

Assets Recovery and Italian Judiciary experiences

Introduction. A presentation of an Italian magistrate experience

As a magistrate, let me give you the point of view from a legal professional working within a given legal system, the Italian one.

I was recruited winning a national selection lasted between 1988 and 1991 and staged in Genoa Court.

I started working in 1992 choosing the Palermo Criminal Court as a Judge. I was appointed at 1st Criminal Section of Palermo Court dealing with ordinary cases and Anti mafia Statutes special proceedings. Investigating court on organized crime assets

Since 1995 I moved to the Northern Italy choosing to change from judge to Deputy Public Prosecutor.

In 2000 I was detached to Public Prosecutor Office in Messina.

I deal with ordinary criminal cases, I applied for economical ones (as a matter of fact tax evasion and bankrupt crimes).

Within national borders: tools for assets recovery in criminal cases

Italian magistrate have two way to manage assets recovery cases: using the classic tools offered by criminal code and criminal procedure code provisions (see sections 240, 648, 648bis 648ter and 316ter c.p.) or use the “civil forfeiture” tools offered by special statutes (see 575/65 Act after 1982, 1988 and 1992 reforms actually DLG 159/11).

This situation is a work in progress so I can offer you just my view at this moment.

The classical tools offer great advantages. I mean, first of all, a worldwide “recognition”.

If I use the classic criminal tools I have to prove a direct link between criminal conducts I am investigating and identified properties, and, eventually ask for seizure and confiscation.

In Italy money laundering crime legislation have been applied for a long time mostly in the area covering the counterfeit of stolen vehicles. These are not “difficult” cases: the illicit origin of the vehicle and forgery conducts are quite easy to prove.

Economic investigation and even more financial investigations do require professional skills. They are not easily available.

In addition, if you choose for the classic tools, the law provides a six months preliminary investigation term. Then you have to inform the individual the Prosecutor Office is investigating on him.

A six months period it is not adequate to get a proper picture of the conducts and as well as of the scheme of the assets to seize.

Encountering this difficulty, Italian prosecutors and judges may turn to a shortcut offered by the Italian civil forfeiture procedure.

In 1982, during a peak of organized crime violence in Sicily, Italy “adopted” the USA RICO Act system.

It was reform marked by a chain of blood, since even the Parliament Deputy who put the law forward, Mr. Pio LA TORRE, was murdered in Palermo. The law was enacted only after organized crime killed the Prefetto of Palermo, the Government local representative, Mr. Carlo Alberto DALLA CHIESA, Rome dispatched to restore public order in Sicily.

In USA RICO Act was adopted in the Sixties to avoid any contact between organized crime and productive system. It was an effective measure and it was successful..

In Italy the Act aimed to confiscate personal use assets only, personal wealth of people classified as “socially dangerous”.

As soon it was applied it rose the problem of the connections between productive activities and organized crime.

It was only in 1992, during the second upsurge of nationwide organized crime violence, that it was enacted a law regulating directly economical activities

I called it a “shortcut” because it lies requires a lesser burden of proof.

I can get a seizure of all assets that “appears” either a proceed of criminal activities or are above the financial resources of an individual, resulting from the incomes he declared to the Tax Agencies o IRS.

It is a reverse burden pending on an individual required to prove the lawful sources of his/her origins of goods and assets he declares.

Since 1982 this system was extended form individual suspected to be member of local organized crime, to individuals suspected of having perpetrated a list of serious crimes (1990). Since 2011, the law covers all “dangerous” individuals.

The weak point is that, notwithstanding the evidence collected in single cases and the role of a financial duplicate of a parallel criminal proceeding, this procedure lacks of a connection with a specific crime and it is based on the social danger of the individual due to his acting.

At the present time, the two systems (the classical criminal confiscation and the civil forfeiture procedure) are merging since individuals convicted for a list of serious crimes can be asked to justify the property they own,

appearing beyond their financial capacities, and therefore facing confiscation (section 12sexies DL 306/92 Act 356/92)

The last step against corruption and tax evasion offences is the *equivalent confiscation* (or a sort of “retaliation” confiscation). I mean a confiscation of properties estimated “equivalent” to the price or profit coming from the crime (section 323ter Italian Criminal Code).

But shortcuts are dangerous if one does not master the procedure properly..

Since 1984, when the 1982 Act was enacted the “social body” reacted elaborating new self-protection strategies.

