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CONFISCATION REPORT OF CRIMINAL ASSETS AND CONSTITUTIONAL GUARANTEES

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ABSTRACT

Confiscation is among the most important legal instruments in the fight against organized crime and money laundering. It is conceived as a formal decision through which can be removed property rights. The implementation field of criminal assets creates a number of problems sometimes insurmountable. One major hurdle is related to the fact that the property, subject of forfeiture at the time of issuing the verdict, is consumed or spent on behalf of third parties and thus saves seizure. In this paper is treated the extent of the confiscation field of action, his report with constitutional guarantees. Takes response questions such as: if violated of the principle of presumption of innocence, passing the burden of proof to the person against whose property is confiscated. Resolving these issues is achieved by analyzing, in a comparative perspective, seizure, referring in particular to the legal interpretations. It's concluded that the seizure is a particular independent procedure from criminal proceedings, so the guarantees of the criminal process cannot be applied in the process of confiscation. The presumption of innocence is closely linked to criminal proceedings, while confiscation is a particular independent procedure from the criminal proceedings, so given that the guarantees of the criminal process cannot be applied in the process of confiscation.

Keywords: Seizure, constitutional guarantees, criminal assets, the presumption of innocence, etc.

INTRODUCTION

The confiscation of criminal assets is not a new concept; it has its origins in early civilizations, in obvious need of individuals to retaliate. Prediction of confiscation in Albanian legislation as a tool of preventing and combating organized crime and money laundering through the seizure of assets derives directly or indirectly from criminal activity based on law "anti-mafia"¹. Ongoing legal and philosophical debates about confiscation of criminal assets is focused on the most sensitive issues such as the burden of proof, the rights of third parties benefiting the criminal assets, extension or not of the seizure also to the heirs, the action of this measure to third persons after alienation or passing on their behalf items that are subject to seizure, confiscation nature of the process, etc. Also, an issue of significant importance of the study is related with the relationship between the legal framework of confiscation and protection of human rights and fundamental freedoms, particularly the observance of constitutional rights and the European Convention for the Protection of Human Rights and Fundamental Human Freedoms, especially observance of the principle of presumption of innocence, the right to a fair trial, legal security, etc.

The concept of seizure

¹ Law no. 10192, date 03.12.2009 "On preventing and combating organized crime and trafficking through preventive measures against property". (Anti-Mafia Law)

In criminal justice systems traditionally are known seizures of assets as a result of their connection with a criminal offense. Confiscation can be defined as a formal decision by which property rights can be removed as a result of a criminal act. Article 1 (point f) of Convention of the United Nations Against Drugs, Vienna 1988, defines forfeiture as: "... a fine where applicable and means permanent taking property by court or by other competent authority".² Whereas, Article 1 (point d) of the European Convention on Laundering of Proceeds from Crime, Strasbourg, 08.XI.1990, defines confiscation "... as a penalty or a measure ordered by a court by following proceedings in relation to one or some offenses, penalty or measure that ends with deprivation of property".³ Meanwhile, in the Article 36 (point 1) of the Criminal Code of the Republic of Albania, is provided, that "... the seizure must be given by the court and has to do with taking and passing to the favor of the state the tools of committing the offense and the offense criminal products".⁴ It should be noted that the Vienna Convention allows any authorized competent body to issue confiscation orders, while the Convention of Europe Council restricts this right only for the courts. The same is provided in the Criminal Code of the Republic of Albania, which expressly provides that "seizure necessarily is given only by the court...".⁵ From this point of view, we can conclude that the system chosen by the Republic of Albania offers more guarantees to respect the rights of persons affected by the seizure.

The scope of seizure

In the Article 3 (point 3) of the Albanian law "anti-mafia"⁶ is predicted that the confiscation of criminal assets is applied also to the assets of persons generated before the entry into force of this Law, as long as the assets are settled during their involvement in criminal activity. Scope of the confiscation of criminal assets, subject to the offense, when extended to the proceeds of crime creates a number of problems that sometimes are insurmountable. A significant drawback of seizing the object of the offense, particularly in relation to the proceeds of crime, is the fact that the property, subject to forfeiture at the time of the verdict, is consumed or cannot be traced and thus saves the seizure. In some cases will not be deprived the beneficiaries of criminal proceeds, when the proceeds of crime are no longer in his possession, but could have passed in the possession of third persons. Albanian legislation has solved this problem by expanding the circle of persons associated with the offender, who may be confiscated. In this case it must be ensured the legitimate rights of third parties.⁷ According to Article 22 (paragraph 3) of the "Anti-mafia" Law this right belongs to the court, anticipating that when the court trial comes that sequestered assets belongs to third parties, the court mainly with reasoned decision, call them to interfere in the process. Third person within the time period set by the court has the right to file its claims in session and request the

² Ratified by Law no. 8722, dated 26.12.2000, "On the adherence of the Republic of Albania in the" United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. " Article 1 (point f) of the Convention.

