DIRITTO PENALE CONTEMPORANEO

ON INSTRUMENTS ADOPTED IN THE AREA OF FREEZING AND CONFISCATION

A critical view of the current EU legal framework

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1. Foreword

The state of constant evolution of EU legal framework on freezing and confiscation of criminal assets shows how the adoption and application of property sanctions and measures aimed at countering crime represent a highly controversial issue, which actually affect the asset recovery process in all its phases.

The 'modern forms of confiscation', devised with a view to arresting or at least restricting that most alarming feature that taints economy and is represented by criminal associations (and the relationships they have set with the business world), are marked by characteristics now completely different from those set forth by the legislators in the past.

In the difficulty and sometimes impossibility of establishing with certainty the precise matching of the proceeds of crime with the single crime, solutions are being spread aiming at reconsidering the object of confiscation itself (in terms of its extension or its identification 'for equivalent value'), the "demonstrative character" of its requirements and the simplification of the burden of proof incumbent on the judicial authority. Even the aims of the instrument are modified: not just simple 'prevention', but also real and actual punishment in all respects.

In this context, Member States' laws still show a certain degree of heterogeneity and complexity, especially given the difficulties arising from domestic constitutional, substantive and procedural norms and also supranational parameters[1].

[1] As to ECHR cases, see for instance Agosi v. The United Kingdom (24/10/1986); Salabiaku v. France (07/10/1988); Raimondo v. Italy (22/02/1994); Air Canada v. The United Kingdom (05/05/1995); Welch v. The United Kingdom (26/02/1996); Philips v. The United Kingdom (05/07/2001); C.M. v. France (26/06/2001); Van Offeren v. The Netherlands (05/05/2007); Geerings v. The Netherlands (01/03/2001); Saccoccia v. Asutria (05/07/2007); Arcuri and Others v. Italy (05/07/2001); Butler v. The United Kingdom (27/06/2002); Dassa Foundation and Others v. Liechtstein (10/07/2007); Sud Fondi S.r.l. and Others v. Italy (30/08/2007); Grayson and Barnham v. The United Kingdom (23/09/2008); Ismaylov v. Russia (06/11/2008); Grifhorst v. France (26/02/2009); Rantsev v. Cyprus and Russia (07/01/2010); Silickiene v. Lithuania

Thus, 'classifying multiplicity' coming up from the different domestic legislations, and finding a fair and consistent balance between efficiency and protection of rights are the challenges of the EU legislator.

Of course, it is difficult to say whether EU law is on the way to achieve these goals: at the current situation, one could reasonably say that progressive but significant improvements, also in respect of the compliance with fundamental rights, are sided with ambiguity and incompleteness.

2. Confiscation as a "false friend"? On differences among Member States' legislation and their impact on asset recovery procedures

As briefly considered above, the overview of the European scenario easily discloses how the very same term encompasses tools whose scope, legal basis and in the end functions may be very different.

Such a variety, if grasped within each single national legal system may, though not without difficulties, as shown for instance by the Italian and German examples, be overseen and certainly settled; but, if projected into supranational level and into the level of the relations among States, it risks conveying the idea that the very same term "confiscation" is dubious, nearly representing– if I may say so – a sort of '*false friend*', which may threaten the common language, foster mistrust and render judicial cooperation complicated in this sector.

"False friend", in the sense that there are still divergences among MS on fundamental questions such as: a) what assets should be liable to confiscation; b) how to confiscate and recover; c) what to do with the recovered assets.

Giving a quick glance to MS' regime, one note that, for instance[2]:

1) value confiscation is existing everywhere except in few States;
2) some States provide for extended confiscation in general, other only for specific crimes;
3) Member States seem to treat standard of proof, especially in extended confiscation, very differently: Member States adhering to the common law tradition employ a 'balance of probabilities' standard routinely in civil cases, whereas many MS adhering to civil law tradition do so less regularly;
4) many MS do not have the ability to separate confiscation proceedings from underlying criminal proceedings;
5) gaps are existing in implementation of mutual recognition obligations provided for by Framework decisions of 2006, 2005 and 2003;
6) finally, enforcement of foreign non conviction-based orders is yet not possible in several MS.

