

Regional conference

COOPERATING AGAINST CORRUPTION

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International cooperation for purpose of confiscation

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1.

Two months ago the European Commission has called on 14 EU Member States to make sure cross-border crime doesn't pay ¹.

A very strong appeal was launched by the Vice-President Viviane Reding, EU Commissioner for Justice, Fundamental Rights and Citizenship, stated that:

"The unwillingness of many Member States to comply with Council Framework Decisions, to which they all have agreed, makes it clear – once again – why the EU's area of justice needed the Lisbon Treaty. In future, we must have clearer rules, more consistent application and enforcement and – above all – trust between justice systems. In the meantime, I call on Member States to put the anti-crime rules in place so that the justice authorities can work together and effectively attack criminals' ill-gotten gains."

She was referring, in particular, to the *Council Framework Decision 2006/783/JHA90* allow Member States to obtain the confiscation of criminal assets abroad, the norms of which – *inter alia* - allow Member States to obtain the confiscation of criminal assets abroad.

As of February 2010, didn't have implemented these regulations, yet.

The EU rules should allow justice authorities to ask their counterparts in other Member States to enforce confiscation orders.

A political lack of interest on these issues, maybe joined to a lack of trust in other country's justice systems, all that still make it hard to attack criminal assets.

¹ Reference: IP/10/1063 Date: 23/08/2010

The EU Commissioner recalled that in 2010 the Italian authorities confiscated €60 million of Mafia assets; while in the UK, £92.3 million was seized from an international crime ring with property in Dubai.

2.

2.a) The international Agreements that our Countries have freely signed on these issues are numerous; it deals with Treaties or Conventions that bind our States to introduce in their legal systems norms aimed to the seizure and the confiscation of assets, as a form of sanction for some crimes, as well as to recognise and implement the requests of international cooperation by other States, aimed to the identical result: the confiscation.

At an international and regional level as well.

2.b) As regards the international level, the widest and most important act we must recall is the United Nations Convention Against transnational Organized Crime and its Protocols².

It can be considered as a sort of paradigm, a virtuous model for the further agreements, the ones having a Regional dimension.

The Palermo Convention contains a very wide range of regulations.

Most of them are aimed to introduce several administrative mechanisms of control of the economic transactions, on the name of the principle of transparency.

While as far as criminal aspects are involved, the Convention contains the following norms.

² United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, signed in Palermo in 2001.

First of all, we must recall article 2, which defines the legal terms employed, such as the notion of:

- Organized criminal group³,
- Proceeds of crime: "any property derived from or obtained, directly or indirectly, through the commission of an offence"
- Freezing or seizure⁴,
- Confiscation⁵.

But there are similarly important regulations contained in:

- Article 6. Criminalization of the laundering of proceeds of crime
- Article 8. Criminalization of corruption

Very important regulations can be found in Article 10, as regards:

- the liability of legal persons⁶.

It is worth to quote some contents of article 12, the one related to *Confiscation and seizure*.

In paragraph 1.a) it states that the confiscation shall include not only the proceeds of crime but – as an alternative – "property the value of which corresponds to that of such proceeds".

Here we are in front of the confiscation of equivalents.

And an identical prescription is repeated in the successive paragraphs of this Article 12:

³ "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;"

⁴ "temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority".

⁵ "which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority".

⁶ "Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention". An analogous norm is present in Article 18 of the of the Council of Europe Criminal Law Convention on Corruption, by 1999.

3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

We must quote par. 7 and the faculty given to the States of introducing norms which in this field inverse the burden of the proof as regards the lawful origins of the assets the persons in question own or anyway dispose of⁷.

And finally there par. 8, according to the which “The provisions of this article shall not be construed to prejudice the rights of bona fide third parties”. This being the principle, it implies its opposite; that is to say, the “no bona fide thirds” any protection. Any situation of apparent ownership, propriety, being the “intermediating person” in full consciousness of that, implies the application of the confiscation.

Hitherto I was analysing the most important norms the States are bound to introduce in their legal system in order to dispose of the particular tool represented by the confiscation, for combating the organised crimes at a national level.

Now I will try to sketch the analogous duties as regards the international juridical cooperation in the field of the confiscation, as regulated by the Palermo Convention.

⁷ “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”.

It deals of the norms contained in Article 13 of the Convention, which reads” *International cooperation for purposes of confiscation*”.

The duties of a State requested for cooperation, as regards the confiscation of any asset situated in its territory, are the following:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

2. ... shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities ... for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party”.

It is interesting to quote Article 18 of the Palermo Convention. It deals with the Article that describes the contents and the modes of the loyal cooperation; and in particular must be underlined Par. 4 that refers to the “spontaneous transmission of information”, quite suggesting that “...*the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.*”⁸

⁸ It is a form of new and strengthened cooperation that can be found in several International Agreements on judicial cooperation in criminal matters, among others: article 28 of the Council of Europe Criminal Law Convention on Corruption, by 1999; and article 7 of the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

A real and important novelty introduced by the Palermo Convention in the relationships between the States is represented by Article 14.

In principle, the sorts of the assets, once confiscated, is something that remained out of the attention. They become a public property and it is to the relevant organs of the concerned State to decide what is to be done about their destination.

Article 14 introduces some legal provisions in the field of the “*Disposal of confiscated proceeds of crime or property*”.

The introducing statement is that it is to the “confiscating State” to decide how these goods must be disposed of.

But Paragraph 2 immediately gives space to an intervention by the requesting State, by providing for that the “confiscating State” can ..., *if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State*”, and that in view of a particular purpose: allow the requesting State to “*give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners*”.

2.c.

The regulations I have tried to analysed in paragraph 2 were substantially recalled by the United Nations Convention against Corruption⁹.