³ Ratified by Law no. 8646, dated 20.07.2000 for the ratification of the European Convention "On Laundering, Search, Seizure and Confiscation of the Proceeds of Crime".

⁴ Criminal Code of the Republic of Albania, Article 36.

⁵ Ibid, Article 36.

⁶ Law no. 10,192, dated 03.12.2009 "On the prevention and combating of organized crime and trafficking through preventive measures against assets". (Anti-Mafia Law)

⁷ See Article 3 (point 2) of Law no. 10,192, dated 03.12.2009 "On the prevention and combating of organized crime and trafficking through preventive measures against assets".

other necessary data. The burden of proof under Albanian legislation⁸ to prove that the assets were acquired legally belongs to the person against whose property confiscation is required. So, people need to justify the way of profit, legal origin of their wealth, that wealth is not related to criminal activity of the suspected person, that the property is in the effective possession, thus not fictitious (formal) in their behalf.

How to deal with third parties that have property rights in connection with criminal proceeds?

The European Court of Human Rights, as part of the right to a fair trial⁹ sets that if third parties have not been able to protect their rights during the trial, the law should allow them to protect their rights after the execution of the seizure. In accordance with these standards, the Albanian legislation in the "*anti-mafia*"¹⁰ law entitle third parties to intervene in the process and conditioning the confiscation of criminal assets to third parties, if they have earned fictitious legal or stimulus action. In these cases the court determines the invalidity of such legal actions and wealth is considered to belonging to the offender. This is how derive, it's shaped the presumption, that wealth that formally are on behalf of other persons, actually they are in directly or indirectly possessed of the suspected person for committing crimes predicted to the Article 3 (item 1) of the Law Nr. 10192, dated 03.12.2009.

Confiscation of value, also known as a cash penalty (fine), contains a certain amount of money to be paid by the offender, which corresponds to the value of proceeds of crime. Albanian legislation, Article 36 (ç)¹¹ provides, that may be forfeited any other property, the value of which corresponds to the proceeds of crime. Confiscation of value, in contrast to the confiscation of the product of the offense, has to do with determining the verdict of the amount of money that will be confiscated. For the court cannot be enough just the conclusion that there is sufficient discrepancy between the income of the suspect and assets acquired by him, to appreciate that all assets should be seized and confiscated.¹² In addition, the court must individualize according to the circumstances sufficiently, only for preventive effects of the proceedings the existence of a causal connection between the particular criminal activity of the suspected person (Article 3, paragraph 1)¹³ and legally unjustified benefit of his property. Property which facilitates cleaning crime products should be confiscated. This theory is based on a broad interpretation of 18 USC & 981 (a) (1) (A)¹⁴ which contains the fact that all assets involved in money laundering will be forfeited. The confiscation of proceeds of criminal offenses should be ordered when a person is found guilty of an offense. This fact constitutes a weak point for seizure procedures.

⁸ Ibid, Article 21, paragraph 3.

⁹ See European Court of Human Rights, judgment of 25 February 1993, *Funke v. France*, publ. ECHR, Series A, No.256-A, para. 44 and European Court of Human Rights.

¹⁰ Ibid, Section 16 "*when during the trial turns out, that sequestered assets belonging to third parties, mainly the court reasoned decision, he calls them to intervene in the process. The third person, within the time period set by the court, has the right to file its claims in session, and to seek other data necessary*" and Article 22 (point 5).

¹¹ See Article 36 of the Criminal Code of the Republic of Albania, Publishing House "LUARASI", Tirana, 2005.

¹² Unifying Decision of the Supreme Court no. 1 date 25.01.2007.

¹³ Law no. 10,192, dated 03.12.2009 "*On the prevention and combat of organized crime and trafficking through preventive measures against assets*".

¹⁴ Crimes and Criminal Procedure - 18 USC Section 981.

Article 6 (item 2) of the European Convention of Human Rights, about the presumption of innocence, prevents the seizure of income after the owner died. Explicitly European Court of Human Rights regarding to the fiscal punitive sanctions sets that "*legacy of guilt of the dead is not in accordance with the standards of criminal justice in a society of rule of law*".¹⁵ In the "*anti-mafia*" Albanian law (article 3 (3))¹⁶ is provided that the seizure may be required in each case to the heirs of the person, subject of the enforcement of this law, but not later than 5 years from the date of death. In this case, confiscation of proceeds of crime is independent from the outcome of the criminal process. Confiscation it's applied according to the Albanian legislation if the provenance of property of the suspected person or other persons (Article 3), which is owned directly or indirectly by a person suspected, it is not legally justified and has to do with the participation/committing of the person suspected to a certain category of crimes. In this sense confiscation cannot be applied, if from the investigation and trial prosecutor's request for the establishment of the seizure of assets turns out that the property was acquired justified legally.

