2.2.Problems**

From the perspective of confiscation as an anti-corruption tool both these two trends create difficulties and sit rather unwell with how European States deal with illicit assets outside the context of domestic or European corruption.

### **(a) Proceeds of Corruption and Ordinary Confiscation**

As regards the first set of reforms that have focused on strengthening the ordinary criminal law model of confiscation, the main problem is that the 'asset recovery strategy' was effectively detracted from its original purpose. The renewed emphasis on asset confiscation

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<sup>25</sup> See also to that effect Fernandez-Bertier, above n 1.

<sup>26</sup> E.g. Article 48(2) of the Romanian Constitution.

was not originally driven by a concern to strengthen confiscation as a criminal sanction for *all forms* of criminal activity (criminal law approach focused on all ordinary crimes). Instead, the aim was to use confiscation as a tool for fighting and preventing *serious forms* of criminal activities (preventative approach focused on serious forms of crime only). In that sense, States took advantage of the popularity of asset confiscation as a preventative tool to fight ‘serious’ criminal activity to pass laws and measures that were instead aimed as tightening the repressive arm of the State more generally. Why is this problematic? First, it risks ordinary confiscation becoming abused and more robust laws (mis)-used for purposes other than to fight serious crime. One example is the passing of laws in Denmark and Southern Germany enabling the confiscation of ‘non-essential’ assets and valuable belonging to refugees above a threshold of roughly £1000.<sup>27</sup> Second, public perception that the fight against serious crime is being used to pursue other objectives without proper consultation creates issues of trust and democratic accountability that in the longer term may discredit confiscation efforts in areas like corruption where it could fulfil a valuable function. Third, and more fundamentally, the emphasis on a general overhauling of ordinary confiscation detracted attention away from the use of asset confiscation as a tool to fight corruption. States were able to show that they were taking active steps to strengthen their asset recovery capacities, when in reality the relevant reforms had little to do with fighting the specific crime of corruption. In particular, this triangulation of the issue avoided a more direct engagement with the fact that ordinary criminal law tools and procedures may not be particularly well-suited to addressing the problem of corruption and may need to be adapted or revisited to better fit the characteristics of this type of crime. For example, in several countries, confiscation is optional, which for ordinary crimes may be entirely appropriate, as the judge should arguably have discretion as to whether confiscation is desirable and appropriate in the circumstances of a particular case. Under conditions of institutional corruption, however, such discretion becomes part of the problem, as there is no legal obligation to compel confiscation, allowing official corruption networks to benefit from a *de facto* immunity. As this example makes clear, this is not to say that there is no place for ordinary confiscation regimes to be used in the context of corruption. Ordinary confiscation can and should be available against the assets of a person convicted of corruption. Rather the argument is that (1) the strengthening of ordinary confiscation, which demanded considerable resources and energy, went far beyond the specific crime of corruption or other forms of serious criminal

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<sup>27</sup> <https://www.theguardian.com/world/2016/jan/26/danish-parliament-approves-plan-to-seize-assets-from-refugees>

activity; (2) that this may have counter-productive effects and (3) that it prevented a more focused inquiry into how ordinary confiscation could be improved for corruption related offences.

(b) Proceeds of Corruption and Other Forms of Confiscation

On the other hand, the second set of reforms, which have sought to develop ‘new’ ways to tackle the proceeds of serious crimes and ‘overcome’ some of the limitations of the ordinary criminal law (i.e. the preventative approach) has paid insufficient regard to the specific characteristics of corruption. Several regimes for extended or civil confiscation take an indiscriminate (and inevitable reductive) approach to serious criminality, dealing with a variety of ‘criminal’ activities in much the same way. In the EU, for example, both private and public corruption are included among a list of crimes to which the new provisions<sup>28</sup> on extended and criminal non-conviction based confiscation apply. At no time was there any attempt to tailor the rules to the character and purpose of each of the listed criminal offences.

