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Tracing, Seizing and Confiscating Criminal Assets. Achievements and challenges in the Italian experience

1. I would like to start my intervention by mentioning the legal instruments which are available in Italy to trace seize and confiscate criminal assets and which are normally used in mafia cases. It is well known that one of major challenges is fighting mafia groups. So far the most dangerous groups are Sicilian Mafia (Cosa Nostra), Neapolitan Camorra and Calabrian Ndrangheta. Without entering in too many details I can say that these mafia groups show and share three basic features:

- (i) they exercise a strong control over their origin territories - that is to say on their civil societies, public authorities and economics - by violence, threat and corruption;
- (ii) in the meantime they are capable to move and settle into other areas - mainly the northern regions of the country and/or in Europe, USA, Canada, South America and Australia – whenever they find a number of favorable conditions¹)
- (iii) beside their traditional criminal activities - such as various traffickings, corruption, frauds, etc. - they carry out business activities where dirty money is laundered.

UN Convention against Transnational Organized Crime (Palermo, 2000) underlines that the goal of organized criminal groups is *to obtain, directly or indirectly, a financial or other material benefit*. There is no need to elaborate more this statement which is absolutely true for mafia groups. This is the reason why forfeiting their assets is so crucial.

2. The Italian criminal system provides two main forms of confiscation:

- (i) the *classic confiscation*, which until 1980's is the only one allowed by the Italian criminal code. It concerns basically the instrumentalities and the proceeds of crime - i.e. any economy advantage derived from criminal offences -;
- (ii) the *extended confiscation* according to which people convicted for (a) mafia type crimes² shall have confiscated their assets if (b) the value of these assets is disproportionate to the legitimate income of the concerned persons, and if (c) these latter do not demonstrate the legitimate source of the assets.

Beside these two main forms of confiscation there is a third accessory one:

¹ See F.Varese, *Mafias in the Move*, Oxford, 2010

² These crimes include participation to a mafia groups, kidnapping for the purpose of getting ransom, usury, extortion, money laundering.

- (iii) the *value confiscation*, which enables to confiscate the property the value of which corresponds to the original assets which could not be submitted to *classic* and/or *extended* confiscation for legal and/or factual reasons.

3. The *extended confiscation* was introduced into the Italian criminal system for a very simple reason. The *classic confiscation* requires that the Prosecutor proves a link between the criminal behavior and the asset which has to be forfeited. This is possible, and even easy, in a case where there is one or a limited number of individuals involved in one or a limited number of criminal offences that are well established in space and time. However the burden of the proof becomes heavy and even unbearable- a genuine *probatio diabolica* - when the criminal is a part of an structured group, when this group commits crimes continuously and professionally during the time and in various areas - in the country as well abroad- and when it launders money in illegal as well in legal activities, by this way merging the profits. It is easy understandable why the *classic confiscation* proved not to be effective enough in most mafia cases. So in 1992 the Parliament reformed the system and admitted the *extended confiscation*, based on a more simplified mechanism of proof. Indeed the *extended confiscation* shares the burden of the proof between the parties: it is to the prosecutor to prove that the criminal owns, directly or indirectly, a patrimony whose value is disproportionate to his/her legitimate income. And it is to the defendant to prove (or at least to allege convincingly) that, despite the disproportion, his/her patrimony has a legitimate origin. During the course of the last 29 years , the *extended confiscation* was increasingly applied by Courts. By the end of 2011 Italian Justice has confiscated more than 10.000 estate units - including houses, flats, factories, warehouses, land units, etc. - and more than 1500 companies. It is worthy to know that most of these assets were forfeited in mafia cases by Courts which made use of the *extended confiscation*. Being an effective tool for tackling organized crime, the *extended confiscation* appears to be consistent too with the fundamental rights of the individuals. So far this form of confiscation passed successfully the tests before the Italian Constitutional Court and the European Court of Human Rights. Both Courts stated that the *extended confiscation* does not violate neither the right of property nor the presumption of innocence and the right to a fair trial.

