The protection of third parties' rights in the Italian system

Workshop on "Mutual recognition of freezing and confiscation orders between efficiency and the rule of law"

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INTRODUCTION

- Management of ablated assets requires the resolution of any issues relating to claims asserted by third parties with **real or personal usage rights, real guarantee rights** and, above all, **credit rights**.

- Likewise, the final allocation of seized and confiscated assets is affected by reduction of their value due to these rights.

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WHO IS THE THIRD PARTY?

- It equals to an unrelated person, to someone who has not made any contribution to the commission of the crime and has not obtained any benefit from the unlawful conduct of others, with the exception of cases in which the benefit from the crime is casual, not on purpose, that is in good faith.

- The third party shall have the burden of proving the facts constituting their claim to the asset and unrelatedness to the crime/dangerousness.

- In cases of extended and preventive confiscation third party is also the heir or assignee of the person concerned meantime dead.

Categories of third parties Rights and guarantees

1.holders of property rights and real and personal rights of enjoyment on ablated assets

2. holders of pre-deductible credits

3. Holders of credit rights estabilished prior to the freezing order

DIFFERENT SOLUTIONS: The multiple avenues for asset recovery in Italy

The Italian legal framework is based on a multiple approach, including different types of confiscation:

1) *Ordinary confiscation*, aimed at confiscating assets linked to a specific crime, following a criminal conviction for that crime (article 240 Penal Code);
2) *Value confiscation*: assets of equivalent amount can be confiscated as well, when assets linked to a specific crime are outside the reach of investigators (article 322-ter Penal Code);
3) *Extended confiscation*, which in principle can be ordered following a conviction for any serious crime listed in article 240-bis of the Penal Code. In this case, the confiscation covers not only the assets associated with this specific crime, but also additional assets that can be considered as the proceeds of other unspecified crimes, based on circumstantial evidence, such as the disproportion between the entire value of the assets owned directly or indirectly by the offender and his legitimate sources of income.
4) *Non-conviction-based* confiscation, ordered through separate proceedings aimed at recovering illicit assets, without the need for a specific criminal conviction (s.c. preventive measures)

1. THE FIRST CATEGORY: THE REAL AND PERSONAL USAGE RIGHTS

in criminal confiscations (1°, 2° and 3° type)

- they are among those entitled to challenge seizure orders (pursuant to articles 322 and 322-bis of the Italian Code of Criminal Procedure they can request a re-examination or appeal) and ask for revocation of the measure pending the seizure order (in accordance with article 321 c.p.p.);

- in article 104-bis, paragraph 1-quinquies, of the actuation provisions of the Italian Code of Criminal Procedure is stated that "*during the trial third parties vested with property interests or personal rights of enjoyment on seized assets, available to the accused in any capacity, are to be summoned*";

- according to the case-law of legitimacy, they have no opportunity to actively partecipate to the trial, nor to challenge the portion of the criminal sentence regarding the confiscation, but can therefore only await the final decision and call for enforcement proceedings for ascertaining the good faith (pursuant to art. 676 of the Italian Code of Criminal Procedure)

THE FIRST CATEGORY:
THE REAL AND PERSONAL USAGE RIGHTS

in preventive confiscations (4° type)

- Third parties able to claim real or personal usage rights to the seized assets are to be summoned to appear before the special panel during the proceedings within thirty days following the enforcement of the seizure order (article 23 of Italian Legislative Decree no. 159 of 2011);
- at the hearing the concerned parties get to be assisted by an attorney, as well as to request any elements useful for the purposes of the confiscation ruling;
- there is still possibility to make their case at an enforcement hearing if they demonstrate a justifiable absence in the proceedings;
- They have the right to independently challenge the first instance ruling (art. 27 of anti-mafia code), as well as to request the revocation of confiscation (art. 28 cited)

THE FIRST CATEGORY:
THE REAL AND PERSONAL USAGE RIGHTS

GENERAL PREMISE

The asset apprehended must be directly or indirectly available to concerned person (defendant or prevented)

The main Italian case-law deems it sufficient to prove the subject's ability to determine its allocation or use, or, in any case, that they are the current dominus. Hereby **iuris tantum (rebuttable) presumptions**:

1) third parties are bound to the dangerous subject by ties of kinship (spouse or children) or cohabitation: in these cases, there is a presumption of the property's indirect availability. If the children, spouses or cohabitants want to avoid confiscation, they have the burden of demonstrating the exclusive availability of the asset. If they are unable, the assets will be confiscated.
2) the suspect has fictitiously transferred or assigned assets to third parties in order to prevent their seizure and confiscation. The judge declares the relative act as ineffective. The following are assumed to be fictitious (Article 26 Legislative Decree no. 159 of 6 September 2011):

- transfers and assignments, even for payment, carried out during the two years prior to the proposal of the measure, involving a parent, child, spouse, or permanent cohabitant, as well as relatives within the sixth degree, and in-laws within the fourth degree;
- transfers and assignments, either free of charge or fiduciary, carried out during the two years prior to the proposal of the measure.

