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EUROJUST STRATEGIC SEMINAR

Towards Greater Cooperation in Freezing and Confiscation of the Proceeds of Crime: a Practitioners Approach

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Introduction to the II Session

A Critical Evaluation of Instruments adopted at EU level in the area of freezing and confiscation

- In few other fields than confiscation the legislative ground (at international level) is so rich (*see also the long list in the discussion paper of this Conference*).
- At the "horizontal" level we have assisted to the progressive expansion of the standards initially reserved only to some specific sectors (e.g. "drugs") or to regional frameworks (the Council of Europe or the EU) to a wider scale (all serious crimes, UN dimension).
- This abundance of instruments also provides the evidence of how difficult it is to make substantial progress at the "vertical" level: i.e. to go further in making the aggression of criminal assets more efficient at all levels, while respecting fundamental rights of the persons (either accused or *bona fide* third parties) involved in the proceedings.

- At the EU level, not less than 7 instruments were adopted.
- It would take too long to list and take into consideration all of them. However it is interesting to note that the EU action has made use of "mutual recognition" as well as of "approximation" instruments.
- This is a further demonstration (if needed...) that mutual recognition alone is not felt as sufficient if it does not go hand in hand with an appropriate level of approximation: approximation of substantive Criminal Law as well as, even more important, of Procedural criminal Law, like it is the case with the recent Directive 2014/42/EU on the freezing and confiscation of instrumentalities and the proceeds of crime in the European Union, adopted in April this year.
- The new directive certainly offers more effective rules in the field of conviction-based confiscation. Its provisions can be more effective also because they have been adopted in the form of a directive and not as "framework decisions", though we should not forget that, after the expiry (on 1st December 2014) of the transitional period provided for by Protocol 36, all the instruments adopted before the entry into force of the Lisbon Treaty will be subject to the scrutiny of the Commission and eventually the Court of Justice.
- At the same time, the new directive introduces a very limited legal basis for non-conviction-based confiscation and the concrete possibility to cover effectively situations where a criminal conviction cannot be obtained is lacking.
- Following the adoption of the new Directive, the situation of the EU instruments applicable in the sector of confiscation cannot be defined as having been really simplified or having become more "users friendly": as a matter of fact, only Joint Action 98/699/JHA is repealed, while only a limited number of provisions [*point (a) of Article 1 and Articles 3 and 4*] of Framework Decision 2001/500/JHA and [*the first four indents of Article 1 and Article 3*] of Framework Decision 2005/212/JHA are replaced by the provisions of this Directive.
- Moreover, this will happen only for the 26 Member States bound by this Directive, while 2 Member States will not be bound by it because of their special statute under the Treaty of Lisbon, so increasing the sensation of "fragmentation".
- This situation can become a factor of uncertainty and could create confusion among the main "clients" of these instruments: judges, prosecutors and lawyers.
- As the Italian Minister of Justice stated in Siracusa, although it represents an important step forward in the field of the fight against criminal assets, Directive

2014/42/EU remains anchored to a restrictive definition of confiscation, understood as the “*final deprivation of property ordered by a court in respect of an offence*”, thus excluding all other legal instruments –not always necessarily linked to the existence of a conviction– that are used in different Member States to attack assets of illicit origin.

- This is the main reason why, as I already recalled this morning, the Council and the Parliament, at the time of the adoption of the new directive on confiscation, called the Commission to present further initiatives on mutual recognition of freezing and confiscation orders including non-conviction-based confiscation.
- The discussions we are going to have along this session will certainly provide plenty of *food for thoughts* not only to the Commission but also to all of us about the way forward on this very important subject, which should –and certainly will– constitute one of the priority fields of the EU action in the years to come in the JHA sector.