THE TOPIC OF THE ISSUE

SEIZURE OF PROPERTY IS IN THE FOUNDATIONS OF THE FIGHT AGAINST ORGANIZED CRIME

Mafia is buying…

TOMO ZORIC *Spokesperson of the Special Prosecutor's Office*

In our society there is the notion of "mafia economy"; it implies a whole array and network of relationships between criminal and production activities which are formally legal and are completely or partly financed from the huge profits made through felony.

For some years now the mechanisms by which illegally acquired property would be frozen or blocked were representing one of European Union's priorities. Assets forfeiture is the decisive blow against illegal enrichment and is today considered to be one of the basic mechanisms by which the security of the citizens is guaranteed. These were the reasons for which the Special Prosecutor's Office organized in cooperation with the OSCE and the U.S. Embassy a big International Assets Forfeiture Conference on March 15 and 16, 2007, with participation of eminent experts from Italy (Antonio Laudati, Giovani Melilo) as well as from the U.S.A. (Thomas Kirvin and Nolan Fuller).

The aim of the conference was to initiate the assets forfeiture issue in the legal system of Serbia, along the pattern in Italian law, i.e. the laws of other countries in the European Union.

For efficient suppression of organized crime it is necessary to inflict a blow to its property. The first one to support such a standpoint was Judge Giovani Falcone. He was the first one to study the mafia by making an economic analysis of the criminal organization, by comparing the structure of this association with the structure of a criminal enterprise. Namely, he thought that in order to defeat mafia, the repressive approach in the fight against it cannot in itself be sufficient, because if the structure of this criminal enterprise continues to produce wealth, mafia will always be able to attract new members and a new leadership. If you arrest one of them or sentence them to more decades in prison, others will come which will be even more aggressive and even more able. Therefore, the only real way to suppress organized crime is to reduce the capital and the income of criminal enterprises. What Falcone has taught us is still valid, and the method of economic analysis of illegal activities is widely implemented in countries which belong to modern democracies.

We must be aware that in our society there is the notion of "mafia economy"; it implies a whole array and network of relationships between criminal and production activities which are formally legal and are completely or partly financed from the huge profits made through felony. This created a situation in which the mafia demonstrates its presence in the economy by penetrating economic branches and activities which are essential for the life of the country, to the extent that it disrupts the economic and social development of entire geographic regions.

What is the problem with the solution in the Serbian law? Assets forfeiture in our law is not a criminal sanction. By its legal nature it is a legal measure which follows the committing of felony and is declared in criminal proceedings; seized is only property originating from felony established by a final court decision.

What about other property for which we do not have evidence which can credibly prove its illegal background in court, although we do have a high degree of reasonable doubt that it is acquired through criminal activity?

I T A L Y

Therefore it is necessary to introduce civil seizure of property which would be parallel to criminal proceedings and would be independent from the outcome of these proceedings. Along the Italian model – when the formal condition is met, and when the criminal proceedings against the person accused of organized crime and corruption are initiated – the state prosecutor initiates financial investigation regarding this person's property. Together with the financial police the prosecutor's office controls the property and the business activities of the accused, but also of the members of his closest family (wife, children, persons which in the last five years were living in the same household with the defendant). Controlled are also business activities of his firms and other linked legal persons related to his property.

When the investigation is completed, the prosecutor has clear financial overview of how big the property is and of the income (the regular one, for which taxes are paid). In case that the income and the property are disproportionate, the prosecutor institutes civil assets forfeiture in front of the competent court. Hence, the task of the prosecutor is to collect all evidence regarding the property and to institute proceedings. Then the court summons the suspect and transfers upon him the burden of proof to explain the big disproportion between the income and the property, namely to prove that the assets were acquired in a lawful manner.