THE FIRST CATEGORY:
THE REAL AND PERSONAL USAGE RIGHTS

1.1. ownership *(follows)*

- PREMISE: The intervention in the proceedings has to deal with the presumption of fictitiousness, pursuant to art. 26, paragraph 2, anti-mafia code;

- Even with this evidentiary limits, the third party who manages to demonstrate the effectiveness of their right, with a view to settling the formal ownership with the power of substantial dominion, is entitled to request the return of the asset (art. 23, paragraph 3, code cited, applicable ex art. 104 bis of actuation provisions of the Italian Code of Criminal Procedure). The effectiveness of the law is, moreover, purified by ethical connotations of good faith, since the law identifies the center of gravity of the protection exclusively in the effectiveness of the alien dominical right.

THE FIRST CATEGORY:
THE REAL AND PERSONAL USAGE RIGHTS

1.2. co-ownership of an indivisible asset

- PREMISE: The intervention in the proceedings has to deal with the presumption of fictitiousness, pursuant to art. 26, paragraph 2, anti-mafia code;

- whether the co-owner intends to exercise the right of pre-emption - recognized by art. 52, paragraph 7, d.cit. - for the purchase of the confiscated share at market value, they need to prove the good faith, in order to avoid possible collusive maneuvers between the third party and the proposed party, instrumental to the final re-appropriation of the asset by the latter.

- whether the co-owner does not intend to exercise the pre-emption right, the entire asset is acquired as part of the State assets and a sum equal to the same market value is paid to the third party.

THE FIRST CATEGORY:
THE REAL AND PERSONAL USAGE RIGHTS

1.3. real or personal rights of enjoyment

- These third parties cannot aspire to a reintegration protection (in accordance with art. 52, paragraph 4, d. cit., "*The definitive confiscation of an asset determines the dissolution of the contracts concerning a personal right of enjoyment, as well as the extinction of the real rights of enjoyment on the assets themselves*").
- They can only be "fairly compensated", commensurate, pursuant to art. 52, paragraph 5, of the cited Code, "to the residual duration of the contract or to the duration of the right in rem".
- The right to fair compensation does not pass through the procedural filter of credit verification, but must be recognized in pre-deduction, and therefore with priority over other credits even when assisted by pre-emption causes, except for the common limit pursuant to art. 53 d.cit. (within 60 percent of the value of the seized or confiscated assets, resulting from the estimate drawn up by the administrator or from the lower sum possibly obtained from the sale of the same).

2. THE SECOND CATEGORY: THE PRE-DEDUCTIBLE CREDITS

2.1. qualified by a specific provision of the law

- The only provision is article 52, paragraph 5, relating to the fair compensation recognized to the holders of real rights of enjoyment and to the holders of personal enjoyment rights as a result of definitive confiscation

2.2. arising on the occasion or as a function of the management procedure, including sums advanced by the State

- It refers to credits which boast a functional (instrumental) - and not merely occasional - connection with the procedure

THE PRE-DEDUCTIBLE CREDITS *(follows)*

The rationale for the different treatment is the legislative intention of granting a particularly privileged regime to credits functionally linked to the procedure

so as to

accredit the commercial reliability of the companies that are subject to it and, consequently, to avoid centrifugal thrusts from suppliers and banks that deal with companies under seizure or confiscation.

2.1. Satisfaction of the credits qualified in law

- They are paid together with all the other credits, included in a single distribution plan, and are likewise subject to the satisfactory quantitative limit pursuant to art. 53 cit.
- However, they occupy a poorer position than the other credits, even if these were assisted by a legitimate cause of pre-emption (art. 61, paragraph 2, cited decree)

2.2. Satisfaction of the functional credits

- **Requirements**:
  - liquid (amount precisely determined);
  - collectable (there is no a suspension or resolution clause);
  - uncontested, undisputed (parties agree or the amount is fixed by judgment not challengable anymore).
- Pursuant to art. 54, paragraph 1, of the cited code they can be paid, subject to the authorization of the delegated judge, even outside the verification procedure and in every moment: indeed, there is no risk of the credit being fictitious, given that the relative obligation has been assumed under the management of the judicial administrator or of the coadjutor of the Agency.

3. THE THIRD CATEGORY: CREDIT RIGHTS ESTABILISHED PRIOR TO THE SEIZURE

3.1. with advanced payment

3.2. with payment in the credit verification sub-proceedings

THE THIRD CATEGORY: CREDIT RIGHTS ESTABILISHED PRIOR TO THE ABLATION

3.1. with advanced payment

- Pursuant to art. 54-bis of anti-mafia code "*the judicial administrator can ask the delegated judge to be authorized to pay, even partial or in installments, credits for the provision of goods or services, which arose prior to the seizure order, in cases where such services are connected to commercial relationships* ***essential*** *for the continuation of the activity.*"
- The rule, which allows the advance payment of outstanding debts outside the verification phase, introduces a sort of double track in the satisfaction of creditors (before seizure) depending not on the worthiness of the credit (aequitas), but on the usefulness of the same for the continuation of the economic activities involved (utilitas) to avoid possible termination of commercial relations and the consequent economic decline of the company.