(10/04/2012); Woolley v. The United Kingdom (10/04/2012); Varvara v. Italy (29/10/2013); Paulet v. United Kingdom (13/05/2014).

[2] Source: *Study for an impact assessment on a proposal for new legal framework on the confiscation and recovery of criminal assets*, RAND Europe, 2012, 223 et seq.

The consequences are striking of course at a practical level and mark the gap between the criminal profit and what effectively acquired by the Authorities, as pointed out in most recent reports (official and not). As far as insufficient recovery is concerned in particular, a technical report delivered to European Commission on 2012 do support the notion of a problem. For instance in UK and Italy reliable data show the vast majority of criminal wealth still goes undercovered[3].

3. The approximation of States' practices through the "underground tunnel" of judicial co-operation: the mutual recognition as a Trojan horse?

The differences among domestic legislations are sometimes overcome through interpretations and efforts which lead to mutual recognition of the confiscation powers and their results. It may happen, and it happens in the sectors to which we are addressing our attention, that judicial cooperation, also in light of the practical solutions pinpointed by the single operators, single national institutions and Eurojust, end up with representing a hidden channel, but no less efficient to harmonise legal systems, at least *de facto*, in their functioning.

Interesting cases deal precisely with one of the most difficult instrument to grasp, that is the non-conviction based confiscation (hereinafter NCB confiscation). These examples show also an important distinction between NCB confiscation *stricto sensu* (with no direct link to a conviction) and confiscations based on different previous convictions (or in ay case where proceeding with a view to prevention is ancillary to a criminal proceeding).

In particular two procedures – both involving Italian judiciary Authority - come up: the first instituted with France and the second with Switzerland.

The first case is well-known.

It is a decision delivered more than ten years ago by the Court of Appeal of Aix en Provence, authorising the execution in France of a decree by the Court of Milan ordering confiscation (restraint) of a real estate in Antibes and regarded as the product of the money-laundering deriving from drug trafficking offences. The French Court of Cassation regarded that the conditions for the execution of the confiscation required by the 1990 Strasbourg Convention were satisfied; in particular, the following circumstances: a) the decision on the confiscation was final and enforceable; b) the assets would have been subject to confiscation also under French law (under similar conditions); c) no violation of domestic *ordre public* occurred. In the case at issue, French judges were convinced to grant the measure, notwithstanding the fact that the execution of a confiscation ordered from a foreign country is allowed by French law

[3] See, *Study for an impact assessment on a proposal for new legal framework on the confiscation and recovery of criminal assets*, above at fn.1; also, the reported outcomes of open-ended Intergovernmental Working Group on Asset Recovery at https://www.unodc.org/unodc/en/treaties/CAC/working-group2.html.

only in the framework of criminal proceedings *stricto sensu*, because the preventive measure on the property had been ordered against a person already convicted in parallel proceedings for criminal association aimed at drug trafficking and that the said measure was against proceeds of crime in respect of which a conviction had already been pronounced[4].

The second case, though it regards the Swiss Confederation, is interesting in that it takes into account some considerations made by the requested authority, useful to understand if and in which terms the preventive measure can be regarded as compliant with the procedural and substantial guarantees recognised by the ECHR.

An order issued by the Swiss Federal Court has recently granted a request for assistance submitted by the Office of the Public Prosecutor attached to Court of Milan aimed at gaining, for restraint purposes, information and documents on the bank account of the person under investigation for being a member of a criminal association named '*ndrangheta* and subject to restraint measures after being located in Switzerland. According to the interpretation of the Swiss judges, preventive confiscation would be criminal in nature, as it is a measure adopted in the framework of proceedings somehow linked to the criminal one and dealing with goods representing the product or the instrument of the offence. Such a measure, typified by significant correspondence with the counterpart instrument provided for by Swiss law, would be compliant with the principles and fundamental guarantees established by the ECHR[5].

4. The 2014 Directive and relevant background. Main criticalities: modern confiscation' vis-à-vis' fundamental principles.

Cooperation between MS presupposes confidence that the decisions to be recognised and executed will always be taken in compliance with fundamental rights. So the better is the balance between efficiency and fundamental rights, the easier is the cooperation itself and this, of course, irrespective to the fact that freezing or confiscation are considered, in the single MS, as sanctions or other type of measures.