This indiscriminate approach creates two types of difficulties. First, the relevant regimes inevitably fail to address the difficulties associated with the confiscation of the proceeds of corruption. Regimes that have developed beyond ordinary confiscation usually apply to crimes that generate profit or ‘economic benefit’<sup>29</sup>. However, as we have seen, while it includes monetary gain, high impact high-level corruption is focused on maintaining political office and privileged position which don’t easily relate to the specific proceeds of a crime. Second, such regimes draw no distinction between different actors. Yet, in countries ridden with systemic corruption, sustaining corrupt deals and relationships are by no means necessarily leading to personal gain for public officials but instead represent the necessary minimum for retaining office and the trust of colleagues. In such settings formal-legal channels of bureaucratic action are often used for perpetrating corruption while many participants to the deal simply and genuinely follow the orders of superiors. Thirdly the regimes are premised on the ‘seriousness’ of the crime, which draws no distinction between high-level corruption and low-level corruption, the governmental function that is being affected, or the degree to which the public trust has been abused. Yet, all of these factors could be relevant to establishing the appropriate type or scope of confiscation.

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<sup>28</sup> See Art 3(a) and (f) and Art 5(2)(a).

<sup>29</sup> This is the wording used in the new EU Directive.

Second, if the specificity of corruption was duly acknowledged, the advantages and disadvantages of regimes such as extended or civil confiscation may come to be seen under a different light. On the one hand, some aspects of the preventative paradigm may not be as pressing in the context of corruption. For example, extended or civil confiscation regimes tend to assume that the fundamental problem with ordinary criminal law is the standard of proof, both in as much as ordinary confiscation requires proof of criminal conduct and insofar as it requires proof of the link between the crime and the asset. Yet, for high-level corruption, for example, the gains of corruption may not always be tangible and may instead require greater attention to be paid to what is legally considered to fall within the scope of ‘proceeds of crime’. On the other hand, some of the objections traditionally directed at the preventative method may not find as much salience in the context of corruption. Thus, for example, the misuse and exploitation of State funds may not necessarily give rise to the same issues under the right to property if the relevant assets are conceptualised as ‘public’ rather than ‘private’ property. Similarly, concerns about the presumption of innocence could diminish in the context of high level corruption where the emphasis is not only on individual criminal responsibility but on the abuse of public office and the corruption of the State. In that context, it could be particularly productive if the problem of high level corruption was also addressed more explicitly within the paradigm of public law, as an integral part of ensuring the oversight and accountability of public officials. Evidently, that public law element is lacking in the context of crimes perpetrated by ordinary citizens.

### (c) Beyond (European) Corruption

Thirdly, once placed within the wider context of how European States deal with illicit assets, a number of biases and double standards begin to emerge, which undermine the legitimacy of the confiscation strategy. Although little effort was put into devising a framework that addresses the specific aspects of proceeds of corruption, not all types of serious organised activity were subject to this indiscriminate approach. Following 9/11, for example considerable efforts were put in combatting the financing of terrorism. Thus, in addition to freezing and confiscation, the combating of terrorism has led to a dense risk-based pre-emptive regulatory regime imposing obligations on credit and financial institutions to gather information about their customers, monitor transactions and report suspicious activities.<sup>30</sup> It

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<sup>30</sup> E.g. FATF IX Special Recommendations.

is not the space here to fully explore these kinds of regimes, which have raised considerable controversy, or contrast them with anti-corruption efforts, but two points may be noted. First, the difference in approach between counter-terrorism and anti-corruption suggests that States are more willing to adopt sweeping measures against the terrorist ‘other’ rather than their own public officials. Second, the justification for this differentiated approach does not withstand scrutiny. The traditional justification for this special regime is that terrorism financing is a means to an end rather than an end in itself. But as section 1 has demonstrated, the view that profit is the primary motive of corruption is equally reductive. On the contrary, the instrumentalisation of money for the purposes of asserting or maintaining political control is crucial to corruption in ways that it is not in the context of terrorism, where money – or at least large sums of money – is not a necessary pre-condition to the commission of a terrorist offence.

