

Confiscation: is the current legal framework sufficient?

GENERAL DISCUSSION. 22/09/14-16'30-17'15- Isabel Vicente Carbajosa.

Two weeks ago, in the opening ceremony of the judicial year, both the Prosecutor General of Spain and the President of the Supreme Court focused their speeches on the crime of corruption and I quote "There is public corruption. It is damaging the image of the public service and the public treasury" "Political corruption is putting into question the legitimacy of the democratic system" "Corruption is undermining the credibility of the institutions", they said. In fact, those statements sadly confirm the conclusions of the Council of Europe Anti-Corruption Group (GRECO) evaluation of Spain (Report of June 2014, evaluation on Spain-October 2013) and the European Commission Report on Corruption. "Threat to the rule of law" GRECO report June 2014,

According to statistics, the public opinion perceives corruption as the second problem of the country (after unemployment) and, as it was pointed out in the GRECO report, the economic crisis has aggravated the mistrust on politicians and political parties. Criminal investigations are conducted on cases of widespread corruption in public local administrations and had a very serious impact in the public treasury. Public procurement rules haven been infringed and the control mechanisms of expenditure have failed. The public opinion perceives corruption as a widespread practice and look at justice seeking for solutions. I'd like to reflect with you today on the transfer abroad of funds originated in corruption-related actions and the role that confiscation of assets may play. The restitution of those assets in the current situation of economic crisis and mistrust and their social re-use has become fundamental for the credibility of our system.

(Eurojust figures. Annual Report of the Prosecutor General of Spain. 2014)

What do we have?

Institutionally speaking, we have The Special Prosecutor's Office Anti-Corruption and Organised Crime of Spain, a central body which was created 25 years ago and the powers of which have be redefined in 2006. Lead by a Chief Prosecutor-Avocat General It is a multidisciplinary-team Office composed of, prosecutors, tax inspectors, auditors, judiciary police Units to fight against Financial and Economic Crimes (plus Financial intelligence Units to fight against money laundering etc...) This Special Prosecutor's Office works with Delegated Prosecutors in several provinces (they hold a "double hat" that has been source of inspiration for the Commission proposal on the establishment of the European Public Prosecutor's Office). It has wide powers to initiate financial investigations **prior** to the opening of a formal criminal investigation by the examining judge ("juge d'instruction") and to get information from National Registries, Notaries, Central Data Bases of the Treasury etc...(. In fact, the preliminary investigations carried out by this Special Anti-corruption Prosecutor's Office have been essential for achieving results in the recent years in the field of recovery of assets and in getting convictions). The traditional system of addressing a complaint to the examining judge ("juge d'instruction") has not proved to be efficient in this kind of criminality.

However, today I'll focus on what is missing... and we don't have "in rem confiscation"

In Spanish law there is not *in rem* confiscation procedure but the criminal and the civil actions are brought together in the criminal procedure. At the beginning of the criminal investigation by the examining judge two proceedings are opened in parallel: the criminal investigation and the financial investigation aiming at the assets recovery to cover the civil liability -the damages and prejudices caused by the perpetrator of a criminal offence. (*The reasons for the establishment of this system was the principle "le criminel tient le civil en*

état" in the criminal procedure) This system has allowed the European Commission to participate as "civil actor" in criminal investigations for fraud against the financial interests of the EU where the only claim of the EC was the recovery of the allegedly unduly granted funds.

The freezing of assets aiming at a future decision on confiscation by the court also takes place at this initial stage of the investigation. Up to now, in the Spanish Criminal procedure, the decision on confiscation was nevertheless only decided following a guilty sentence by a criminal court.

Changes of the legal status of "confiscation": from an "additional penalty" of the principal penalty to a "complementary measure" .

However, little by little the status of the confiscation of assets has changed in the Spanish law due to the adoption of international and European legislation in this area –

- Strasbourg Convention on Laundering, Search, Seizure and Confiscation for the Proceeds from Crime 1990 -Articles 13 and 18
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism 2005, article 23,
- United Nations Convention Against Corruption –UNCAC- article 54,
- Council Framework Decision 2005/212/JHA,
- Directive 2012/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.

The Spanish Criminal Code defined previously confiscation as a penalty of a property-related nature but it is now considered to be a "complementary measure" to the criminal penalties and this could lead to the regulation of an "In rem" confiscation procedure in the future.

Reform of the Criminal Code: extended powers of confiscation, that is to say, it does not only covers the instrumentalities for the commission of the criminal offence but also the products of the offence (the fruits of the crime). This reform also contains measures allowing confiscation of property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence:

- Explanation of article 127 and the Code of Criminal Procedure: The onus of the proof. Our Jurisprudence has admitted not direct evidence in those cases: Supreme Court rulings in 1997 and 2007.
- Directive 2014, new reform of our Criminal Code. **We welcome the Impact of those reforms in the fight against CORRUPTION given that it now covers offences directly relating to corruption. Bribery, missappropriation of funds have been already listed in the Criminal Code project that is currently in progress.**, (Previously, more limited scope for the extended confiscation). The abuse of office is still missing.

Further changes of this legal status are still possible under Spanish law given the social function of the right to private property. According to Article 33 of the Spanish Constitution the social function of this right shall determine the limits of its content in accordance with the law (public utility or social interest are justified grounds for depriving an individual from his/her property rights, with a proper compensation in accordance with the law).