To what extent did the 2014 Directive effectively succeed in achieving the targets of harmonisation and granting at the same time the balance between the need of countering crime and protecting rights?

Let us proceed from an overview of the ensuing instruments applied in this area, until the entry into force of the directive to be examined, taking into account that this framework is to be referred to not only to better understand the background where the instrument approved last year originated from, but also because this last

[4] Cour de Cassation (criminal chamber), 13 November 2003 (nr. 03-80.731).

[5] Tribunale federale penale, II Sezione, sentenza del 21 gennaio 2011, http://www.penalecontemporaneo.it/upload/Trib.%20penale%20federale%20svizzero,%20sez.%20II,%2021%20gennaio%202011,%20%20Pres.%20Cova,%20ric.%20A..pdf

instrument does not replace the previous ones which keep on remaining in force for different purposes.

Before the 2014 directive, the Union had adopted a series of instruments in this field[6]:

- Joint Action 98/699/JHA, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime;

- Framework decision 2001/500/JHA, which obliges Member State to enable confiscation, to allow value confiscation where the direct proceeds of crime cannot be seized and to ensure that requests from other Member States are treated with the same priority as domestic proceedings;

- Framework decision 2003/577/JHA, which requires mutual recognition of freezing orders for a long list of crimes punishable by 3 years imprisonment, or if the 'dual criminality' principle is satisfied;

- Framework decision 2005/212/JHA, which harmonises confiscation laws. Ordinary confiscation, including value confiscation, must be available for all crimes punishable by 1 year of imprisonment. Extended confiscation must be available for certain serious offences, when "committed within the framework of a criminal organisation";

- Framework decision 2006/783/JHA, which mirrors these provisions for the mutual recognition of confiscation orders

- Council decision 2007/845/JHA on the exchange of information and cooperation between Asset Recovery Offices.

Notwithstanding the adoption of a wide variety of measures, the legal tools in their entirety do not seem to achieve the targets set. Quite the contrary.

This is due in part to some loopholes in the European legislation itself, where sometimes the lack of clarity in respect of the identification of targets and the identification of the means to achieve them (as is the case for the so-called extended confiscation, for instance), derives in part – it cannot be denied – from a certain slowness of Member States in implementing the aspects to be harmonised as required by the framework decisions.

[6] As to international conventions, see the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990); the UN Convention against Corruption (2003); the UN Convention against Transnational Organized Crime (2000).

Some criticalities are still unresolved especially in respect of the safeguard of fundamental rights.

Therefore, while the so-called ordinary confiscation (*ordinary conviction-based confiscation*) is widely recognised and perceived as a legitimate limitation to property, if applied in compliance with fundamental procedural safeguards, the so-called extended confiscation (*extended confiscation*) raises some perplexities, and above all the so-called *non-conviction based confiscation* is still surrounded by a sort of "ill fame".

According to some present interpretations, the so-called preventive confiscation is not only inconsistent with domestic legal systems, but also with the fundamental principles enshrined in the Charter and the European Convention of Human Rights.

In view of the fact that they are not necessarily connected with a conviction, these measures cannot be easily regarded as a necessary and proportionate limitation to property; and in any case they give rise to the consistency with the presumption of innocence (this in particular for the so-called non-conviction based confiscation) and with the principle of legality (also in its corollary of non-retrospective application, according to the wording of Article 7 of ECHR) for what concerns in particular, but not only, the so-called extended confiscation.

No less critical is the third party confiscation which is regarded by some difficult to justify in light of the principle of proportion (if not even in conflict with the said principle in some cases).

In truth, also for what concerns the 'ordinary' confiscation, problems may arise where an all-embracing notion of 'profit' is considered; in such a case, the instrument risks becoming an almost "omnivorous" measure including elements of compensation, refunding and finally, of real and actual punishment. In this respect, it has not to be ignored, apart from the most serious offences taken into account by the European instruments, that there could be the phenomena of associating confiscation, as is the case of confiscation 'for a corresponding value', with monetary sanctions, with reference to other criminal types of conduct regarding matters to be harmonised (for instance economic crimes). Under these circumstances, the problem of the double imposition of the sanction may come up (to all extent "property sanction") with outcomes which are likely to be inconsistent with the *non bis in idem* principle, so much so nowadays after the late positions adopted both by the ECHR and the Court of Justice of the Union.