It's violated the principle of presumption of innocence, passing the burden of proof to the person against whose property assets are confiscated?

Constitutional Court of the Republic of Albania¹⁷ has interpreted the presumption of innocence in the sense that ordinary courts should not begin the process with the conviction, that the defendant committed the crime for which he is accused, that the burden of proof is on the prosecution, that any doubt should go in favor of the defendant. Constitutional Court¹⁸ clarify that this interpretation of Article 30 of the Constitution (presumption of innocence) is closely linked to criminal proceedings, while confiscation is a particular procedure independent from the criminal process, and so the guarantees of the criminal process cannot be applied in the process of confiscation. In the case of decision of confiscating the property the burden of proof originally it belongs to the prosecutor to argue reasonable suspicion based on indications that a person is participating in organized crime and trafficking, showing that has reasonable grounds to suspect and sufficient data to trial preventive effect, that they are not assets acquired legally, what motivates the existence of their presumption of illegality and as a result, to pass the burden of proof of the suspected person. Thereafter, the burden of proof passes to the suspected person to justify the lawful origin of his estate, to argue the lack of connection with setting property as criminal offenses products or their investments. So, in this process the burden of proof is divided between the prosecutor and the person who will be seized or confiscated.

Following these reasoning and arguments for the necessity of distinguishing between criminal proceedings and preventive process, guarantees of the criminal process for the presumption of innocence are not applicable in preventive process, sanctioned by law subject to review. This technique of the burden of proof determined in the Albanian law "*anti-mafia*" in this regard, according to the Decision of the Constitutional Court¹⁹ does not contradict the principle of presumption of innocence. The process of judicial civil forfeiture is similar to

¹⁵ European Court of Human Rights, 29 August 1997, AP, MP and TP v. Switzerland, Reports of Judgments and Decisions (1997 V), 1447, p. 48.

¹⁶ See Article 3 (point (3) of Law no. 10,192, dated 03.12.2009 "On the prevention and combating of organized crime and trafficking through preventive measures against assets".

¹⁷ See decisions of the Constitutional Court No. 9, dated 28.04.2004; Nr. 23 dated 23.07.2009.

¹⁸ See Decision No. 4, dated 23.02.2011, the Constitutional Court, pg.37, 38.

¹⁹ Ibidem, pg. 38.

any other civil process. Procedures followed in this case are civil and not criminal. The process of forfeiture however is *in rem* and asks from the court to provide jurisdiction over property and not against its owner. Therefore, the court provides "arrest warrant" *in rem*.²⁰ Unlike from the civil forfeiture, criminal forfeiture represents a punitive measure against the interests of the owner's property and depends on that person's punishment for serious violations of criminal law. So this kind of seizure it's made in *personam* (persons). According to a general rule, "property that is subject of criminal forfeiture cannot be taken before the final decision sentence."²¹

CONCLUSIONS

The Criminal Code of the Republic of Albania, which determines that forfeiture must be given only from the court, shows that our system offers more guarantees to respect the rights of persons affected by the seizure. Confiscation of property is not placed "blindly" on all assets, in the case when it turns out, that the suspect owns a number of properties, but it's valued and decided on each of them and only for those assets that from the investigation and trial results, that there was justified origin, ancestry legitimate, and verified existence of a causal connection between the particular criminal activity of suspected person and legally unjustified benefit of his wealth.

Constitutional guarantees for the presumption of innocence are conditioned with the defendant in the criminal process and are not applicable to the preventive process. Passing the burden of proof of the suspect for criminal property does not contradict the principle of presumption of innocence, as procedures to be followed in this case are civil and not criminal. The process of forfeiture however is *in rem*, to the thing, and not "in *personam*" and in this case the court shall provide jurisdiction over property and not against its owner.

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4. Code of the Republic of Albania.
5. FATF
6. European Court of Human Rights, <http://echr.coe.int/Pages/home.aspx?p=caselaë>
7. Crimes and Criminal Procedure - 18 USC Section 981.
8. The decision of the Constitutional Court No. 9, dated 28.04.2004.
9. Decision of the Constitutional Court no. 4, 23.02.2011.
10. U.S.C. & 1615, U.S.C. & 853 and 18 U.S.C. & 952 (Federal laws against drugs and money laundering)

²⁰ In Latin "against or in respect of a thing," refers to a legal action directed toward wealth. Thus, if the issue is related to the property, the property - the action is "in *rem*". "In *rem*" it is different from "in *personam*" which is an action directed against a particular person.

²¹ 21 U.S.C. & 853 and 18 U.S.C. & 952 (federal laws against drugs and money).