



Co-funded by
the European Union

Project RECOVER – Crime doesn't pay (GA no. 101091375)

1 workshop – online

January 31, 2023

Anna Maria Maugeri: About this aspect of the safeguards, the guarantees to apply this regulation (for example, first of all, the standard of proof). Also another aspect, the application or the principle of legality, that means also the principle of non-retroactivity. Because if we talk about the guarantee of the criminal matter, we have to talk not only about legality: it is not enough that there is a law that gives the rule for the application of the conversation, but it's also important the principle of non-retroactivity, that is a specific principle of criminal law in Italy. For example, the principle of non-retroactivity is not applied to the extended confiscation, even if a constant conversation is applied after conviction or to the preventive confiscation, because it's a preventive measure of security and not a criminal sanction. If we want to apply the guarantee of the criminal matter, we have to apply also this principle.

Let me now introduce Filippo Spiezia, the Italian National Member at Eurojust and expert of judicial cooperation. He will talk about the first practice in the application of the Regulation and the issues connected to the first application of the Regulation. In particular, analysing this aspect, we will talk about what means "proceeding criminal matter" and which are the safeguards in order to apply this Regulation.

Filippo Spiezia - Thank you, professor Maugeri.

Good afternoon to you all, dear professors, colleagues and friends world-wide connected.

First of all, my apologies: I managed to join you for this very interesting workshop only now, but as Francesco Jimenez is very well aware, having been the previous Spanish NM for Eurojust, on Tuesday we have college meeting at Eurojust, so I beg your pardon if probably I'm saying also something that has already been expressed during the workshop so far.

Thank you, Prof.ssa Maugeri, for your kind introduction in relation to my person and professional career. When I hear all these, I get persuaded that I'm getting older, because only when you are quite old, you can count some achievements. It short, I can say that I prefer to be presented only in this way: I'm an enthusiastic of my work, judicial cooperation. And in this position, I would like to share some considerations, some thoughts, with you in relation to this very interesting topic that you have chosen.

I would like to start that uh from some data. In the view of this meeting, I've requested to my analysts to calculate the number of cases registered at the Eurojust and, as far as the Italian desk is concerned in relation to freezing and confiscation from 2016 to December 2022, and we count more than 200 cases, 223 operational cases. Overall, this is a considerable amount of operational cases (with cases I'm referring to corresponding proceedings in Italy).

Overcome judicial cooperation problems, especially in the field of assets recovery, confiscation of criminal aspects in an area that remain very challenging. The EU legislator is aware of this: in this area we can count many treaties and legal instruments, but this can be interpreted also as a sign of the persisting problems in this area. The main output of Eurojust expertise has been shared at National level with practitioners through dedicated reports, for example the report of 2019 on assets recovery and with the last year report on money laundering. In relation to the title of one of this reports, the fight against crime and its complexity, I can see a link with Falcone's speech of 1988: how much¹ time has passed, and how the situation still remain the same. It is worth recalling what Falcone said "*the money has the hearts of the rabbits, but the legs of the hare*".

Filippo Spiezia - We are confronting with criminal organizations which have enormous power in terms of economic capacities. The key message, according to Giovanni Falcone, is the possibility to deprive criminal organizations of the proceeds of crimes. I also would like to talk about an initiative we took in the context of Eurojust, which involved *Guardia di Finanza*, an Italian military force devoted to trace criminal assets: it was a protocol to start bilateral cooperation by analyzing so called “cold cases” regarding asset recovery and confiscation of criminal assets. The outcome of this protocol was first release on 2022 and it has a chapter on the issue of non-conviction-based confiscations. There are four models of this type of confiscations in the context of EU Member States: the “classic” non-conviction-based confiscation, which apply when the conviction is not possible because of the death of the defendant or because of immunity, etc.; the second type of non-conviction-based confiscation includes the “*extended confiscation*”, which apply on assets that are not related to crimes for which a conviction has been issued; the third one consists in an *actio in rem*, i.e. types of confiscation ordered in proceedings against property and not people; the fourth type of confiscation, which includes Italian *misure di prevenzione*, consists in confiscation of unexplained wealth, such as goods that are not proportional to legal incomes of the person. The majority of EU Member States adopted the first type of non-conviction-based confiscation, while only thirteen of them established other types of measures such as, for example, *actio in rem*.

In the matter of the notion of “criminal proceedings” and in order to define the concept it is the essential to consider the features enlightened in relation to the *ne bis in idem* principle. According to the Jurisprudence of the Court of Justice the main features of proceedings in criminal matter can be considered are the following: the proceeding must be foreseen and ruled by a law; the proceeding must be held by a judicial authority (such as a judicial courts); the proceeding must offer safeguards, such as the right to appeal the decision; the final decision should have the features of substantial penalty, although it has the form of civil or administrative sanction, for its gravity and seriousness.