There also seems to be some double standard between the approach taken on corruption within Europe and on corruption abroad, in relation to which the EU is taking an increasingly hard line, well beyond the legal remit of its powers and authority. In the aftermath of the Arab Spring and the situation in Ukraine and the Crimea, the Council used its powers under the Common Foreign and Security Policy (CFSP) to order the imposition of sanctions on a list of individuals and entities allegedly responsible for the ‘misappropriation of State funds’ in Tunisia,<sup>31</sup> Egypt<sup>32</sup> and Ukraine.<sup>33</sup> Pursuant to Article 215 TFEU, the EU is empowered, if not bound,<sup>34</sup> to give effect to such a CFSP decision in the domain of economic and monetary transactions. A number of Regulations freezing the European funds of the relevant individuals and entities and prohibiting all EU citizens and EU companies, as well as individuals and companies located in EU territory from engaging in any economic activity with those listed. The Court of Justice of the EU upheld the validity of the scheme,<sup>35</sup> but it remains extremely controversial. The argument that assistance to fight corruption is connected to the conduct of the CFSP is extremely tenuous. The result is that the Council’s wider powers and discretion under the CFSP are effectively instrumentalised to circumvent procedures for mutual legal assistance in criminal matters, which are both more cumbersome and do not have pan-European application. Instead, the authorities would need to make a request for assistance in the freezing of funds of individuals and entities currently facing

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<sup>31</sup> [Council Decision 2011/72/CFSP](#) and [Council Regulation \(EU\) No 101/2011](#).

<sup>32</sup> [Council Decision 2011/172/CFSP](#) and [Council Regulation \(EU\) No 270/2011](#).

<sup>33</sup> [Council Decision 2014/119/CFSP](#) and [Council Regulation \(EU\) No 208/2014](#).

<sup>34</sup> Contrast wording of Article 215(1) TFEU with Article 215(2) TFEU,

<sup>35</sup> Case C-220/14 P *Ahmed Abdelaziz Ezz and Others v Council of the European Union* ECLI:EU:C:2015:147.



proceedings on corruption charges. In addition, it is not clear what would happen if the said individual or entity is convicted, as the EU's powers under Article 215 TFEU have never been used to confiscate property. The likelihood is that the State where the property or money is located will confiscate the relevant assets, but that will make the initial involvement of the EU even more difficult to justify.

### 2.3. Proceeds of Corruption, Legal Reform and State Crime

At a more systemic level, finally, one may question the likely effectiveness of exclusively legal solutions to the problem of corruption. Much of international and European efforts over the last couple of decades have been to impose international obligations upon States and to create a web of monitoring bodies and practices, by which States are evaluated and made to comply. FATF, but also GRECO<sup>36</sup> and the European Commission, have increasingly been recognised as 'disciplinary forces', making sure that State adopt the necessary legal structures and institutions to further anti-corruption efforts. However, as we already alluded to in section 1, systemic corruption way too often successfully controls or at least influences crucial parts of the law enforcement apparatus including the policy, prosecutors and the judiciary. Think for example, of the French ex-president Nicolas Sarkozy seeking inside knowledge from a judge on an investigation about his campaign finances<sup>37</sup> or the right-wing Orbán government systematically subverting the judiciary in Hungary<sup>38</sup>. As a result, corruption is often strictly speaking legal either because the corrupt group can craft laws to its own benefit or because corruption is conducted in public offices with ample discretion allowing for preferential treatment of cronies without breaking any laws. In both of these cases – control over the enforcement apparatus or biased laws – general legal prescriptions and monitoring of implementation by international and European bodies have done little to further anti-corruption efforts.

Taken together, these problems suggest that the fundamental problem with a legal 'asset recovery' strategy may be a failure to conceptualise corruption as a State crime, as opposed to a crime carried out by officials or individuals operating outside the State apparatus. The emphasis on corruption as a State crime would explain why the criminal law model and the preventative law model of asset confiscation have both failed to adequately address the

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<sup>36</sup> The process includes a "horizontal" evaluation procedure (all members are evaluated within an Evaluation Round); and an impact assessment ("compliance procedure") designed to assess the measures taken by its members to implement the recommendations.

<sup>37</sup> <http://www.bbc.com/news/world-europe-28103223>

<sup>38</sup> Jakab András-Gajduschek György (eds.) (2016) A Magyar Jogrendszer Állapota. MTA-TK, Budapest.

problem of high level corruption: such corruption is simply not a crime that is pursued by ordinary citizens acting independently of the State. It would also explain why European States seem keener to pursue strong asset confiscation strategy in other areas such as terrorism, as well as to denounce and fight corruption occurring in other countries. Last but not least, a just reckoning with corruption as a State crime would also explain the limitations of the law as an anti-corruption tool: until the State itself is reformed, the law itself will have limited effects in practice. This is not to say that asset confiscation could never help to combat corruption: in a period of transition, for example, it could be used by a progressive regime to confiscate the assets of previous corrupt leaders. Rather, the main point is that, if corruption is primarily viewed as a State crime, the ‘asset confiscation strategy’ alone, without a broader reform of the State apparatus and synergies at the political and social level, is not itself a magic formula against corruption.