In case that the suspect cannot prove this, the property is confiscated and becomes state property. I will give a few examples from the practice of Italian colleagues involved in the fight against the mafia:
Hectares of land were confiscated from "cosa nostra" in Korleone and were transformed into wine plantations; young people are engaged to produce extra quality wine with the name "freed from mafia".
Villas and houses were transformed into schools and institutions of high education.
Boats and speedboats which the mafia had used for transportation of drugs were given to the army and police of the Republic of Italy.
Even five-star hotels on the beautiful hill in Palermo with magnificent panorama lifts and a view to the sea in which Prosecutor Radovanovic was accommodated during his visit to Italy, were confiscated from a mafia group.

All this property can be temporarily confiscated before the final decision on confiscation. In this case the state agency must manage the property and it must nominate a manager which will act upon court order. I will mention some interesting examples from Italian practice:
Since Italian criminals, like the others, have big passion for pedigreed horses, the Italian prosecutor had temporarily confiscated an entire horse-farm of high value race-horses. As these horses must be fed and since the employees must continue their work on the farm, the manager had to continue all activities in order to keep or increase the value of the horses, because in the final score this was going to become state property. If you confiscate chains of hotels, supermarkets, pizzerias, the temporary manager acts upon court orders so that all activities are normally performed: the employees work, services are rendered, products are sold…

In 1982 Italy passed a law which made it possible for the courts to confiscate assets from individuals who were part of the "mafia conspiracy", as well as from relatives or collaborators which were suspected to have taken care of mafia belongings. These provisions were afterwards challenged in front of the European Court of Human Rights in the case Raimondo v. Italy (1994), which decided that they were acceptable as proportionate preventive measures. In the case Raimondo v. Italy (1991) the claimant said that civil confiscation is a sentence without a declaration of guilt, and that this is in violation of Article 6 (2) of the European Human Rights Convention; however, the Human Rights Commission concluded that the procedure did not include the establishment of guilt and that therefore the claimant did never became the defendant.

However, it is very important to stress that human rights are inviolable and that such proceedings must not endanger them in any way. In regard to human rights the European Court of Human Rights issued a few judgments which contain a legal analysis related to forfeiture and human rights. I would mention in this regard the famous cases: Salabiaku v. France, Phillips v. The United Kingdom and Raimondo v. Italy.

SALABIAKU V. FRANCE

Here I would stress that confiscation in the sense of civil law must be in accordance with human rights. The European Court in Strasbourg gave its opinion in regard to some charges filed by those whose property the state had confiscated. The famous historical case of Salabiaku v. France is considered to be a turning point in the field of human rights protection. Salabiaku was sentenced because of drug trafficking. The French judge issued a final judgment and gave it to the fiscal organs, which established that he disposed of huge property (villa, several apartments, yacht, shares, firms…) although he had no income which was legally taxed. The French State confiscated his property implementing inversion of the evidence procedure due to disproportion between income and property. Salabiaku filed charges to the Court for Human Rights, claiming that seizure envisaged by the judgment abrogates the right to private property guaranteed in the Constitution. The Court of Human Rights issues a historical judgment in which it says: democracy does strive towards private property enjoying protection, but only under the condition that it is not contrary to public interests, as well as that the owner proves the origin of his property if there is a legitimate request of public authorities in this regard. Salabiaku's charges were dismissed with the argumentation that private property must be transparent, since transparency is the precondition for the protection of property.

The case Phillips v. The United Kingdom (judgment ECHR, July 5, 2001)

Pursuant to the 1994 Drug Trafficking Act ("1994 Act") the court must issue a warrant of confiscation

regarding the defendant who stands trial for one or more cases of trade in drugs, and for whom the court established to have received at any time a payment or other compensation related to drug trafficking.

In November 1995 Steven Phillips was caught smuggling a big quantity of cannabis to England. On July 12, 1996, he was sentenced to nine years in prison for this felony. He was sentenced earlier before as well, but never in relation to drugs. There was control of Phillips's assets pursuant to Article 2 of the 1994 Act. The investigative officer stated that Phillips had not declared any source of income liable for taxation, although he was a registered owner of a house and a few other assets, among which five vehicles. The investigation officer concluded that Phillips did profit from trade in narcotics and that the sum was 117,838.27 Pounds.

