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RINSE Talks about Confiscating Assets in the EU.

The Podcast that Follows Dirty Money

EP. 1 Mutual Recognition: Procedural Aspects and Protection of Fundamental Rights

- Speaker 1 : Andreana Esposito, Associate Professor of Criminal Law
- Speaker 2 : Maria Vittoria De Simone, Magistrate of the Italian National Anti-Mafia and Anti-Terrorism Directorate

INTRO. Judicial cooperation in criminal matters is based on the principle of mutual recognition of judgments and includes measures for harmonising legislations of Member States. It is on this basis that Regulation (EU) 2018/1805 was adopted at the European level, with the aim of making the cooperation between judicial authorities of Member States more efficient and swifter. The adoption of the Regulation has produced ambivalent results during its initial period of implementation: theoretically, it should have facilitated judicial cooperation, but in practice, it is still not widely used by judges despite the high number of freezing and confiscations abroad. Italy has always played a pioneering role in combating economic crime through asset confiscation measures, even before the adoption of Directive 2014/42/EU, which aimed to harmonise the field of asset recovery.

On the one hand, this is a bitter record, as it is tied to the strong historical presence of organised crime in the Italian territory; on the other hand, it has enabled the Italian legal system to develop particularly effective measures, such as preventive confiscation.

With specific reference to the application of the Regulation on the mutual recognition of freezing and confiscation orders in the European Union, some countries, such as Germany, have raised concerns about the protection of fundamental rights of individuals involved in the proceedings, while recognizing the need for effective tools for cross-border recovery of crime proceeds. About the procedural aspects including the discussion on Recital 13 concerning the scope of the Regulation, the protection of procedural fundamental rights, and the new Directive on asset recovery and confiscation [COM/2022/245 final] proposed by the European Parliament and the Council[1] will discuss Andreana Esposito, Associate Professor of Criminal Law at the University of Campania Luigi

[1] On 2 May 2024, the new Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation was published in the Official Journal; it entered into force on 22 May 2024.

Vanvitelli and coordinator of the RINSE research project, and Maria Vittoria De Simone, Magistrate of the Italian National Anti-Mafia and Anti-Terrorism Directorate, and member of the Board of Directors of the National Agency for Seized and Confiscated Assets.

[00:03:20] QUESTION 1

I would first ask to briefly outline the application of the procedure as delineated by Regulation (EU) 2018/1805, and to highlight the main points of criticism. In your opinion, what are the primary reasons for the failure to fully implement mutual recognition as envisaged by the Regulation, despite the high number of freezing and confiscations abroad, as mentioned in judicial reports?

[00:04:00] ANSWER 1

The mutual recognition of judicial decisions is the principle upon which Regulation (EU) 2018/1805 is founded. This principle is the cornerstone of judicial cooperation within the European Union; however, its effective implementation would first require a minimum level of harmonisation of national legislations. Despite the progressive harmonisation of the criminal justice systems of the EU Member States, a proper European Criminal Law does not yet exist. Each country applies its own domestic law and bases its criminal measures on it. The execution of foreign measures in a Member State other than the one that adopted them is often hindered by administrative issues, procedural delays, or a lack of trust between the States.

The EU legal framework on the mutual recognition of freezing and confiscation orders, prior to the entry into force of Regulation, was established by two framework decisions: 2003/577/JHA on freezing property and evidence and 2006/783/JHA on confiscation orders.

At that time, prior than the Regulation's adoption, the implementation reports of the European Commission regarding these two framework decisions reveal that the regime for the mutual recognition of freezing and confiscation orders was not fully effective. One of the fundamental reasons for this inefficacy was undoubtedly the lack of uniformity in the implementation and application of the Framework Decisions across the Member States.

Since the effectiveness of the European freezing and confiscation system is intrinsically linked to the proper functioning of the mutual recognition between MSs of such orders, it was deemed appropriate to ensure full implementation at the European level through legally binding and directly applicable Union legislation.

The Regulation applies to all freezing and confiscation orders issued within the framework of "proceedings in criminal matters" and has been applicable since December 19, 2021. The first analysis of the functioning of this new instrument was carried out by Eurojust through data collection from operational experiences during the reference period from January 1, 2021, to December 31, 2022. This preliminary analysis clearly shows that the area of foreign seizures and confiscations remains highly problematic, especially in cases where the order is not based on a conviction, such as preventive measures, which are primarily an Italian instrument.

The main issues that have hindered the effective execution of such measures, have concerned the lack or inaccuracy of information provided within the certificate exchanged between authorities of different Member States, as per the Regulation. The data provided is often incomplete, the ownership of the assets or bank accounts subject to the order is unclear, especially when the asset or account belongs to a person from a third country other than the one recognizing the order. Sometimes, a country may not recognise the legal basis of the issued order, as has happened in some cases with Italian preventive measures. The awareness of these issues underpins the Proposal for a Directive of the European Parliament and the Council on asset recovery and confiscation presented on May 25, 2022. This proposal aims to strengthen the capacity of competent national authorities to trace and identify, freeze, confiscate, manage, and allocate assets derived from criminal activities, as well as to facilitate the asset recovery process.