THE THIRD CATEGORY: CREDIT RIGHTS ESTABILISHED PRIOR TO THE ABLATION

➡ **with advanced payment**

Therefore:

- **weak or ordinary creditors**, holders of a dispensable relationship for the life of the seized company, suffer a temporary quiescence in the realization of their claim, not being able to act executivis on the assets subject to ablation (see art. 55 of the Anti-Mafia Code);

- **strong creditors** (e.g. **the water supplier, the phon-internet supplier, the landlord, some workers, tax consultant, some public bodies**), linked to the company by a contractual relationship the interruption of which would decree the peremption of the latter, can be satisfied - subject to the authorization of the delegated judge - in early and outside the credit check procedure.

THE THIRD CATEGORY: CREDIT RIGHTS ESTABILISHED PRIOR TO THE ABLATION

Any risk ???

with advanced payment

- *(follows)*
- The quantitative terms of the payment: in case of authorization of a partial payment, the residual debt should follow the ordinary method of credit verification.

- No limits of satisfaction: no applicability of the threshold of 60 per cent of the value of the seized or confiscated assets, *"resulting from the estimated value or from the lower sum possibly obtained from the sale of the same, to the net of the expenses of the confiscation procedure as well as of the administration of the seized assets and of those incurred in the credit verification procedure*" (art. 53 d. cit.)
- This implies that the provision pursuant to art. 54-bis cit., as it contains a conspicuous derogation from the general credit verification regime with the application of the patrimonial guarantee limit, is exceptional in nature and, therefore, must be interpreted outside of any analogical temptation, requiring the judicial administrator the rigorous highlighting of the **reasons for the indispensability** of the payment for business continuity.

THE THIRD CATEGORY: CREDIT RIGHTS ESTABILISHED PRIOR TO THE ABLATION

3.2. with payment in the credit verification sub-proceedings

- The anti-mafia code has granted a specific protection to third parties claiming real guarantee and credit rights prior to the seizure, with the handling of the verification procedure being entrusted to the delegated judge, the one chosen by the special panel ordering the preventive measures (non-conviction based, I remind you).
- The legislative mechanism consists of an almost complete transposition of the framework contained in the bankruptcy law for the relationships in progress at the time of bankruptcy, and for the makeup of the liabilities.
- The innovative system of third parties protection contained within the anti-mafia code for preventive measures has also recently been expanded to include extended confiscation pursuant to art. 240-bis of the Italian Penal Code and confiscations ordered in relation to serious crimes pertaining to the anti-mafia district prosecutors' offices.
- The other confiscation models remain beyond the scope of this protection system.

Requirements for satisfaction

a) credit rights and real guarantee rights are to be established prior to the seizure, founded in documents with ascertained dates;

b) the accused has not other assets (obviously not seized/confiscated) suitable for satisfying the credit upon which the patrimonial guarantee can be enforced, with the exception of credits backed by legitimate pre-emptive rights on those specific assets;

c) the credit is not instrumental to the illegal activity or to that which constitutes its fruits or the re-use thereof, provided that the creditor demonstrates good faith and an unawareness of the illegal activity (credits resulting from services linked to illegal activity or the re-use of proceeds are therefore excluded if the concerned claimer do not prove the exclusion of any charge, even if only for fault);

d) in case of promise of payment or acknowledgement of debt, that the underlying relationship is proven;

e) in case of debt securities, that the bearer proves the underlying relationship and that one which legitimises their possession.

a) non-abstractness of the credit and its certain anteriority with respect to the seizure

- **It aims at preventing the accused from being able to evade the effects of the confiscation by establishing prior creditorial positions of convenience or simulating their existence retrospectively.**
- The reference to the temporal certainty of the credit seems to evoke, at first glance, the discipline of art. 2704 of the civil code, which in the private sector links the certainty of the date to obligations (e.g. registration of the agreement itself) or events (e.g. death of the subscriber, reproduction in public documents) likely to dissolve any margin of doubt.
- This construction would imply the proscription from the sphere of protection of that portion of creditors constituted by suppliers of the proposal, who, according to the *id quod plerumque accidit*, do not have certain proof of their credit (e.g. registered private deeds, etc.), but of documents issued unilaterally (orders sent by fax, transport documents) and removed from qualified registration procedures, except for the purely internal one, in the own and of the recipient (e.g. for invoices). This is in line with the expediency needs of negotiating relations, the dynamics of which would be stiffened by the use of procedures permeated by extreme formalization.

Therefore, bearing in mind the scope of the discipline to avoid elusive behaviours, more akin to the penal standard than to the civil one, it may resort to indirect proof for the reconstruction of the genesis of the credit, taking into account a plurality of elements which, if serious, precise and concordant, can form the basis of their assumption.

B) no possibility of successful payment with other assets belonging to the accused

exception of credits backed by legitimate pre-emptive rights on those specific assets

- **It aims at preventing the person subjected to the proceedings from benefiting from the proceeds of the illegal activities in order to free their remaining personal assets.**

- There is no burden of having started the enforcement procedure on the residual assets of the defendant/proposed, but an objective unsuitability of the remaining assets of the concerned debtor to satisfy the credit.
- Problem of **partial capacity of the residual:**
  - arbitrary distinctions between creditors without pre-emption on the seized assets
  - the satisfaction of the credits according to a percentage established by the same judging body with prognosis of the value of the residual assets of the proposal

- It should also be considered that the regulatory solution is in any case impracticable whenever, as often happens, entire joint-stock companies are seized, where the personal liability of the shareholder is absolutely exceptional, so that the rules of company law do not allow - in the executive stage - to transcend from the aggression of the corporate assets to the personal one of the shareholder.