From this point of view, it’s difficult to fully apply the Regulation 1805/2018 to proceedings whit non-conviction-based confiscation as Italian *misure di Prevenzione*: the aim of these types of confiscation is to deprive someone of enrichment that is not legally justifiable. So It would not be possible to affirm that these proceedings led to a “substantial penalty” unless we enlarge the notion itself.

I think that we need to decide, at European level, if we want to have a common answer to this question: do we want to have efficient instruments in order to deprive criminal organizations of proceeds of crime and of any sort of unexplained wealth?

In my opinion, the main flaw of the discipline provided by the Regulation is that its concrete applicability still depends on the decision of national judges, in line with the legal features of their national systems. Because the latter remain quite disharmonized, the implementation of the not conviction based confiscation remain a challenged at EU level although there is an attempt to broaden to scope of the action in the matter in the Regulation 1805/2018. If we scrutinize other international legal instruments we can say that the main feature and the ground to have some legal chances in order to implemet aborad not conviction based confiscations is that the proceeding, of judicla nature, should always present some link nwith criminal activity. The more such link is evident and demonstrated the more we can count on the possibility to execute such decision.

Anna Maria Maugeri - Thank you Mr. Spiezia. Now I would like to give the floor to other participants if they have questions on these topics.

Ernesto Savona (Transcrime) - I would like to thank Mr. Spiezia for his intervention. I have a question: how can we get some data on the application of the regulation? It would be extremely relevant for us to gain information about the number of EU States who requested to apply its discipline or about the possible reasons for refusing execution.

Filippo Spiezia – Thanks a lot Prof. Savona for your question. First of all, some of these cases dealt at Eurojust are still pending, so it's not possible to have disclosure on some of them. Also, we have in house all the data you mentioned but the problem is that we don't have sufficient power to make a systematic analysis of all the Eurojust cases: we need more staff members in order to do that. In relation to the Italian situation, we're preparing the 2022 report and one of the topics of this report will be, indeed, the level of implementation of the 2018 regulation: you might find some relevant data about the requesting States or concerning the reasons of refusal.

Ernesto Savona - May I ask another question? Mr. Spiezia you are an expert in this field. What do you think about the experience of judges in evaluating the request from another Country?

Filippo Spiezia - It's an important issue. Surely, training of national Courts would be needed. Another option, in order to guarantee a uniform response, could be identifying competent courts at national level, where possible.

Anna Maria Maugeri - I have one question for you, Mr. Spiezia. Why do your colleagues think that Italian *confisca di prevenzione* or other similar types of non-conviction-based confiscations don't fall within the scope of the regulation?

Filippo Spiezia – **In my opinion we** don't have yet a definition of “proceeding in criminal matters” because the 13th recital was simply a text of compromise, that was introduced to give an answer to the Italian delegation during the negotiation for the need to enlarge the scope of the instrument, but, when we have a compromise solution without sufficient clarity, the results are what we see on the table. So, to be frank with you, I don't think this is a clear concept, which can justify the application of the principle of mutual recognition proceedings in EU Member States in the specific matter. When we talk about measures that might restrict the right of property, we need clear definitions and clear legal basis this is not the case. This is the reason why my colleagues struggle to include this type of confiscation when they resort to the Regulation 1805.

Anna Maria Maugeri - I think this is the aim and the challenge to our research. Maybe Francisco has some questions.

Francisco Jiménez-Villarejo Fernández - I fully agree with Filippo on the necessity of having guidance on the meaning of the concept of “proceeding in criminal matters”. The issue that we have on the table is very relevant. I would like to make a reference to the decision taken by the Luxembourg Court on the 19th of march 2020: in that case (C-234/2018) the Court pointed out that EU Law does not preclude the legislation of a Member State to provide the confiscation of illegally obtained assets ordered by a national court following proceedings which are not subject to national criminal law.

Anna Maria Maugeri - Another topic I would like to talk about is the safeguards provided by the proceedings which fall within the scope of the regulation. The 18th recital concerns this matter. My question is: may we include among these guarantees the ones established for criminal proceedings? For example, those that concern the standard of prove.

Filippo Spiezia - The answer to this question is strictly related to the nature of the proceedings we are talking about: if we deal with proceedings in “criminal matters”, although not criminal proceedings, the level of guarantees have to reach to a high standard. Surely, as the European Court of Human Rights and the European Court of Justice states, we must avoid the so called “*truffa delle etichette*” (lit. fraud of labels). In order to do so, we have to look to the substance of proceedings. As I said before, relevant results can be achieved with different procedures such as civil or administrative procedures.