The defendant did not present satisfactory evidence which would deny the assumption that he had acquired this amount of money through trade in narcotics. The Court commented that in his attempt to refute the accusation and counter the prosecutor's allegations, Phillips omitted to undertake obvious, usual and simple steps which would clearly had been undertaken had his description of facts been truthful. As a result, the Court decided that the defendant made a profit of 91,400 Pounds through trade in narcotics and he was ordered to pay this amount, and in case that he does not pay it he was to be imprisoned for two years.

ECHR concluded that the implementation of these presumptions as they are defined in the 1994 Act does not imply that the defendant is accused of new felonies while the value of the object of confiscation was being estimated, apart from those for which he was convicted in just court proceeding. The purpose of the estimation procedure is only to enable the national court to estimate the amount which in the confiscation order must be adequately established. In ECHR's view this procedure was similar to the one in which the court establishes the fine or imprisonment to be ordered for a legally sentenced person. In other words, the legal assumption was not implemented in order to make it possible for the court to establish Phillips's guilty in regard to the felony, but rather to enable the national court to estimate the amount which will be established in the confiscation order. The presumption of innocence is the only relevant one until a person is declared guilty, but it is not implemented in the subsequent procedure in which the judgment is issued, except in the case that in this procedure new accusation against the defendant would be presented.

I would like to give a picture of legal solutions in other countries, in order to construct on the basis thereof the assumptions for which I think should be included into our positive law.

B E L G I U M

Belgium's Law of June 17, 1990, represented a big step in the evolution of legal regulations in regard to confiscation. This Law enables confiscation of assets originating directly from felony, as well as substituted assets and profits thereof (Article 42, 3, Criminal Code). These can be confiscated even if they do not belong to assets owned by the sentenced person; however, third persons are eligible to such confiscation only in case they cannot prove legitimate ownership over the assets in question.

Another important step was undertaken by the Law of December 19, 2002, which broadened the possibility of seizure and confiscation in criminal cases. It included the possibility of replacement of value: if a person acquired funds through felony which is under investigation, and these cannot be traced, the public prosecutor and the investigative judge can estimate the value and confiscate any part of the suspect's inherited property up to the adequate amount. No relationship should be established between the confiscated part of inherited property and the felony.

The possibility to alleviate the burden of proving the origin of the assets was introduced for a limited list of crimes, such as corruption, trade in drugs, human trafficking, hormonal fraud, organized crime and complex tax fraud. When a person is declared guilty for one or more of above mentioned felonies, and when the public prosecutor can show the difference between the assets which the given person acquired legally, on the one hand, and this person's real property on the other, in a five-year period preceding the indictment, the person declared guilty must submit convincing evidence that the surplus in his property is not originating from felony for which the person was declared guilty. If the person does not manage to do so, the surplus can be confiscated.

Laws of March 19 and 26, 2003, established a new public prosecutor's Office on the state level, which is called "Central Office for Seizure and Confiscation" (COSC).

GREAT BRITAIN AND IRELAND

The following description is based upon the 2002 Criminal Code of The United Kingdom and the Criminal

Justice Act of 1994: in common law, systems to confiscate assets of a criminal origin focus upon the prosecutor, who approaches the court for information on the amount of profit which a person acquired through criminal activity. In cases related to trade in drugs, the investigation can be expanded beyond the limits of a concrete felony to include all crimes related to drugs. In the case of drug-related felony the investigation will probably be limited to a concrete crime for which the person is suspected. The aim of investigation is to legally oblige the convicted person to pay the state the amount which was established as the value of the acquired profit. The order is focusing upon concrete assets, and the defendant can decide on the steps necessary to fulfill this obligation. If he does not do so, he risks to be imprisoned because of failing to fulfill the obligation.

Although investigation on material benefit whose aim it is to produce a confiscation order can be conducted only upon related decision, the assets can be frozen before trial in order to prevent consumption thereof. Restriction regarding disposal is often related to all assets of the defendant, although some of them cannot be identified. Assets owned by third persons, which are believed to represent the defendant's property, can also be restricted. Freeze orders usually allow for payments for living costs and conducting daily business. The prosecutor could ask the court to appoint a manager in order to keep the frozen assets.