5. Overview of the some critical issues arising from the 2014 Directive.

Controversial issues in respect of the possible opposition with some fundamental principles, (sometime) lack of clarity in the legal instruments of the Union, slow pace in the implementation process by Member States are the basic

coordinates within which the essential choices of the directive approved in last year's April were identified as fundamental options and subsequently adopted[7].

Among the various issues raised in the study of this directive – issues in the matter of implementation, transposition and of course harmonisation – I would dwell only on those I consider interesting for what concerns their practical application.

- It is common knowledge that under the 2005 Framework Decision, specifically under Article 3, paragraph 4, States had the possibility to resort to procedures other than criminal ones, and in any case confiscation was required to be based on a judgment of conviction, even though such judgment could have also been handed down in separate proceedings.

To what extent is this still an option in light of the 'new' 2014 directive?

It could be maintained that cases of "non-conviction based confiscation" shall be assigned to an area where the national power of discretion still prevails, as the express provision of Article 1 of the Directive suggests.

As a matter of fact, even if this interpretation is correct, cases of 'non-conviction' led confiscation should not be ruled out both considering the limited cases set forth in the instrument and on the basis of the 2005 Framework Decision that is still operational.

Both solutions would clearly not allow for the establishment of a European model of non-conviction based confiscation with a broader meaning as is the case for example for the Italian system, but in any case they would be a way to further harmonise and familiarise with cases of deprivation of the exercise of property rights, if actually used in practise by States.

With a view to a possible step forward, it is essential to go beyond a shallow reading of the interpretation given for this form of confiscation by European case-law, particularly case-law by the European Court of Human Rights.

It is true that the Court of Strasbourg has established on a number of occasions that some forms of confiscation applied by national authorities did not comply with the Convention, even when no conviction was imposed.

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[7] MAUGERI, *La Direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato dell'Unione Europea tra garanzie ed efficienza: un "work in progress"*, http://www.penalecontemporaneo.it/upload/1410939866MAUGERI_2014c.pdf; BALSAMO, *Il "Codice antimafia" e la proposta di direttiva europea sulla confisca: quali prospettive per le misure patrimoniali nel contesto europeo?*, http://www.penalecontemporaneo.it/upload/1342707610Articolo%20Balsamo%20confisca.pdf; F. MAZZACUVA, *La posizione della Commissione LIBE del Parlamento europeo alla proposta di direttiva relativa al congelamento e alla confisca dei proventi di reato*, http://www.penalecontemporaneo.it/materia/3-/35-/-/2424-la_posizione_della_commissione_libe_del_parlamento_europeo_alla_proposta_di_direttiva_relativa_al_congelamento_e_alla_confisca_dei_proventi_di_reato/
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0178+0+DOC+XML+V0//IT

As shown by these cases, the European Court of Human Rights actually refrained from asserting a principle of definite incompatibility between confiscation and a judgment of acquittal. On the contrary, the Court clarified that, even in case of acquittal, punitive property measures should however be adopted once a person has substantially been found guilty of a fact or such fact has been ascribed to the perpetrator, as is the case for those decisions by which an offence is established to be statute-barred.

On the other hand, it is common knowledge that the European Court has provided a significant endorsement for the property measures applied through an *in rem* procedure that are qualified as forms of regulating the use of assets in compliance with the public interest, and therefore they fall within the scope of Article 1, paragraph 2 of Additional Protocol no. 1 to the ECHR.

- Another outstanding point covers the so-called *extended confiscation*, which is considered by the 2014 Directive.

It is common knowledge that in most domestic systems provision has been made for the so-called extended confiscation essentially for purposes of prevention, more or less explicitly stated. Suffice it to think for example of a type of confiscation under Article 12-*sexies* of Legislative Decree 306/1992 or confiscation with a view to prevention under Legislative Decree no. 159/2011 in the Italian system; or *comiso ampliado* as per Article 127 of the *código penal* or *erweiterter Verfall* in terms of § 73d *StGB*.

In any domestic case-law (and this is also true for the European Court of Human Rights) more or less explicit attention had to be devoted to problems connected to the legal nature of such types of confiscation, including the standard of proof, their aim and the restrictions to judicial authorities' powers of inquiry, particularly with respect to the criminal origin of the assets that may be confiscated.

