

Project RECOVER – Crime Doesn't Pay
Reform Proposal by Portugal – General Prosecutor's Office

Portugal has already a strong regime on assets confiscation. Our problem is the judicial praxis, not the law. Even so, some small amendments, both at substantive and mostly at procedural level, would be desirable.

From the substantive point of view would be important to have an extended confiscation regime, fully transposing article 5 of Directive 2014/42/UE. So the Portuguese law should allow confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence listed in article 1.º of Law 5/2002, where the court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

Only with that possibility will be possible to solve the cases where the property in question is proportionate to the lawful income of the convicted person, but nevertheless the court on the basis of the circumstances of the case, is satisfied that the assets are derived from criminal conduct.

From the substantive point of view would also be important to clarify the *bona fides*' concept [knowledge (or reasons for this knowledge) of the illegal origin/utilization/purpose] relating to companies. They are usually used to transfer the assets and the concept of bona fides can't be here the same. It is impossible to prove that a company knows the assets origin. The key concept should be here, who is in the control of the company, who is his beneficial owner.

From the procedural point of view the system needs more improvements: the lack of clear and secure rules is here evident.

First of all one need the procedural rules on non-conviction based confiscation. The substantive law allows non-conviction based confiscation in all possible cases (is a general clause) but nobody knows how to do it. During the pretrial phase, the judge of

freedoms can confiscate in case of non-conviction based confiscation. The same rule should apply during the trial phase, if there is no possibility of conviction.

It is also necessary to clarify the defense rights of third parties. May they have a lawyer? should they be notified of the indictment? When may they appeal?

Finally it is important to clarify the freezing powers. On the one hand it is necessary to clarify that freezing to guarantee value confiscation doesn't need the so called *periculum in mora*. On the other hand it is also desirable to clarify that it isn't necessary to notify the assets' owner that he/she will be officially defendant in the procedure before freezing. The freezing powers should encompass urgent measures in order to prevent.