

“The Principles of Patrimony Due Process of Law: The Punitive Confiscation and the Protection of Third Parties Misrelated to the Crime”

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Abstract

The main motive for cross-border organised crime, including mafia-type criminal organisations, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of such crime. However, the effective prevention of and fight against organised crime should be achieved by neutralising the proceeds of crime and should be extended, in certain cases, to any property derived from activities of a criminal nature. Organised criminal groups operate without borders and increasingly acquire assets in Member States other than those in which they are based. There is an increasing need for effective international cooperation on asset recovery and mutual legal assistance. Among the most effective means of combating organised crime is providing for severe legal consequences for committing such crime, as well as the effective detection and the confiscation of the instrumentalities and proceeds of crime. Although existing statistics are limited, the amounts recovered from proceeds of crime in the Union seem insufficient compared to the estimated proceeds. Studies have shown that, although regulated by Union and national law, confiscation procedures remain underused. The adoption of minimum rules will approximate the Member States' freezing and confiscation regimes, thus facilitating mutual trust and

effective cross-border cooperation. The *Stockholm Programme* and the *Justice and Home Affairs Council Conclusions* on confiscation and asset recovery, adopted in June 2010, emphasise the importance of a more effective identification, confiscation and re-use of criminal assets. In this article, we will focus on the recent Directive of the EU Parliament and of the Council on freezing and confiscation of proceeds of crime in the EU (3 April 2014).

Key Words: Confiscation; The protection of third parties unrelated to the crime; the principles of patrimony due process of law

1. Introduction

The main engine for cross-border organized crime, including mafia-type criminal organizations, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime. However, the effective prevention of and fight against organized crime should be achieved by neutralizing the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature.

Based on these premises, on 25 February 2014¹, the European Parliament, called under the ordinary legislative procedure of examination and approval of the European Commission's proposal (as amended by the Council of the European Union), passed a directive² in which, essentially, the confiscation is related to criminal conviction, even if rendered in absentia, envisaging the confiscation in case of disproportion between their property and income, the confiscation of property registered to nominees, asset management by specialized national offices and the destination to social use of goods, subject to the procedures set by individual states.

¹ European Parliament legislative resolution of 25 February 2014 on the proposal for a regulation of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union.

² 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 European Union (OJ, 29.04.2014, L 127/39).

The current EU legal framework regarding the freezing, seizure and confiscation of property consists of the Joint Action 98/699/JHA³, the Council's Framework Decision 2001/500/JHA⁴, the Council's Framework Decision 2003/577/JHA⁵, the Council's Framework Decision 2005/212/JHA⁶ and the Council's Framework Decision 2006/783/JHA⁷.

The Commission's implementation reports, relative to the Framework Decisions 2003/577/JHA, 2005/212/JHA and 2006/783/JHA, show that the existing systems of confiscation and mutual recognition of freezing and confiscation measures are not fully effective. The confiscation is hindered due to the differences between the Member States' legislations, hence the current Directive has to modify and expand the provisions of the Framework Decisions 2001/500/JHA and 2005/212/JHA (Article 14).

2. The principles of patrimony due process of law

According to the European legislator, to effectively contrast the criminal groups engaged in transnational groundwork and a wide range of illegal economic activities, there may be situations, during the investigation, where it is required that the criminal conviction is followed by the confiscation not only of the property associated with a given crime, but also of additional assets, which the judicial authority determines to constitute income from other crimes.

Within the European framework, this approach is defined as "Extended confiscation"; the Framework Decision 2005/212/JHA provides three different sets of minimum conditions, from which Member States may choose, in order to apply this type of extended confiscation.

³ Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime adopted by the Council on the basis of Article K.3 of the Treaty on European Union (OJ L 333, 9.12.1998, p. 1).

⁴ Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7. 2001, p. 1).

⁵ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45).

⁶ Framework Decision 2005/212/JHA of 24 February 2005 on the confiscation of goods, instruments and proceeds of crime (OJ L 68, 15.3.2005, p. 49).