Praxis

This judge delegates (compromise):

- **the judicial administrator to carry out queries to the relevant public registers, as regards registered real estate and movable property;**
- **the police to search bank, insurance and more generally financial accounts.**

c) non-instrumentality nexus and blameless ignorance

The formulation of art. 52 of the anti-mafia code establishes the admission of credit that "*is not instrumental to the illicit activity or to that which constitutes its fruit or reuse (so-called **objective good faith), provided that the creditor demonstrates good faith and unaware reliance (so-called **subjective good faith**)*".**

- The provision correlates the enunciation of objective good faith (**lack of instrumentality nexus**) with subjective good faith (**blameless ignorance**) by adopting a conditional clause ("unless the creditor demonstrates…"), thus suggesting the prescription of the recurrence – additive or cumulative – of both conditions.
- However, the rule, interpreted in this way, would have significant practical implications, running the risk of forcing the majority of associates not to negotiate with a candidate for the extended/preventive confiscation, not even for activities unrelated to the illicit ones, if aware of the subjective quality of the debtor (and therefore, not even a credit for food supplies to support family).
- The hermeneutic epilogue is clearly unacceptable, as the civil death of the convicted/prevented would be decreed not in application of a sanction inflicted on him, but of measures disqualifications imposed on third parties.
- Therefore, in the opinion of the writer, the formulation is a result of exuberance: the lack of objective good faith could be filled by proof of subjective good faith, *id est* the ignorance of the existence of the aforementioned functional connection, and vice versa.
- The allegation to (subjective) good faith of the further requirement of unaware entrustment resolves itself into a mere hendiadys between the two elements.

c1) non-instrumentality nexus

- **The lack of objective good faith cannot be presumed, yet some factual elements can - on the circumstantial level - lead to it.**

- More generally, pursuant to art. 52, co. 3, d.cit., in the assessment of good faith, the conditions of the parties, the personal and financial relationships between them and the type of activity carried out by the creditor have to be taken into account, also with reference to the branch of activity, the existence of particular due diligence obligations in the pre-contractual phase, as well as, in the case of entities, the size of the same.
- These are **mandatory but not binding parameters** (possible consideration of other ones not mentioned by the legislator).

c1) non-instrumentality nexus

Elements symptomatic of a **defect in objective good faith** (by way of example):

- the granting of a credit in the period of manifestation of the social dangerousness of the proposal;
- the granting of a mortgage loan for an amount that is manifestly excessive compared to the size of the income base of the beneficiary, negligently preempting the obligations checks imposed by loan policies and related risk control;
- the granting of a mortgage loan to applicants in the presence of a clear disproportion between their lawful incomes and the value of the properties acquired as collateral, without any creditworthiness assessment;
- the granting of a land loan in the awareness that the recipient was different from the apparent one, that the price indicated in the property purchase contract was not the real one and that the guarantee had been provided through an operation contrary to the European directive on anti-money laundering (e.g. post-dated checks);
- the disbursement of sums, by a banking institution, to the offer without ascertained lawful income, in breach of the obligation to provide information on the income situation of the offer, deriving from the law or from rules of common prudence to ascertain the instrumentality of the credit to the illegal activity.

c2) Blameless ignorance

- In all cases aforementioned it will therefore be the creditor's responsibility to prove that they have **innocently trusted** in the apparent situation.

- It is to be assessed the reasonableness of the assignment on a case-by-case basis, which cannot be invoked by anyone who is in a situation of **negligence**, for example for having notably neglected the obligations deriving from the law (pursuant to articles 1175, 1176, 1189, 1337, 1341, 1366, 1375, 1393, 1396 and 1429 of the civil code), or for not having observed common rules of prudence through which to ascertain the reality of things, instead of relying on the mere appearance of facts.

d-e) proof of the underlying relationship (and legitimization of possess)

- **in case of promise of payment or acknowledgement of debt**
- **in case of debt securities**

- Therefore, it provides for further exceptions to the civil law regime inspired by the need, typical of prevention and criminal sector, to avoid the easy pre-establishment of convenient creditors

PRACTICAL CASES
sample questions

- ✓ Did the third party take action to prevent or, at least, envisage the offence?
- ✓ Is the third party implicated in any (other) related offence?
- ✓ Does the third party have a legitimate interest in the property and have an arm's length relationship with the suspect?
- ✓ Did the third-party act diligently according to the law in the creation of the interest in the asset?