It is worth to quote Article 52 of this Convention, which regards the “*Prevention and detection of transfers of proceeds of crime*”. The States shall take measures aimed “*to determine the identity of beneficial owners of funds deposited into high-value accounts ... sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates*”. To this end, in particular, the States shall “*require financial institutions within its jurisdiction to verify the*

⁹ Adopted by the General Assembly resolution 58/4 of 31 October 2003.

identity of customers ...; scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities”.

Quite similar regulations are present in the The 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. And in the September 2003 UN Convention against Transnational Organized Crime.

All these instruments widen the scope of the money-laundering offence by stating that it should not only apply to the proceeds of the respectively concerned criminal activities, but should also cover the proceeds of all serious crimes. All these Conventions urge States to create a comprehensive domestic supervisory and regulatory regime for banks and non-bank financial institutions, including natural and legal persons, as well as any entities particularly susceptible to being involved in a money-laundering scheme.

And finally I want to recall the contents of Article 5 of the 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

It regulates the *“Proceeds or property confiscated by a Party”*.

We can find here the same guide-lines we considered while commenting the Palermo Conventions. The States are invited to make a specific use of the confiscated goods, in particular in cases of judicial cooperation. They should conclude agreements on:

“i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose”.

3.

This being a very essential sketch of the norms contained in these international agreements, I will try to examine at least some analogous norms as issued at a Regional level, by the European Union.

At a general level, the most important text is represented by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union¹⁰. But, because of its general character, the sole reference we find to the issues we are discussing here is represented by Article 8 which regards the Restitution and states:

“At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners”.

More interesting is *the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.*

In Article 2 there are the definitions¹¹.

¹⁰ Adopted by the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union.

¹¹ (c) "confiscation order" shall mean a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property;

(d) "property" shall mean property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the court in the issuing State has decided:

(i) is the proceeds of an offence, or equivalent to either the full value or part of the value of such proceeds,

or

(ii) constitutes the instrumentalities of such an offence,

or

(iii) is liable to confiscation resulting from the application in the issuing State of any of the extended powers of confiscation specified in Article 3(1) and (2) of Framework Decision 2005/212/JHA,

or

(iv) is liable to confiscation under any other provisions relating to extended powers of confiscation under the law of the issuing State;

(e) "proceeds" shall mean any economic advantage derived from criminal offences. It may consist of any form of property;

And it must be noted that it is considered as a confiscation order imposed by a Court, relevant to the ends of these Framework Decision, not only a “final penalty” but a “measure” as well. **Thus we can say that all these norms regard also the “security measures”, whether and when issued by a Court.**

The norms contained in the Framework Decision apply to a very wide list of crimes¹².

(f) "instrumentalities" shall mean any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

¹² - participation in a criminal organization,

- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorized entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organized or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,

And, here too, the sorts of the confiscated goods find a regulation, a very complicated regulation:

“Article 16 - Disposal of confiscated property

1. Money which has been obtained from the execution of the confiscation order shall be disposed of by the executing State as follows:

(a) if the amount obtained from the execution of the confiscation order is below EUR 10000, or the equivalent to that amount, the amount shall accrue to the executing State;

(b) in all other cases, 50 % of the amount which has been obtained from the execution of the confiscation order shall be transferred by the executing State to the issuing State.

2. Property other than money, which has been obtained from the execution of the confiscation order, shall be disposed of in one of the following ways, to be decided by the executing State:

(a) the property may be sold. In that case, the proceeds of the sale shall be disposed of in accordance with paragraph 1;(b) the property may be transferred to the issuing State. If the confiscation order covers an amount of money, the property may only be transferred to the issuing State when that State has given its consent.”

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- arson,
 - crimes within the jurisdiction of the International Criminal Court,
 - unlawful seizure of aircraft/ships,
 - sabotage.

This Framework Decision was preceded by the *Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.*

It is interesting to quote it because there is an explicit provision for the **confiscation of equivalents**¹³.

4.

Some conclusive remarks.

I will try to better explain the reasons why I was underlining the issue of the confiscation per equivalent and, above all, what I defined the “sort of the confiscated goods”.

The criminal organizations can accept the risk of the arrest of their representatives, there including the most important ones. No one is indispensable, all the members can be replaced.

The loss of the assets is a far less simple consequence.

This is the importance of the confiscation as an effective sanction.

To these ends the confiscation by equivalent is a very positive tool.

And beside that, as a functional complement, there are the several international Agreements related to the Money Laundering, the notion of “suspicious transaction” I was evoking.

¹³ Article 3 - Value confiscation

Each Member State shall take the necessary steps to ensure that its legislation and procedures on the confiscation of the proceeds of crime also allow, at least in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders.

But, while using the words “sort of the confiscated goods”, I was referring to a different order of issues.

There is the “dirty economy”, the proceeds of the organized criminality are reinvested, they become industries, shops, real estate.

These goods become a further tool for the control of the economy, for the control of wide parts of the territory of our Countries.

The loss, the patent loss of these “visible signs of presence”, represents a shame, an identically visible loss of image.

Thus they tend to recover these assets, through the intervention of some broker dummy they try to re-buy what they consider as their own properties, the tool of their presence in the economy, in a territory.

While mentioning all that, I am referring to concrete experiences.

On the basis of these experiences, I think that the States, the Community of the States, must consider these risks. And act accordingly.

Article 14 of the Palermo Convention highlights the issue of the sort of the assets confiscated thanks to a judicial cooperation. And invites the States to use these goods in order to *“give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners”*.

The institutional and cultural discussions can, starting by the indications contained in this norm, try to study different forms of re-use.

The assets could be entrusted to public Entities for their institutional tasks or to Non Governmental Organisations, under a public control.

Belgrade – Rome, October 2010