Mr BRUSCA Giovanni is a Palermo Mafia killer and a highly dangerous individual.

All his bank accounts in 1984 changed suddenly from a high cash surplus to a debt situation. He still managed money but only in a bank debt situation.

All investments of Mr. RIINA’s fiduciaries in Sicily were based on bank loans.

Nowadays neither individuals or corporate properties are reported without a “lawful” bank credit. No individual good is owned without leasing form a third party.

That situation means that one must investigate on the financial activities of the third parties involved.

If after the preliminary investigations, one still expects individuals will not be able to provide the evidence of the lawful sources of their properties, will be frustrated very soon.

The lack of interest in deep financial investigation is increasing the gap between the act of seizure and the final decision to be taken on confiscation.

The outside world: dealing with assets recovery crossing the border

I gave you a picture of the situation within my nation borders. We have then to deal with money-laundering activities.

On the one hand, it is hard to find the nexus between the property and the offence. On the other it is difficult even to manage large amounts of cash itself, even worst if dealing with a permanent cash flow.

The solution is the passage from hard cash to digital money offered by the legal financial market

When a teenager my father, hoping I could learn English, subscribed to the TIME MAGAZINE International.

Reading the magazine up to the very last pages, I found there advertisements for anonymous companies and foreign bank accounts services. At that time, I felt they were whistleblowers, set up by government agencies. As professional myself, I came to realize and experienced that a professional activity can offer a tax evasion instrument.

Whenever a customer contact a lawful entity asking investment advice for hard cash and telling it comes either from drugs, weapon trafficking or racketing crimes, one can be sure that 99,99% of the professional consulted will report to every security channel, being full aware of risks involved in the activity requested. Only the 00,01% will agree with no remorse.

If a client consult a legitimate financial entity asking them for solutions of investments to protect and hide tax evasion income he got from a lawful activity (such as building or reselling or whatever else you can imagine), 95% of the professional consulted, will introduce him to the private bank sector and the VIP area (higher activity for higher amount of money given). This is a shark field of professionals wearing jackets and ties, competing for "their" fees.

If the lawful source of the cash can be evidenced, almost every suspect will fade away.

At 80% those situations are true, real tax evasion cash. However this is a channel easy to be manipulated by interested people.

Tax evasion, as a matter of fact, is a compulsory effect of money laundering in legal activity.

Use cash in an ordinary activity involve hiding costs of register fake income.

In both cases I have to get a solution or I'll lose my "illicit income" in taxes (VAT and direct taxes).

The good news is that you have to deal with professionals acting as legal ones and cheated by their own clients. If asked properly they will cooperate.

The problem is how to ask properly.

Outside national borders: tools for assets recovery in EU and world wide.

It is a principle of the EU that, within borders of the Union, that no limits are set to assets transfers.

Free circulation of people, service, goods and capitals is a principle of EU (sections UET part three title II sections 28ss title IV sections 45ss).

Globalizations itself means contacts and relations worldwide for most of activities and individual, both honest ones and criminals.

In my view, a line in a map can highly affect effectiveness of recovery efforts, even within EU nations.

The International Rogatory Commission (or Mutual Legal Assistance request, MLA) evoke an uncommon “territory” for the national legal professional.

The MLA is not an ordinary tool and must properly be managed when used.

Using MLA means to ask another legal professional to work for your investigations and cases.

At the best, both lawyers (national and foreign) have a vested interest in the case, however generally just one has, the requesting one.

MLA must be managed according to the principle of reciprocity between nations.

The refusal of cooperation or the lack of diligence can be risen as an official response of form one nation to the other.

Each Government could stop a MLA for “national interest reasons” and the relevance of dealing a single MLA as an aspect of relation between nations, explain why you have to address a copy of the MLA to your own Central Justice Department.

Since you are asking another professional (judiciary or police) to work for you is your interest to put the other one in the very best condition to execute the MLA as soon as possible giving him all details needed to deal with the request.

If I used the shortcut Italian legal system offers of the civil forfeiture, I’ll face my first obstacle in an international prospective: a MLA usually “requires” a crime committed at least for the requesting authority.

A request of cooperation in civil forfeiture procedure can be addressed to Common Law legal systems with a “hope” to be granted.

However even a Civil Law system, as the French one in a case by case situation, can grant cooperation. The French Cassation considered that in the same situation a confiscation order should be emitted under their own legal system⁽¹⁾.

You have to know how to ask, what you can request and even whom to request.