⁷ Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59).

Consequently, when transposing this Framework Decision, the Member States have chosen different options, from which derived different concepts of extended confiscation within national jurisdictions. Such divergence hinders cross-border cooperation in cases of confiscation; from the need to further harmonise the provisions on extended confiscation, by defining a single set of minimum standards, was born the ratio of the Directive 2014/42/EU of 3 April 2014 of the European Parliament and of the Council on freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

The European legislator starts from the consideration that by virtue of a final criminal conviction, it should be possible to confiscate instrumentalities and proceeds of crime, or property the value of which corresponds to such instrumentalities or proceeds. This final sentence, in contrast with an economic- financial transnational crime, may also be pronounced as a result of a procedure in absentia (Article 4, I Section).

Whether the confiscation, based on a final conviction, is not possible, in certain circumstances it should be possible to confiscate instrumentalities and proceeds of crime, at least where such impossibility is the result of illness or absconding of the suspected or accused person. However, in such events of illness and escape, the existence of a procedure in absentia in the Member States should be sufficient to fulfil such obligation (Article 4, II Section). In case of escape of the suspect or the accused, the Member States should adopt every necessary measure, in order to summon to appear the person in question in the confiscation's proceedings or to inform the latter of such proceedings.

Italy has had a significant delay in the implementation of some important European Union's legal instruments, issued on the matter.

In particular, the Council Framework Decision 2006/783/JHA of 6 October 2006, related to the application of the principle of mutual recognition to confiscation orders⁸, has not yet been transposed in the Italian legal system. The rule, having a procedural nature, aimed to the mutual recognition to confiscation orders with a direct coordination between the judicial authorities. The foreseen deadline for the transposition has now expired for over five years (24 November 2008)⁹.

⁸ OJEU L 328, 24.11.2006, p. 59.

⁹ The article 50 of the Law of 7 July 2009, No. 88 containing the "Provisions of obligations arising from Italy to the European Communities (Community Law 2008)" had given the delegation to the Government for the adoption of a legislative decree containing

A delay even more sensible (of over 8 years) is related to the implementation of the Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence¹⁰, whose terms have expired on 2 August 2005. This instrument establishes the rules under which a Member State recognizes and executes on its territory a measure of freezing or seizure, issued by a judicial authority of another Member State¹¹.

In view of this international legal framework, appears evident that the establishment of the extended confiscation must find its own enhancement and compatibility, at first place, within the context of the European legislation. A more incisive expropriation action of the Italian authorities and an increasingly marked transnational dimension of the mafias generates the problem of the frequent relocation abroad of assets of illicit origin. Such phenomena is put in place to allocate the goods away from the preventive expropriation action, when the latter results not supported by appropriate forms of investigative cooperation and judicial assistance on a broader European scene.

In such framework, an issue currently on the focus within the internal debate relates the irrelevance of the undeclared income to the revenue authorities, in order to proof the lawful origin of seized or confiscated properties.

The contrasts of interpretation upon the Article 24 of the Italian Legislative Decree of 6 September 2011, No. 159 (Codex Anti-mafia) entitled "Confiscation", gave input to the issue's remittance by order of 12 December 2013 to the United Sections with a hearing that has been scheduled for 24 May 2014: "If, for the purpose of the judgment on

the provisions necessary to implement that framework decision. The terms of the delegation have expired on December 7, 2010 without the delegation has been exercised. During the XVII Legislature was presented the Bill of March 21, 2013 entitled 'delegation to the Government for the implementation of the Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition of confiscation orders'.

¹⁰ OJEU L 196, 2.8.2003, p. 45.

¹¹ The article 30 of the Law of 25 February 2008, No. 34 on "Provisions for obligations arising from Italy to the European Communities (Community Law 2007)" had given the delegation to the Government for the adoption of a legislative decree containing the provisions necessary to implement that framework decision. The terms of the delegation have expired on March 21, 2009 without the delegation.

disproportion, it is not taken into consideration the tax evasion of proceeds and any other type of illegal activity.”