[00:09:04] QUESTION 2

Preventive measures are a distinctive feature of Italian legal system, a primacy clearly linked to the strong presence of organised crime on our territory, which has necessitated the adoption and provision of a complex and articulated system particularly effective in matters of asset confiscation. Thus, in dealings with authorities from other states, is it easy to explain the nature of preventive measures on assets, how they operate, and their legal basis? Have there been any difficulties in communication with other judicial authorities regarding this type of confiscation measures?

[00:10:10] ANSWER 2

The system of crime prevention was introduced in Italy as early as 1982 and is currently regulated by the so-called Anti-mafia code (Legislative Decree 159/2011). It originated as a tool to combat the aggressive Sicilian mafia and the accumulation of illicitly acquired assets of extraordinary relevance, but over time it has been extended to several types of crimes. Preventive measures remain a distinctive feature of the Italian legal system, based on the concept of dangerousness, which can apply to individuals in the case of personal preventive measures or to assets in the case of asset-related measures, or both. The most complex aspect, difficult to convey in countries unfamiliar with such a system, is precisely the concept of dangerousness and the irrelevance of prior commission of a crime. These measures are aimed at preventing crime by addressing the social danger posed by certain categories of individuals or assets, regardless of whether a crime has been committed beforehand.

For their application, it suffices to demonstrate, at the conclusion of a procedure now under judicial jurisdiction, the actual dangerousness. In other words, it is the autonomy of the preventive procedure from the criminal proceeding that, in some cases, allows for the application of confiscation even in cases of acquittal from the crime. This is difficult to grasp for other EU countries that do not have a similar procedure in their legal systems. However, awareness gained in EU countries of the importance of tools such as freezing and confiscation in combating organised crime has led other States to introduce confiscation measures independent of the criminal proceedings, such as non-conviction-based confiscation. Italian preventive confiscation certainly stands as a paradigmatic example in this regard.

Despite the progressive alignment of other states with Italian legislation on non-conviction-based confiscation, Italy's preventive confiscation is currently the subject of debate at the European Court of Human Rights. This debate regards the compatibility of this particular confiscation with the European Convention on Human Rights. The outcome of this case remains to be seen.

[00:13:20] QUESTION 3

We are awaiting the ECtHR's decision on Italian preventive asset measures. Previously, the same Court has ruled on personal preventive measures; now, attention turns to asset-related preventive measures. It remains to be seen how the system will maintain itself or if normative or jurisprudential adjustments will be necessary.

I would like to draw your attention to Recital 13 of the Regulation. Regarding it, in the negotiation phase, the Italian delegation strongly advocated for a textual amendment. Specifically, the reference to "measures issued within the framework of criminal proceedings" has now been revised to "measures issued within the framework of proceedings in criminal matters." in its final version. This change signifies a shift from "criminal proceedings" to a broader concept "proceedings in criminal matters". What implications does this modification carry? Was it purely stylistic, or does it imply something more significant?

[00:15:28] ANSWER 3

It is certainly a substantive modification in the sense that the change made to Recital 13 has broadened the scope of the Regulation. If Recital 13 had been approved in its original form, which contained a limited reference to measures adopted within a "criminal proceeding," it would have excluded from application all freezing and confiscation measures adopted outside of a criminal proceeding. This would encompass all measures adopted without a conviction, such as asset-related preventive measures.

However, it should be noted that even this expression has raised some interpretative uncertainties. "Proceedings in criminal matters" is indeed an autonomous concept of the of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights. It encompasses all freezing and confiscation measures issued in proceedings related to a criminal offense. Although such measures may not exist in the legal system of the executing Member State, the latter should be able to recognise and enforce them.

[00:17:50] QUESTION 4

Indeed, it seems we will continue to hear discussions about the concept of "criminal matters" that delineates the boundaries of the principle of mutual recognition. Moving to the question regarding the protection of fundamental rights, in your opinion, is the critical observation sometimes made that the Regulation does not give sufficient recognition to fundamental rights a valid consideration? Is it true that the Regulation seems to prioritize the effectiveness and efficiency of the measures over the protection of fundamental rights?

[00:19:09] ANSWER 4

I don't think so. In several parts of the Regulation, there are references to the respect for fundamental rights. If we just look at Recital 16, it specifies that the Regulation does not modify the obligation to respect fundamental rights and legal principles enshrined in Article 6 of the Treaty on European Union (TEU). Furthermore, Recital 17 clarifies that the Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

Moreover, according to the Regulation the procedure for the transmission and enforcement of freezing and confiscation orders must ensure both the effectiveness of the process for recovering criminally obtained assets and simultaneously respect fundamental rights.

Cooperation between Member States, based on the principle of mutual recognition and immediate execution of judicial decisions, presupposes that such decisions to be recognised have presumably been adopted in accordance with the principles of legality, subsidiarity, and proportionality. Such cooperation also presupposes that the rights of individuals affected by freezing and confiscation measures, as well as the rights of third-party owners of assets who are unrelated to the proceedings, are guaranteed.