Taking into consideration the words of the Spanish Prosecutor General and the President of the Supreme Court, we could envisage a special system of confiscation (in rem) for those situations where the public treasury is at stake (in Corruption related offences)

Cooperation and assistance: Execution of confiscation orders

Problems with mutual recognition in rem confiscation orders and our civil liability orders in cases where they are brought together within the criminal procedure.

Mutual assistance (not mutual recognition) the Use of the **Strasbourg Convention on Laundering, Search, Seizure and Confiscation for the Proceeds from Crime 1990** covers both, decisions to confiscate taken by criminal courts and the so-called in rem confiscation (“proceedings for the purpose of confiscation” or “in rem proceedings” may be decided by administrative courts, in civil proceedings etc...). The procedural framework of such decisions is very diverse in terms of presumption of licitly/illicitly acquired property, time-limits etc...

Both systems aim at the same goal, to deprive the offender from the proceeds of crime. Article 18 of the Strasbourg Convention states the grounds for refusal: co-operation MAY be refused...There are no mandatory grounds for refusal, therefore, in rem confiscation orders have been executed. Similarly, in the field of the Italian “procedimento di prevenzione personale e patrimoniale” confiscation orders have been executed by the Spanish Judicial authorities.

In rem confiscation, the ultimate tool? It is may be the failure of Criminal law in the fight against certain economic crimes and the admission that we cannot fight against this criminality with criminal law tools. Shall we change them? Shall we change the rules of the criminal procedure in order to make it suitable and credible to fight against this criminality?

Risk of a double standard in the use of the criminal justice.

We need to continue using criminal law for this kind of offences since confiscation of is not only about the recovery of assets and products of crime but it also provides key evidence of the “modus operandi” of the criminal organizations. On the other hand confiscation is not the only tool for making sure that crime does not pay.

Difficulties for the application of criminal law

How do we currently work in these investigations? Macro-investigations, separate investigations within the same criminal procedure are created, (Al-Capone approach) Whistleblower, bargain with the manager of the funds but the amount recovered is largely insufficient and the tracing and seizing the proceeds of crime always partial.

I'd like just to call you attention for further debate or reflection on several issues.

CRIMINALIZATION AND LAW ENFORCEMENT

Criminal offences that should be integrated in the Criminal Code and/or revisited.

Illicit enrichment: Illicit enrichment (article 20 of the UNCAC)

The Spanish penal code does not consider illicit enrichment to be a separate criminal offence that is subject to prosecution. Rather, it only addresses other crimes that may lead to illicit enrichment, such as bribery, embezzlement etc.

The Spanish Supreme Court has noted that several, non-contradictory indications are admissible as sufficient proof beyond a reasonable doubt that the assets in question have an illicit origin.¹

Illicit enrichment of public officials is a criminal offence in the French Criminal Code.

These crimes can be flagged through the asset and ²interest declarations submitted by Spanish public officials. In Spain, members of the government have to disclose interests and activities to the Spanish Conflict of Interest Office (CIO). The CIO is responsible for managing these declarations and making them public. If there is any evidence of criminal offence, the CIO has to refer to the State Prosecutor's Office.

Illicit funding of political parties: the electoral offence currently contained in the Spanish Criminal Code is not enough, article 140 of the Law 5/85 added by LO 1/2003 breaking the rules on grants for election expenses - article 7. 3 of the UNCAC

Abuse of office-article 404 Spanish Criminal Code. Penalty: disqualification of public office, insufficient to combat this criminal behavior.

Procedural issues

- Length of procedures (lack of means, **Privileges and immunities** of politicians: cherry picking the court that will investigate their activities, the examining judge....length of procedures, value of evidence is diminished and undue delays) the right to pardon.
- Statute of limitations (article 29 of the UNCAC "each State party shall ...establish a **long statute of limitations period** in which to commence proceedings for any offence in accordance with this Convention" time barring limits of certain offences, punishment of certain offences, trial in absentia.
- Asset Recovery Offices (AROS): Belgium (COSC) and Holland (BOOM). No regulation in Spain, this is a real problem. European Parliament Proposal on European Recovery Centres
- Regulation for Wistleblower.

(PREVENTIVE MEASURES

Measures: preventive measures (transparency, control, transparency in the funding of candidatures for elected public office and, the funding of political parties, taking appropriate legislative and administrative measures to enhance transparency in the funding of political parties. Control Persons Politically Exposed). Use of foundations and other administrative entities to avoid controls. Court of Audit and Regional Audit)

¹ Ibid. Also see: SST de 2-10-2004, by Justice Granados Perez, SST 1-3-2005, by Justice Berdugo, SST de 14-9-2005, by Justice Monterde, .STS de 19-1-2005 , by Justice Giménez García.

² Pinto Leon, Ignacio, "El enriquecimiento ilícito" – Tesis, México, 200, p. 74.

Is the current legal framework sufficient?

The best legal framework is never sufficient: we need to strengthen the criminal investigation entities (Asset Recovery Offices et...In Spain they need to be created) Decision of the Council 2007 should be further developed.

Powers of the Public Prosecutor office- capable of using the law (to adopt preventive measures as freezing of assets-powers of a tax authority, a customs officer etc... We could also start here the discussion on the powers of the European Public Prosecutor's Office (EPPO) but this topic would merit several conferences.

Yes, the legal framework could be sufficient but we need judges and prosecutors with the courage, support and independence to apply it. That is also the responsibility of the EU.