Procedure

1. initial decree of the delegated judge

not prior to the first degree confiscation decree

adequate knowledge base, but risk useless dispersion of procedural energies in the event of revocation of the seizure order

(so better after the second degree)

2. presentation by creditors of applications for lodgement of liabilities

within 60 days

formal requirements: specific identification of the petitum and the causa petendi. No necessity of the patronage of a lawyer, in which case signature of the party

3. examination by judicial administrator /coadjutor of Agency of the creditors' claims and drawing up of a draft statement of liabilities

with the reasoned enunciation of his own conclusions on the admission or exclusion of each claim

at least 20 days before the hearing scheduled for the verification of credits

Procedure

late requests within one year

4. submission of written observations and deposit of additional documentation by creditors

up to five days before the hearing, under penalty of dismissal

5. the verification hearing

Public interest, differently from bankruptcy law, is shown by:

- the participation, albeit optionally, by the public prosecutor, who can bring important adversarial elements before the judge;
- the attribution, to the delegated judge, of the power to decide outside the typically civil law scheme of the iuxta alligata et probata partium, assuming the appropriate information also ex officio

6. final decree of the delegated judge (enforceability of the passive state)

indicating separately:
- the credits it deems to admit, with any reasons for pre-emption;
- those it deems not to admit, in whole or in part, succinctly explaining the reasons for the exclusion

Procedure

7. optional opposition proceedings before the Court

against:
- the **rejection measures** of the credit;
- the **admissive measures** of the credit

the party can "*produce new documents only if he proves that he did not get them in timely possession for reasons not attributable to the party itself*"

Appeal before Supreme Court of Cassation within 30 days

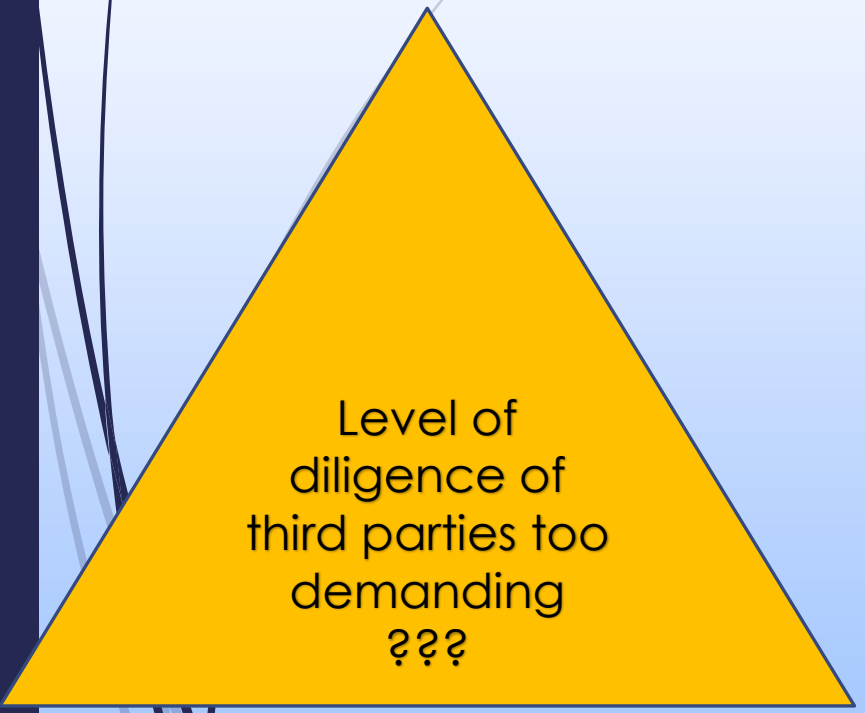
8. the liquidation of assets

- after the irrevocability of the confiscation order the assets must be **sold no later than one year from that irrevocability**
- It is a National Agency task

9. the drafting of the credit payment project and the determination of the payment plan

- **after the liquidation of assets**
- It is a National Agency task

Concrete satisfaction



- the asset guarantee, notwithstanding art. 2740 of the Italian Civil Code, is met by the State within the limit of 60% of the value of the seized or confiscated assets, as:

- indicated on the estimate prepared by the administrator;
- or resulting from any lower amount obtained from the sale of the assets themselves.

- As a consequence of this provision, the State applies a sort of sanction to each creditor exclusively for having done business with a convicted person, even in good faith, effectively reducing the amount owed for the credit by 40% (art. 53 of the anti-mafia code)

Guidelines Court of Caltanissetta

- "**8. The credit check procedure.**
- 8.1. Pursuant to art. 58, co. 5-ter, the judicial administrator/coadjutor of Agency has the task of filing a draft statement of liabilities at least twenty days before the hearing scheduled for the verification of the credits.
- 8.2. In the analysis of the individual credit applications, the judicial administrator takes a position on the existence of the conditions and requirements pursuant to articles 58 and 52 of the CAM, also carrying out queries to the relevant public registers regarding the existence of any immovable and movable assets registered in the availability of the proposal other than those in vinculis on which the third party could exercise the patrimonial guarantee suitable for the satisfaction of his credit.
- 8.3. The administrator will take care to specifically report the existence of any legitimate pre-emption causes on specific seized assets".

CASE STUDIES

INSTRUCTIONS

From now on you will find simulations, role play exercises or discussions designed to bring the readings to life.

Alpha filled personally and virtually a request for admission to the liabilities of the credit accrued by virtue of the employment relationship established with a seized company, therefore assisted by a privilege pursuant to art. 2751 bis n.1 of the Italian Civil Code, corresponding to different monthly salaries.

Alpha attached to the application a self-certification regarding his debt position and a copy of the identification document, reserving the right to produce all the necessary documentation in order to demonstrate the existence of the aforementioned credit and the relative amount, a situation which did not occur as he was not even presented at the various credit verification hearings.

The ANSBC coadjutor proposed a declaration of **inadmissibility** of the application due to lack of the minimum requirements such as the exact identification of the credit, the signature of the application and the power of attorney to lawyer to present the claim, as well as due to insufficient documentation attached, limited to a generic self-certification.