### **3. Needs for supporting institutions making law effectiveness against the powerful in a systematically corrupt environment**

The theoretical discussion and legal analysis above highlighted the importance of taking into account the broader context in which corruption exchanges are taking place and carefully assess if a legalistic, criminal-law focused approach is sufficient for using asset confiscation as an anticorruption tool. In short, the prevailing understanding of corruption as a crime underpinning much of the asset confiscation reforms to date should be revised in at least three major ways to better adapt asset confiscation regimes to the realities of corrupt exchanges and corrupt governments: first, while the goal of high impact high-level corruption is often monetary gain, it is also frequently aiming at maintaining political office and privileged position which don’t easily relate to specific proceeds of a crime. Second, corruption is often strictly speaking legal either because the corrupt group can craft laws to its own benefit or because corruption is conducted in public offices with ample discretion allowing for preferential treatment of cronies without breaking any law. Third, in countries ridden with systemic corruption, sustaining corrupt deals and relationships are by no means necessarily leading to personal gain for public officials rather represent the necessary minimum for retaining office and trust of colleagues. In such settings formal-legal channels of bureaucratic action are often used for perpetrating corruption while many participants to the deal simply and genuinely follow the orders of superiors.

Understanding these peculiarities of high-level systemic corruption, ANTICORRP research provides policy pointers along three main dimensions, each of which plays a fundamental role in supporting asset confiscation as an anticorruption tool. Recognising the importance of supporting institutions calls for asset confiscation reform being combined with promoting reform in other areas simultaneously, as well as furthering political and popular initiatives that create the conditions for effective law enforcement.

**1) Acknowledge that high level corruption is primarily a State crime and design policies with such considerations at the forefront.**

The reliance on traditional legal tools, whether ordinary criminal confiscation or more preventative regimes may be, at worst, misguided, or at best may need to be accompanied by more systemic efforts to reform the State apparatus.

**2) Strengthen the asset confiscation regime only if the independence and meritocracy of judiciary are guaranteed. In their absence, strengthen the judiciary before asset confiscation reform.**

The independence and meritocracy of the judiciary is indispensable for any anticorruption reform to work effectively against members of a corrupt elite. In countries where the judiciary is under the firm control of a corrupt government, relaxing human rights constraints on asset confiscation may just lend corrupt elites more powerful tools to retain power and weaken their political enemies.

**3) Foster clean and fair political competition when laws are corruptly manipulated.**

When corruption is largely legal, it cannot be effectively combatted with legal means and proceeds of corruption cannot easily be confiscated. In such situations, an investigation even if leading to no guilty verdict can supply the public with crucial information about ethically questionable actions. Hence, work on fostering litigation by victims can support political competition which may eventually remove corrupt governments from office inflicting the high costs on them, probably much higher than confiscating the proceeds of corruption.

**4) Support civil society and use international pressure to guarantee the impartiality of asset confiscation work when traditional legal means of implementation are weak.**

When corrupt legislatures and governments have the option of changing legislation in order to ensure immunity from ongoing investigations, ordinary legal instruments are most likely to be ineffective against corruption. In such cases, relying on civil society support and international pressure (e.g. linking EU Funds to maintaining standards of good government) may prove to be crucial for asset confiscation to act as effective anticorruption tool.



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## **Project profile**

ANTICORRP is a large-scale research project funded by the European Commission's Seventh Framework Programme. The full name of the project is "Anti-corruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption". The project started in March 2012 and will last for five years. The research is conducted by 20 research groups in fifteen countries.

The fundamental purpose of ANTICORRP is to investigate and explain the factors that promote or hinder the development of effective anti-corruption policies and impartial government institutions. A central issue is how policy responses can be tailored to deal effectively with various forms of corruption. Through this approach ANTICORRP seeks to advance the knowledge on how corruption can be curbed in Europe and elsewhere. Special emphasis is laid on the agency of different state and non-state actors to contribute to building good governance.

Project acronym: ANTICORRP

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