What is the approach followed by the directive in this connection?

As far as the standard of proof is concerned, in my view the instrument at issue has quite wisely opted for a halfway solution between two theoretically feasible alternatives.

In making a choice between a purely civil law standard (in terms of "more likely than not") – and this would actually have raised doubts because probably too low a threshold would have been introduced – and a criminal law standard (according to the BARD rule) – and in this case, being diametrically opposed to the former, the threshold would have been too high and such a standard would have not been suitable for the general prevention purposes of the instrument in question – it was decided to introduce a rule that could be called a 'reinforced' civil law standard.

Some elements are in support of such a solution including the '*wording*' of the directive that, in my opinion, plays a decisive role because under Article 5 the judicial authority shall be "satisfied" that the prescribed standard is met, and it is further specified that the exercise of extended powers of confiscation shall be conditioned upon the circumstance that the judicial authority is satisfied on a balance of

probabilities, or may reasonably assume, that the property at issue is *more than likely* to derive from criminal conduct rather than from other types of activity[8].

Furthermore, the directive wisely contemplates the possibility of introducing a time limit within which property may be considered to derive from criminal conduct.

Under this provision, which has already been included in the preceding 2005 Framework Decision, an approach endorsed by many domestic systems in compliance with the principles of legality, proportionality and guilt is regarded as a 'common' rule.

- The importance attached by the EU legislator to the principle of proportion in the exercise of the powers of confiscation, is confirmed when with reference to the confiscation of properties the value of which corresponds to the instrumentalities and proceeds of crime, it is stipulated that the relevant law provision could be applied if, in light of the particular circumstances of the case at issue, the said measure is proportionate, taking into account the value of the instrumentalities involved.

In addition, but it is a provision which has to be regarded as applicable in exceptional circumstances, it is established that in implementing the directive the States might provide that confiscation should not be ordered in so far as it would, according to domestic law, represent undue hardship for the affected person, on the basis of the circumstances of the respective individual case, which should be decisive (specifying moreover that this possibility should be made use of in a very restricted way and would be allowed only if the execution of confiscation would put the person concerned in a situation in which it would be very difficult for him to survive). Indeed, some legal systems are already moving along these lines, as is the case for the German legal system, at par. 74 b StGB (*Grundsatz der Verhältnismäßigkeit*), the Austrian legal system as well as in the interpretation of Poca 2002 by case-law[9].

- Finally, problems may arise where an all-embracing notion of 'proceeds' is considered; in such a case, confiscation risks becoming an almost "omnivorous" measure including elements of compensation, refunding and finally, of real and actual punishment.

The choice of the 2014 Directive, which is substantiated by the previous instruments (see in particular the 2005 framework decision) but also in case-law and doctrine, seems to be directed at averting the risk that all the assets of unlawful origin may not be recovered and in the end, the risk that the message "crime does not pay" does not effectively get across; it encompasses «any economic advantage derived, directly or indirectly, from a criminal offence» so as to embrace any asset and include «any subsequent reinvestment or transformation of direct proceeds and any valuable benefits».

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[8] MAUGERI, *La Direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato dell'Unione Europea tra garanzie ed efficienza: un "*work in progress*"*, at fn. 7.

[9] MAUGERI, *La Direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato dell'Unione Europea tra garanzie ed efficienza: un "*work in progress*"*, at fn. 7.

In particular, this extension is obviously conceived to facilitate mutual recognition and co-operation and it is shareable for the part in which it aims, by all intents and purposes, to overcome the possible limits to the identification of assets to be confiscated, and to the effective exercise of the powers of confiscation, deriving from actions undertaken after the commission of the offence.

Nonetheless, it is not uncommon, in scientific debates as well as in domestic case-law, to reflect whether the profit that can be confiscated only includes economic advantages directly deriving from the commission of the offence (that is an effective enrichment, an additional property benefit causally relatable to the offence) or whether instead it can be broadened to embrace also the not immediate and indirect economic outcomes, in this respect, the purely financial advantage (as is the case for the not collected credit), the "hidden loss" (for instance in accounting books), and simple savings.