For purposes of the simulation, assume you are the judge presiding over the verification sub-proceedings

RULING ADOPTED

The delegated judge holds that some of the observations of the ANSBC coadjutor are right on target, albeit in need of some clarification.

Indeed, it is evident that the application for admission to the liabilities, being completely lacking in the signature, is without doubt an essential prerequisite for a procedural act to be said to exist. Instead there is no need of a power of attorney and, consequently, of a lawyer.

Furthermore, although the petitum can be determined from the analysis of the company's accounting documentation, the cause petendi is not adequately highlighted in the application, i.e. the allegation of the factual elements from which to exclude the nexus of instrumentality of the credit to the illicit activity of the subject and/or the so-called guilty ignorance of such a link.

CASE N. 2

In 2005 Beta was libelled on social networks by the offender Zeta.

With judgment of April 2007 Zeta was sentenced to 10,000 euros in compensation for damages, an amount he did not pay because in december 2007 all his assets were seized as part of the prevention procedure against him.

In this credit verification procedure Beta asks for getting the amount due to him as compensation for the illegal fact of the person concerned.

For judicial administrator the credit is **inadmissible** because the textual content of the provision pursuant to art. 52 d. cit. would seem to exclude credits from non-contractual torts from the scope of credit verification operations, given that the reference to "deeds having a certain date prior to the seizure" would evoke, on a philological level, the relevance of only contractual credits. The use of the term "deeds", in fact, would be indicative, on a lexical level, of a sphere of operation of the regulation different from that referred to in art. 2043 of the civil code which, in introducing the tort, makes use of the term "fact" to identify the cause of the indemnifiable damage.

This hermeneutical thesis would be supported by the prescription of the creditor's good faith as a further prerequisite for the insinuation of the liabilities, the predicability of this requirement being able to be inferred only with respect to credits of contractual origin, one could even supporting - in terms of obstacles - the full awareness, on the part of the victim of the crime, at the time of the onset of his credit, of the criminal context in which the proposed-damaging party operates.

For purposes of the simulation, assume you are the judge presiding over the verification sub-proceedings

RULING ADOPTED

For the delegated judge the judicial administrator's opinion appears to be affected by intrinsic thinness both on a logical and on a systematic level.

Indeed, the rationale of the rule which excludes the admission of credits characterized by lack of good faith is to be found, obviously, in the need to avoid any form of restitution of wealth in the illicit context of origin, through the initiative of third parties who have shared the criminal conduct of the proposed. In this teleological objective it would be paradoxical to exclude from the insinuation in the liabilities, due to lack of good faith, the passive subject of the crime, in relation to which **the satisfaction of the claim is not destined to fuel illicit circuits or to the reversion of the assets** seized in the original criminal context.

Moreover, a preclusive interpretation of the admission of credits from non-contractual torts would incur a **hermeneutical distortion** of a systematic type. In fact, the art. 48 of Legislative Decree no. 159/2011 provides for the destination of the confiscated sums and assets also to compensate the victims of mafia-type crimes, for which an exclusion of the same from the exercise of the right to compensation in the phase prior to the finality of the confiscation would appear dystonic.

On the other hand, wanting to exclude, for all the reasons set out, the insinuation to the liabilities of the credits from tort law, there is no doubt that **the state ablatory action would result in a vulnerability for the victims of crimes other than mafia crimes** or in any case from those with a violent component which, in some way, under the pressure of European Union law, could aspire to forms of state relief. The taxpayers of crimes with a fraudulent component, for example, would be strongly affected by a massive ablatory action, which would end up exhausting the generic patrimonial guarantee on which to be able to count for the satisfaction of their credits, with consequent violation - due to unreasonable unequal treatment - of the art. 3 Const.

CASE N. 3

The petitioner claims to have a credit, for the supply of telephone services to a call center society, equal to € 50.727,12, as the balance of the June 2012-May 2016 invoices, according to the best annexed. Half of this credit was accrued in the year before the seizure (2017)

The National Agency's coadjutor, considering the application accompanied by the documentation certifying the credit, proposes the **admission**.

For purposes of the simulation, assume you are **the judge presiding over the verification sub-proceedings**

RULING ADOPTED

For the delegated judge, if it is true that the **production of invoices** can constitute a valid initial probative platform, it is equally true that this is not sufficient, considered **in isolation** and above all in the absence of an annotation of the same in the accounts of both parties to the mandatory report. Nor it is possible, with only the documentation produced, to reconstruct the **overall credit-debt situation** between the applicant and the client company, since the existence of any credit notes or other deeds or facts, partially or totally, cannot be excluded in terms of certainty discharges of the obligation.

Moreover, it cannot fail to be noted that nothing has been deduced with regard to the profile of **good faith**, since the related application must also be rejected from this point of view.

In addition, the **chronic debt exposure** of the applicant is to be valued negatively, both in the coincidence between the beginning of the execution phase of the contract and the debt onset, and in the worsening progression of the exhibition itself: the accrual, right from the initial phase of the relationship, of a worsening debt of the second towards the first was solely attributable to the very **serious negligence** with which he latter protected his position, a negligence which resulted in an **inexplicable abdication of all the rights and faculties arising from the contract**, in a context in which, moreover, he could have terminated the contract immediately, on first request, unconditionally and without the filter of the benefit of enforcement.