During investigation the prosecutor has the right to make certain presumptions. Among others, also to presume that the property acquired by the defendant after a certain date (usually six years prior to the indictment) or after declaring the guilt, was based upon criminal behavior and that all defendant's expenditure after a given date were paid from property originating from criminal behavior. These presumptions can be refuted by defendant's evidence. Confiscation hearings require that presented evidence fulfills the standard of balance of probabilities; this standard is lower than the standard related to evidence submitted in criminal cases, which must be "beyond reasonable doubt". In this way the court's starting position is that the defendant's property is acquired in a non-legal manner and it is up to the defendant to prove that the property, or part of it, was acquired in a legal manner.

Confiscation hearing will probably not immediately follow the declaration of guilt. There can be several postponements until the prosecution or the competent organ collect evidence related to material benefit. The confiscation order will not regard the entire benefit; it will rather be limited to the amount which can be realized within the assets which are at the defendant's disposal. However, usually it is possible to renew the assessment of material benefit even after the confiscation order was issued in case that there are new information on the volume of benefit or on the assets at the defendant's disposal.

Civil forfeiture and the implementation of tax competences

Modern use of legal procedures which focus upon assets acquired through criminal activity, and not upon the guilt or innocence of concrete perpetrators, began with events in the U.S.A. during the eighties. In the 18th century the customs laws in the U.S.A. contained the mandate for civil forfeiture.

Provisions dealing with confiscation of criminal assets where introduced into American laws against racketeering during the eighties in order to enable the seizure of assets at the disposal of drug dealers, mafia and criminal state employees even in cases with no prosecution or declaration of guilt. The seizure procedure is possible in regard to property for which it is claimed to present the instrument of criminal activity, or its result. These procedures are treated as repayment, and not as criminal procedure. They can be successful in the case when criminal profit is seized from persons who would benefit from these profits in situations when there is no evidence of a degree required for criminal prosecution, although available evidence is sufficient for a lawsuit of a lower civil standard, or in cases when there will be no prosecution because the perpetrator escaped or died. American laws allow also for administrative seizure by federal agencies, without court intervention, or seizure through court proceedings when the case is denied, or when it includes assets of a bigger value.

The concept of civil seizure has endured constitutional challenge in the U.S. Supreme Court. The Court concluded that civil seizure is not a criminal sanction and that it is constitutionally acceptable as long as in a given individual case there is not at issue "something highly disproportionate to the severity of the felony". However, this faced serious opposition on the basis of the opinion that the law enforcement agencies are given too big competences and that this could become a source of oppression. Besides, the American systems have allowed the agencies to use seized assets within projects for law enforcement, which caused claims that these competences are used with the aim to collect funds in the law enforcement agencies. In 2000 the American system of civil seizure was remodeled in order to secure greater protection for innocent owners. The "standard of big disproportion" was introduced in order to establish whether the implementation of a given civil seizure was unconstitutional.

In Great Britain confiscation of criminal assets after guilt was declared was introduced in 1986 for the crime of trade in drugs. In 1995 this expanded in order to include all serious felony and the burden of proof in regard to property was cancelled. In 2002 Great Britain passed a law on criminal assets which

introduced the possibility of civil seizure in case when the competent organs confirm that there will be no prosecution. This establishes a formal hierarchy in which primacy is given to the initiating of criminal proceedings. This is the field of work of an agency, separated from the police and the prosecutor, which is called the Assets Recovery Agency, and it does this upon court order. This very same Agency can use tax competences in case that civil seizure is not available. These competences for civil seizure were challenged on the basis of ECHR in front of courts in Northern Ireland which so far have concluded that these are civil cases for assets recovery, and not trials which declare criminal sentences.

A special law was passed in Ireland in 1996 by which it was possible to have civil seizure of assets for which it is believed to be of criminal origin, and if within seven years their legitimate owner do not request recovery thereof, they can be transformed into state property. The court must accept that the belief in the criminal origin is based on arguments. This proceeding is conducted by an agency composed of representatives of the police, revenue office and social security. Irish law is unusual in that the same agency has competences to request tax on profits accumulated through criminal activity.