[00:21:40] QUESTION 5

Now we come to our final question, which allows us to look ahead to the Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation 25.5.2022 COM (2022) 245 final 2022/0167(COD). As a member of the board of directors of the Italian National Agency for Confiscated Assets, what do you believe are the potentials of this Directive, considering that many Member States lack specific regulations on the management and reuse of confiscated assets for social or institutional purposes? Based on your experience, does the European legislator will be really interested to address the "social reuse"?

[00:22:57] ANSWER 5

Yes, I believe that the measures adopted in recent years demonstrate a primary interest both at the European and international levels regarding the social reuse of confiscated assets and the management aimed at preserving the economic value of these assets.

The proposed Directive, in the Recital 29, statues that Member States should put in place effective management measures. Such measures should include a systematic assessment of how to best preserve and optimise the value of property before the adoption of freezing measures, also known as pre-seizure planning. This is a fundamental principle that has been extensively worked on.

Furthermore, the Directive's Proposal clearly urges Member States to establish dedicated offices or dedicated authorities for the management of seized and confiscated assets, with a focus on preserving their value pending the final decision on confiscation. The Italian model, exemplified by the National Agency for the Administration and Destination of Assets Seized and Confiscated from Organized Crime (abbreviated as ANBSC) established in 2010, has gradually been adopted by several other Member States. However, the regulatory framework governing the management and use of these

assets in these countries differs significantly from each other's. For instance, in many other countries, the sale of assets typically represents the primary mode of disposal, whereas in Italy, sale is considered a last resort. Assets are only sold when they cannot be reallocated to institutional and social purposes.

However, it must be said that the EU is looking with great interest at the allocation of confiscated assets for social and institutional purposes. Increasingly, references to this mode of allocation are found in various acts adopted at the European level. Already in Directive 2014/42/EU, the management of confiscated assets was addressed, asking Member States to adopt suitable measures and establish centralised offices to ensure proper asset management. Similar guidelines are also outlined in Regulation (EU) 2018/1805, where Recital 47 strengthens the call for all Member States to enact legislation for the social re-use of assets.

In recent years, the importance of the social re-use of seized and confiscated assets has also been recognised internationally. On the occasion of the 20th anniversary of the Palermo Convention against Transnational Organized Crime, Italy presented a resolution adopted on October 16, 2020, notably named the "Falcone Resolution", which specifically addresses the re-use of assets for the benefit of communities. The principles outlined in the Resolution were further developed in the Kyoto Declaration adopted in 2021, which includes a section committing to addressing the economic crime and a specific call to consider the model of social reuse for all states.

CONCLUSION

Confiscation is a sanction whose nature can be extensively debated, yet it lends itself to legal narrative due to significant jurisprudential interventions that redefine its boundaries. Evolving case law operates within a framework of values. Asset measures have become compasses today, allowing us to intercept legal developments.

HIGHLIGHT

Regulation (EU) 2018/1805 is based on the principle of mutual recognition, which requires harmonisation of national legislations to be effectively applied across European territory. Despite the gradual alignment of criminal legal systems among Member States, there is no true European criminal law because each country applies its own system, principles, and criminal laws. These divergences make it challenging to recognize criminal measures adopted elsewhere in a state.

In the realm of confiscation and seizure, the difficulty in harmonising laws is even more evident. Hence, it was necessary to adopt a binding EU act, such as the Regulation. Eurojust conducted an initial analysis on the effectiveness and functioning of Regulation (EU) 2018/1805, and the collected data are not encouraging, especially when confiscation measures not based on a conviction, such as Italian preventive measures, needs to be mutually recognised. There is difficulty in implementing mutual recognition in such cases.

Italian preventive confiscations are a highly effective tool in combating major criminal groups by depriving them of their illicit gains. Preventive measures are based on the concept of the dangerousness of assets and aim to prevent a crime, rather than punish it. The autonomy of the

preventive procedure from the criminal one, is hardly understandable in other European countries. Nevertheless, more states are recognizing the need to curb the expansion of illicit assets in the market and are introducing types of confiscations preceding criminal convictions (non-conviction-based confiscation) into their legal systems.

Currently, preventive confiscation is the subject of heated debate, even before the European Court of Human Rights, regarding its compatibility with fundamental rights. Indeed, the debate is fueled by Recital 13 of the Regulation, which outlines its scope through the concept of "proceedings in criminal matters". This autonomous concept of EU law still lacks clear boundaries, making it difficult to understand which of the numerous confiscation measures fall within its scope.

Regarding the protection of fundamental rights, the Regulation is very attentive to this aspect. Cooperation among Member States presupposes mutual trust, which implies that all European states respect fundamental rights, rule of law, principles of legality, and proportionality of sanctions.

The new proposed Directive on asset recovery confiscation of 2022 aims to enhance the confiscation powers of states by proposing norms that, among other things, expand the role of national offices for asset recovery and management and allow the application of confiscation to a broader range of crimes. For the first time, attention is also given to the social reuse of assets of illicit origin: the Italian model is extending to other Member States that tend to sell rather than reallocate confiscated assets back to society.

In recent years, the allocation of assets from criminal activities for social purposes has become internationally felt need, generating significant interest in the topic today.

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