CASE N. 4

The application for admission to the liabilities of Equitalia Riscossione Sicilia concerns privileged and unsecured credits of various kinds for taxes and duties of central State (IRES , Irap, VAT, registration for land transfer, vehicle taxes), State public bodies (omitted INAIL and INPS contributions for pensions and welfare) and local taxes (IMU on ownership of real estates and registration taxes of rents), as well as administrative fines and legal interests resulting from their omitted payment, for a total of € 270.205,69.

Let's discover together the rules for satisfaction of tax credits

The National Agency's coadjutor proposed to **admit** credit as per application. It is specified that these credits, having been definitively confiscated the personal assets of the defendant, are extinguished by confusion pursuant to art. 1253 of the Italian Civil Code, recalled by art. 50, co. 2 of Legislative Decree no. 159/2011.

RULING ADOPTED

For the delegated judge the National Agency's coadjutor's observations appear to be **only partially acceptable** for the following reasons:

- credits claimed with reference to the omissions of contributions of a **welfare nature** are **admitted**, assuming in consideration of the public nature of the creditor institution (INAIL and INPS) **good faith, not even** operating the institution of **confusion** due to the diversity between the titular public entity on the side active in the various mandatory relationships (precisely the aforementioned non-economic public bodies) and the one in charge of the *res* (Inland Revenue);
- credits relating to registration tax for rent transfer or IMU (**local taxes**) **cannot be accepted**.

In fact, it is expressly established in art. 51, co. 3 bis, of the CAM, that during the judicial administration, rectius *"until the assignment or destination of the goods to which they refer*", the payment of taxes, fees and local taxes that are based on the **possession or ownership of a property** remains **suspended**.

In the present case, since these are tax claims closely linked to the ablated properties accrued in a phase prior to the prevention procedure, it follows that the State's request cannot be satisfied here. Moreover, it is **not** ascertained the **definitive allocation** of real estates to **municipalities**.

- the application must be declared **inadmissible** due to a lack of interest as regards all the **remaining payment** orders and debit notices not mentioned, **regardless of their timing before or after the seizure**. In fact, since these are credits for Ires, Irap, VAT, vehicle taxes and administrative fines and legal interests resulting from their omitted payment, therefore, **in the ownership of the central administration**, the same are destined for **confusion** once the definitive confiscation pursuant to art. 50, co. 2, of the CAM, without prejudice to the provisions of art. 59, co. 4, of Legislative Decree no. 159/2011.

WORK CASES (N. 5)

NO ADMISSION FOR EMPLOYMENT CREDIT, PROPOSED CARATURE AWARENESS

It was the son of the person who, during the confiscation, was considered the figurehead of the defendant, in addition to having been found by the judicial administrator a series of relationships of such intensity, based on an operational collaboration and on precise economic interests.

Given the co-interest of the father of the applicant creditor in the affairs of the defendant and, especially, in the management of public establishments under confiscation, a co-interest that transcends the limits of the fictitious interposition of company shares, the former being able to intervene also in the choices of the latter relating to the personnel to be hired, it must be considered that - regardless of the applicant's formal clean record - his claim of insinuation cannot be accepted, since there are objective elements, such as the degree of close parental conjunction between the applicant and the defendant's frontman and the defendant interference by the latter in the management choices of the business activities being confiscated, to deduce the defect of the requirement of good faith, as explained above, by the creditor.

Let's discuss together

REJECTION OF EMPLOYMENT CREDIT TEMPORAL DURATION OF THE RELATIONSHIP AND COMPANY ROLE REFER TO AWARENESS PROPOSED

It is clear that, if these companies, as widely explained in the confiscation decree issued by this Court, were the instrument for the procurement, by the defendant, of illicit profits shared with the mafia associations present in the area, all the subordinate workers of the related companies have provided services instrumental to the realization of the unlawful purpose pursued.

For some of these employees, moreover, it is difficult to exclude good faith, understood in subjective terms as ignorance of the instrumentality of their contribution, which is in any case subject to the burden of proof on the part of the creditor. Indeed, XY collaborated with the proposed for nine years, the first of which (since 2000) in a context in which it was difficult to ignore the criminal quality of the same.

On this point, it suffices to recall the declarations, implemented in the aforementioned confiscation decree, with which the collaborator of justice highlights the notoriety - in the reference territory - of the entrepreneurial-criminal caliber of the defendant, who, moreover, was also arrested for connected crimes and controlled in the company of various subjects, all linked by relationships of joint interest with the proposed.

BANK CASES (N. 6)

GROUP CREDIT TRANSFER

In the case of assignment of credit it is commonly believed that good faith must be ascertained both with regard to the assignor and with regard to the assignee, with a **mitigation of the evaluation rigor**, according to a part of the jurisprudence, in the case of assignment **en bloc** of credits for the objective non-collectability of an analytical examination of the individual credits by the transferee.

Let's discuss together

BANK CREDIT ADMISSION, GOOD FAITH

In the case in question, an innocent assignment by the credit institution, rectius, there was an absence of any instrumentality of its mortgage credit with respect to the illicit activity ascribed to the proposed.