It should be noted that for the preventive confiscation there was no contest, since the orientation, according to which the questionable person cannot justify the legitimate origin of the good with proceeds coming from tax evasion as well as those proceeds coming through accessions to the various tax amnesties, has been established. In fact, the discussions were set only for the extended confiscation. Moreover, the preventive confiscation can also be applied against a socially dangerous tax evader, addicted to such traffic. It would be arduous to imagine that a socially dangerous person could justify his/her assets, assuming that the goods have been purchased with proceeds from tax evasion. This legislative clarification must, a fortiori, also consider the assumption of extended confiscation, stated in Article 12 *sexies* of Law No. 356 of 1992.

3. The protection of third parties unrelated to the crime

An issue of greatest interest, as well as one of the most sensitive to tackle with, is the protection of third parties. In this regard, the Article 6 entitled “Confiscation from a third party” expressly provides that “*Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.*”

The current national legal framework is quite diverse as, for instance, in the proceedings of prevention third parties are: 1. Holders of real rights on their own thing; 2. Holders of real rights of enjoyment on other’s thing: surface, emphyteusis, usufruct, use, habitation, servitude; 3. Holders of security interests in real property: pledge and mortgage. Under the current legislation, the Court calls, during the proceedings, to intervene, assisted - where they deem it- by a defender, the third parties, who are owners or co-owners of the seized assets and those who have real or personal rights of enjoyment over the seized assets, in order to pursue their claims on certain assets.

One the other hand, the monition of third parties, who enjoy security interests, isn't provided. The latter will be able to perform only defensive deductions during the hearings of credits' verification and, thus, just after many years from the seizure.

In most cases, the third party owners of security interests are banking institutions which have granted a loan to the proposed and transcribed bulky mortgages on real estate (made payable to the proposed or rather to fictitious nominees or constituents of a business complex). One of the critical issues, reported during the destination of properties or properties that are part of a business complex, is the transcription of the mortgages by the banking institutions, in respect of lending, on immovable property. This constraint prevents the destination to social use of such property. Similarly, the omissive prediction of a differentiated term considered for the credits' verification, due to the type of credit claimed by the third, creates major difficulties for the continuation of a company under seizure, both any eventual payment of the remaining loan's instalments.

In principle, the European Directive devotes ample space to profiles of procedural guarantees of those involved in the process of confiscation. The article 8 expressly provides that: *"Member States shall take the necessary measures to ensure that, in order to safeguard their rights, the persons affected by proceedings provided in this Directive enjoy the right to an effective remedy and to a fair trial"*; specifying in the subsequent paragraphs that: *"Without prejudice to Directive 2012/13/EU and Directive 2013/48/EU, individuals, whose assets are subject to proceeding of confiscation, have the right to an attorney throughout the entire procedure of confiscation, in order to exercise its rights with respect to the identification of instrumentalities and proceeds. The interested individuals are informed of this right.*

In proceedings under Article 5, the concerned person has the effective possibility of contesting the circumstances of the case, including the specific facts and the available evidences, based on which the assets in question are considered as derivatives from criminal conducts".

In species it is worthy of note, for the foreseeable difficulties of an internal application, the rule dictated by the last paragraph of Article 8, providing that: *"If, as a result of a crime, there subsist rights to the compensation of the victims against the person subject to an order of forfeiture under this Directive, the Member States shall take the necessary measures to*

ensure that the confiscation procedure does not prevent to such victims to assert their rights."

With respect to the transposition, the Member States shall bring into force the legislative, regulatory and administrative necessary provisions, in order to comply with the present Directive by October 4, 2015 (Article 12).

4. Conclusion

Nowadays the question of the punitive confiscation and the protection of third parties unrelated to the crime is one of the most actual object into the international scientific discussion on the table of legal professions, as we can see at last important national meeting on the 29 of the October 2015 at Cagliari (Italy), titled "Criminal Justice of prevention"¹².

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