4. In order to have a better understanding about how the *extended confiscation* works, I would like to spend some words about a recent mafia case (*Minotauro*) dealt by the Prosecution Office of Torino (IT). In this case prosecutors succeeded to get an arrest warrant against around 150 persons who were allegedly members of Ndrangheta groups which were active in Piedmont. The arrest warrant was issued by the Court upon the request of the Prosecution Office at the outcome of complex investigations which *Carabinieri* carried out for years under the supervision of prosecutors. In the meantime financial investigations were performed by two other law enforcement agencies - *Guardia di Finanza* and *Direzione Investigativa Antimafia*-. These investigations disclosed that that around half of the suspects owned, directly and/or indirectly, assets whose value was disproportionate to their legitimate income. This enabled the Prosecution Office to request and get too by the Court a seizure order in view of the *extended confiscation* at the outcome of the trial. In order to contain the risk the many of these assets could disappear the arrest warrant and the seizure order were executed simultaneously. The total amount the assets were seized was estimated around € 115 M³. For obvious reasons the tracing of the assets had to be carried out in an undisclosed way. For this purpose *Guardia di Finanza* and *Direzione Investigativa Antimafia* had full and quick access to several data bases including land registry, property registry, car registry, tax registry, bank registry, etc. The two law enforcement agencies

³ Assets include estate houses, flats, land units, cars, bank accounts and financial activities, companies:

had to check the financial position of about 600 persons, including the suspects and the members of their families. In order to speed up such a massive control *Guardia di Finanza* made use of an *ad hoc* and home-made software (*Molecola*). This software was capable to fish all relevant information from the accessible databases, to process data and to check whether the condition of the disproportion was met. After assets were seized, almost all of the concerned suspects challenged the order before the upper Courts. Generally speaking, this confirms a fact which was lively described by a mafia boss when he said *we prefer to stand rich in jail than poor and free*. In *Minotauro* upper Courts, at the outcome of adversarial hearings, released seized assets whenever the suspects proved that the assets proved to have a legitimate source. The value lost is about 20% of the total amount of the assets which were originally seized.

5. *Minotauro* case shows that when there is an adequate legal framework, a strong determination and a good co-ordination between prosecutorial authority and law enforcement, as well as an easy access to relevant data bases, the assets recovery may be successful. However if this is true for domestic actions, prosecutors and investigators may face serious problems when they intend to expand financial and economic investigations abroad. Before a request of massive and complex financial investigations, foreign authorities are likely not to be available. Reasons may differ. Either they have not resources enough. Or they do not take such requests as a priority. Or they have not the appropriate legal basis. Or simply because they deem that such requests would trigger *fishing expeditions* which do not deserve any follow up. It is well known that organized crime and namely mafia groups do not know borders any longer and this is particularly true also for re-investing and laundering money derived from criminal offences.

If so, the effective strategy of forfeiting criminal assets at international level needs three basic conditions :

- (i) first, a minimum of harmonization of substantive criminal rules about seizure and confiscation is required: at least different legal system should be compatible and not conflicting;
- (ii) second, an intense and continuous investigative co-operation legal framework is needed to allow the rapid exchange of information: assets before being seized and confiscated have to be sought and found;
- (iii) third, a mechanism of legal assistance based on mutual trust is essential to the prompt execution of seizure and confiscation orders: any delay can frustrate the effectiveness of such measures taking into account the skill of organized crime groups to transfer and conceal assets, especially movables and financial assets.

In the last decade EU took some steps towards a system capable to fight organized crime by more effective and dissuasive tools of seizure and confiscation. These steps were focused on all the above mentioned conditions. So far, the full implementation of such measures unfortunately is neither easy nor quick and it is foreseeable that a similar process within a larger community of States will be still more difficult. Some weeks ago MEDEL (*Magistrats européens pour la démocratie et les libertés*), a cartel of 14 national associations of judges and prosecutors, launched an *Appeal to Enhance EU Fight Against Organized Crime*. This Appeal states that there is a *dark Europe* which still is prospering by *stealing enormous assets, impoverishing and polluting*

the economy , politics and civil society. It is enough change *Europe* with *world* to believe that there is no reason to give up.
I thank you for your attention.

(Vienna, Sep 4, 2012. Draft Presentation by Alberto PERDUCA, Deputy Chief Prosecutor, Responsible for Money Laundering and Criminal Assts Recovery Departmen. , Prosecution Office in Torino (IT)