In fact, on the one hand, no indications of potential bad faith or contiguity of the banking institution with respect to the patrimonial interests of the proposed person emerge in the relational documents, having to be noted that the economic relations were maintained with a company owned by the defendant only indirectly; on the other hand, it appears that the applicant has positively fulfilled the information and verification obligations of the borrower company, through a **correct assessment of creditworthiness during the preliminary investigation**.

In this sense, the chronological priority of the applicant's mortgage credit with respect to the preventive seizure, which occurred (and transcribed in the public registers) almost two years later; the reason for the aforementioned credit, deriving from a loan agreement granted with the sole purpose of financing the completion of the building under construction to be leased to third parties, an activity consistent with the corporate purpose of the aforementioned company; the value of the guaranteed property (approximately Euro 2,189,500.00), estimated by an external company and far higher than the loan requested (Euro 1,750,000.00); the acquisition of additional guarantees, such as the warrancy issued by the parent company for a considerable amount (2,625,000.00 euros) and the assignment of the receivable deriving from the lease payments of part of the assets to be purchased and partly already leased.

BANK CASES (N. 6)

MORTGAGE ADMISSION TO COMPANY, BANK CHECKED FINANCIAL STATEMENTS, INCOME RETURN. ALSO FINANCING SPECIFIC COMPANY ASSETS

In another case with a positive outcome for the creditor, the check on the real income capacity of the applicants was not limited to a single year, but to two consecutive years (income produced in 2000 and 2001); of these, the F24 model was also requested, certifying, if nothing else, the actual payment of taxes, in relation to the declared income; moreover, (at least) the "trial balance" was requested which, although not exhaustive, as a check on the balance sheets of a longer time span would have been appropriate, nevertheless already allowed for some assessment of the (probable) self-financing capacity of the company; the loan was aimed at allowing the two spouses to purchase a property in which to carry out their commercial activity, so that it was a loan aimed, in a nutshell, at guaranteeing - at least formally - to two traders the possibility of investing in their business, without the concern of having to eventually be forced to leave the premises of their company, simply due to the expiry of the lease; the agreed accruals, equal to approximately €. 1,500.00 per month, they can be said - albeit at the limit of sustainability - in any case compatible with the audit balance of the company from which the two assumed to derive their income; the evidence that the insolvency coincides exactly with the start of the preventive seizure.

Let's discuss together

NO DEFAULT INTEREST AFTER SEIZURE

The creditor made a request for payment of the residual amount of the loan disbursed in favor of other members of the defendant's family unit:

a) €. 100,362.76 for the residual capital;

b) €. 28,884.26 for interest (both contractual and late payment).

The amount under "b" cannot be admitted.

By examining the details of the outstanding installments, it became clear that the insolvency coincided exactly with the start of the preventive seizure, so that credit for interest cannot be admitted, for the obvious reason that the late payment (i.e. i.e. delayed or omitted performance) exists in so far as it is an unjustified delay (or omission), but such cannot be said to be determined by the application of the law. In fact, during the prevention procedure, the credit arising before the seizure must be subjected to the credit verification sub-procedure referred to in articles 57 and following of the "Anti-Mafia Code", so that **the suspension of the loan payment is a due act** by the judicial administrator, unless explicitly and differently authorized by the Chief Executive Officer.

BANK CASES (N. 6)

REJECTION OF BANK CREDIT, NO ASSESSMENT OF RELIABILITY OF THE BORROWER'S PRE-CONTRACTUAL DOCUMENTATION AND ABSENCE OF CHECKS DURING THE RELATIONSHIP

Conversely, in another case it was considered that the applicant bank had ignored due to culpable negligence the illicit origin of the capital with which the borrower honored the loan installments, given that it limited itself exclusively to verifying the effective ownership of the commercial activity declared (and actually the two cohabitants practiced the activity of merchants), as well as the proven lack of previous insolvencies by the borrower without implementing any further investigation, not even regarding the profitability of the trade carried out.

In a word, the bank **has totally flattened on the documentation produced by the party**, without carrying out any checks aimed at detecting the possible falsity of the apparently documented data, thus making its own private interest prevail - albeit polluted by the remunerated facilitation in terms of illicit activity of the family - on the public interest that illicit activities are not financed and also that the reuse of illicitly accumulated sums is not allowed.

For mere completeness, it should be noted that approximately three years after the stipulation of the loan in question, the Bank of Italy had issued an internal regulation called "Provision containing implementing provisions on customer due diligence, pursuant to art. 7, paragraph 2, of Legislative Decree 21 November 2007, n. 231“, a sort of concrete recognition of all the best practices in terms of customer due diligence already imposed by higher-ranking regulatory sources, which therefore were **already in force** at the time of stipulation of the mortgages in question.

Among the many rules listed therein, there is the one which requires the banking institution to autonomously acquire documents aimed at verifying the reliability of those produced by the party and also to evaluate the operations of subjects with similar dimensional characteristics, economic sector and geographical area, which in itself would have required serious doubts about the reliability of the tax returns produced by the two young cohabitants, when placed in relation with the information obtainable from the Chambers of Commerce and also from the history of previous jobs (and related salaries) of both.

Let’s discuss together

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Thank you