What you need is an interface to contact and understand what is required for the other professional to accomplish.

You need intelligence and analysis of those topics, this interrelated world of communication. And you need them in a short time.

The first and easiest solution is to have a glance at your Criminal Procedure Code.

It is sad to say that referring to your own rules does not means that the other professional in the requested country is expected to know or act according to them. If special rule are needed you must specify it in your request.

Second step is to look for bilateral MLA treaties MLA between your Nation and the requested country or a multilateral treaty for both of the countries.

You must be aware the if a nation sign a treaty it does not mean that it can be applied directly. A signed treaty must be ratified to be a law with relevance for both of you (who is requesting and who receives the request).

¹ See the Arrêt n° 5848 du 13 novembre 2003 of the Cour de cassation - Chambre criminelle The sentence decided that "la décision de confiscation est définitive et exécutoire et que le bien confisqué est susceptible de l'être dans des circonstances analogues selon la loi française, en ses articles 131-21 et 324-7 du Code pénal ; qu'ils ajoutent enfin que l'exécution de la décision précitée ne peut porter atteinte à l'ordre public dès lors que la requête tend à la confiscation d'un immeuble acquis par le blanchiment de sommes issues d'une organisation criminelle" granting the MLA

As a matter of fact Italy ratified the UNCAC (United Nations Convention against Corruption), but - alas! - I do not deal with corruption cases.

Italy signed but not ratified the Council of Europe Warsaw Convention, the 198 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

Italy signed but not ratified also the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (29 May 2000) and, consequentially the Council Framework Decision of 13 June 2002 on Joint Investigation Teams.

You can contact your Central Authority and for many cases they can offer you preliminary suggestions in light of their own their experiences.

As national Central Authority, they handle a lot of cases each year but their competence lies in on your national legal system.

You can ask them to get a picture of the legal system of the requested nation, but not in case you need a quick solution

Many Justice Departments or Central Authorities offer guideline for incoming MLA (see Switzerland or UK). Internet in this case is a good source of data, but you must face a foreign language.

For a good source of information, a direct channel to the requested country you can use the INTERPOL one. This is a UN international organization worldwide, active 24/24 7/7.

If you need a response for a freezing order within hours they are a solution.

In 1999, a Friday afternoon, getting a case of a fraud with a bank international transfer order already executed, a Police Officer at the Italian interface of the INTERPOL was able to activate a freezing on half million ECU still in the account in Liechtenstein. The MLA, with translation, was typed and send within a day to the correct address.

However the Police interface implies a lot of stages. You consult the national INTERPOL. Then they contacts the requested country INTERPOL competent division and then you go on to reach the Judiciary. That situation can leads to misunderstanding (for my fault, of course).

Direct contacts between legal professionals in assets recovery in Europe are allowed by the first European Convention of Assistance in Criminal Matters (Strasbourg 1959), in case of urgency (section 15 subsection 2) and were allowed, as an ordinary tool, by the Schengen Aquis (see section 48 and sec. 53).

European Union developed direct contact creating a judicial network (EUROJUST <http://www.eurojust.europa.eu>) you can contact to be assisted, and offering practical tools (such as atlas and *fiches belges* at <http://www.ejn-crimjust.europa.eu/ejn/>) offering address, telephone address and contact point for the “competent” judiciary authorities

The very last source of qualified intelligence and interface is the network of Financial Intelligence Units risen after UN Convention Transnational Organized Crime UN (Palermo 2000).

Each EU country has a national FIU (even with different nature, as central bank ones or police ones or judiciary ones) and details on bank account and movement can be given in a short time.

And they are worldwide.

I first met the Bahamas FIU sending to the Italian one a copy of the whole file of a client “*non grata*” given spontaneously by a local bank.

Acquiring details of the accounts I’ve to asked for in a MLA easy my work and the other professional appointed to deal with my request

Knowing in advance that money are not any more in the requested country but moved elsewhere, let me focus only on an evidence collect request.

However every national FIU is a financial monitoring authority with not criminal investigation duties. They are not giving you “evidence” for the Court and every use of information given must be authorized by the sending FIU.

In the assets recovery perspective they are a precious channel but with a not identified nature.

As conclusion I have to thank all the people who offered me their cooperation and advice in my professional activity and they are too many to be named individually, but in this occasion a special thank to the Council of Europe for this conference and their efforts in offering channels for effective cooperation in assets recovery. It works!