

RECOVERING ASSETS IN ITALY EXAMINING THE PROCESSES

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Instruments of the Italian legislation for the legal protection of the injured party in trials for financial crimes

- In Italy we do not have any institution comparable to the *Asset Tracing and/or Recovery*
- European Union has conducted an efficient and timely action trying to harmonize the Member States legislations and issued a number of **guidelines** on the fight against fraudulent offences and on the protection of financial interests
- Another instrument which proved useful in the EU context is the **Directive**, whose aim is to establish the principles that legislators will have to respect when drafting national laws and the purposes that shall be reached through the introduction of these laws

Protection of the Party Injured by a Fraudulent Offence: complaint

- **Complaint:** optional declaration by which the private party (or representative of a company), injured by a fraudulent offence / financial crime, asks the Prosecutor to investigate
- Within the complaint the party can ask for the **probative seizure**
- The Prosecutor can order, with a justified decree, the seizure of the **corpus delicti** and of every other property **pertinent to the crime** and needed for the investigation: corpus delicti includes not only *“the property on which or by means of which the crime was committed”* but also *“its profit, product or price”*

Banking secrecy

- Banking secrecy is the obligation for bank representatives and employees to keep confidential any information on their clients' business, acquired in connection with their profession. The holder of the banking secrecy is exclusively the client
- In the presence of a writ of attachment issued by the judicial authority in a criminal case it is impossible, in Italy, to appeal to the “banking secrecy”
- The judicial authority may request banks and post offices to provide a copy of the accounts held by the tax payer, including all other related documents and deeds as well as third party guarantees. The judicial authority may also send questionnaires to request banks and post offices to provide further news, documents and specific information having a bearing on the accounts. All data and information gathered during the bank investigation shall remain confidential



Preventive seizure and pre-judgement attachment

- These measures have in common the protective purpose but they differ in terms of the motivations on the basis of which they may be issued
- **Preventive seizure:** the judge orders, with a justified decree, the seizure of *“all property related to the offence”* in the hypothesis that their full availability may *“worsen or extend”* the consequences of the crime itself or *“facilitate committing other crimes”*
- The **pre-judgement attachment** may be performed on the defendant's personal property (also real estate), on money or other items due to him, in all instances where it is reasonable to admit that, at the end of the criminal trial, if the defendant is condemned, the related guarantees may fail or disperse

Seizure of properties for recovering civil parties' damages

- In the context of a criminal procedure, the civil action enables to protect the injured party in criminal trials
- The civil action is exercised when the injured party sues for damages in a civil procedure
- The civil action can be exercised by the subject – also a company – hoping to achieve the restitution of property or compensation for damages
- The **pre- judgment attachment of asset turns into seizure** of property when the sentence to the payment of a pecuniary punishment becomes irrevocable or when the sentence condemning the defendant and the person civilly liable to the payment of compensation for damages to the civil party becomes enforceable

International Instruments: Rogatory Letters

- International rogatory letters: a national judicial authority files a request to another national judicial authority asking the latter to help gathering evidence
- Italian legislation is complying to the European Convention of mutual assistance in criminal matters, which was signed in Strasbourg on the 20th of April 1959. According to the specialty rule, the Convention prevails over the national legislation
- The following can be **object of rogatory letters**: notifications, experts' opinions, seizures, documents, tests, transfer of the corpus delicti, hearings, and any other issue relating to the crime object of investigation

International Instruments: Recognition of Foreign Judgments

- The law n. 257 dated 3 July 1989, summarizes different Conventions and gives the legal framework for the recognition of the foreign criminal sentence
- Those who, despite their not being involved with the proceeding, have a bearing on obtaining the restitution, compensation for damages or other civil effects, are entitled to request the recognition of foreign sentences in Italy
- Respect of two criteria for the recognition of foreign sentences: **proportionality and adequacy of the penalties**
- Procedure: the Ministry of Justice verifies that the sentence is against an Italian resident or a person who is party of an Italian criminal proceeding. The Ministry invites the General Prosecutor to carry out a number of activities at the end of which he states the accuracy of the request of recognition

Law n. 231/01

- The rights of a party injured by a financial crime shall be protected also when, during a criminal investigation, it is ascertained that the liability lies not only on some subjects within a company, but also on the company itself
- Law n. 231/01 establishes a complex of principles concerning corporate's liability for the crimes committed by its managers or directors
- According to law n. 231/01, the judge states a company's liability when specific crimes (among which: financial crimes) are committed by (i) the top management or (ii) by individuals subordinate to the top management
- If the crime is committed by individuals (i) → presumption of the company's liability
- If the crime is committed by individuals (ii) → the company is liable if it is proved that it was possible to commit the offence because of failure of supervision by the management and supervisory body

- Preventive function of Law 231/01 → the companies will be encouraged to organise their structures and business activities in such a way as to ensure that adequate conditions exist to safeguard legally protected interests
- The sanctions imposed on companies are: (i) fines or (ii) disqualification: the most serious of which include suspension of licenses and concessions, a ban from dealing with the PA, a ban from carrying on specific business activities, exclusion from or cancellation of public financing or contribution, a ban from advertising goods or services
- Banning sanctions can be applied upon request of the Public Prosecutor, also as a precautionary measure during the investigative process

Law 231/01 and damages compensation

- The company shall not be subjected to any banning sanction when: i) **compensation or reparation are offered to the injured party**; ii) the organizational problems provoking the crime are eliminated; iii) control mechanisms are adopted to prevent crimes; iv) the profit, which is generally considered as the motivation for the crime to be committed, is available for the Prosecutor

THANK YOU FOR YOUR ATTENTION

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