Approach based upon tax which is used in Ireland, and which was later introduced into British law, has advantages because it envisages big fines and interests. Such approach can be implemented only in states which have means and elaborated systems to practically keep the entire population in relevant data-bases. The law can envisage that the citizen with a mysterious income must prove that all tax obligations are fulfilled. Tax organs are interested only in the existence of income, and it should be irrelevant whether it is of legal or illegal origin. There is no need to follow concrete assets, or to link them with concrete felonies.

Some tax laws contain competencies for freezing and seizure of assets until tax obligations are fulfilled. Access based on tax data has priority in that it is morally neutral, and through collecting significant unpaid obligations, interests and fines, it can effectively remove criminal profits, by which income and, of course, the "taxpayer" would be brought to legitimate economy. This approach causes less trouble in regard to human rights and the system, except that separate provisions on criminal profit represent a form of discrimination which asks for a rational explanation. Besides, civil competences for law enforcement can be used in combination with criminal sentences for tax violations. In order to make this approach more effective, separate provisions must be introduced to enable exchange of tax related data and information of organs in charge of investigating the origin of assets.

Forfeiture of suspicious property

On the basis of this comparative analysis of foreign and our national laws I would now offer in conclusion assumptions which reflect my personal standpoint in regard to solutions which should be introduced into our laws.

Recommendations

Provisions on assets forfeiture and confiscation in the Criminal Law and the Criminal Code Procedure should be partly changed in order to harmonize and simplify them, and in order to enable the expanded competencies for the seizure of assets to be implemented in a bigger number of serious crimes.

In case of serious crimes the burden of proof should be alleviated in regard to the origin of assets suspicious for possible criminal origin. In this context laws should include assumptions which would assist courts in the process of evaluating the volume of profits acquired through felony.

In case of serious crimes the system of confiscation of valuable assets should be introduced, and thus the competent legal organs should be allowed to seize part of inherited property of the suspect for which they assess to relate to the total sum of assets acquired through criminal activity, without the need to establish a relationship between the seized inherited part of property and the committed crime. Together with this a procedure for seizing immobile property should be adopted.

Legal persons should be liable to criminal responsibility.

The establishment of a center with a team of experts which would work on all police-related and operational aspects of seizure, confiscation and managing the assets.

The most significant progress in the strategy of control over crime in the last decades was tracing and seizure of profits acquired through criminal activity.

The introduction of the notion of money laundering in the majority of legal systems.

The introduction of provisions upon which, after the declaration of guilt, assets are confiscated from the

person which holds the assets, controls them, or had created them.
Many countries (mainly those with common law systems) introduced forms of civil seizure, by which assets generated through criminal activity can be followed, restricted and eventually seized for general benefit, even if there might have been no criminal prosecution or conviction for committed crimes. The approach which is similar to seizure of criminal assets is the use of tax competences regarding the profit created through criminal activity.

Camden Assets Recovery Interagency Network – CARIN. CARIN is an informal international network and represents a practical alliance for cooperation among national "experts" in the field of following, seizure and confiscation of assets.

ECHR established the right to fair trial; presumption of innocence; protection of property.

What does this experience teach us? Mafia is no longer killing, it is buying. It is a specific type of profitable criminal enterprise, and both freedom and democracy are endangered.

We must oppose organized crime through a system of laws and a system of institutions. Through strong state institutions, such as the police, the special prosecutor and court, the state must prove to be stronger than organized crime. And let me quote Montesquieu: "Good laws do not make good people, but good people can make good laws and implement them". All forces in the society must contribute to the adoption of such a law along these models of the European countries (proposal: the Italian one, because of similarities in the legal systems). Only this is Serbia's right path to the European Union; recognized, with good legislature. I would say that in the situation in which we are now, we face what Aristotle called the necessity for good laws. We must have good laws, and this means good institutions which will not only pass good laws, but also control their proper implementation.