10.2 An Alternative Method to Combat the Mafia: Confiscation of Criminal Assets

*by Lorenzo Bodrero**

With their profits having totaled $2.1 trillion globally in 2001 (about 3.6% of global GDP), organized crime syndicates pose a serious threat to the financial, cultural, and social development of our world. However, with the exception of a few countries, efficient and supranational countermeasures are still far from being adopted.

From blood to laws

Italy represents an exception. Although perceived worldwide as being a country heavily influenced by the Mafia, Italy has developed effective responses – both judicial and social – to counter the infiltration of organized crime into its social and economic apparatus. Italy, for instance, has implemented the crime of "Mafia association" into its penal code (the famous "416 bis") in 1982, with which criminals recognized to be members of a wider network can be prosecuted with tougher charges. Without going into all the judicial norms in place in Italy, special mention should be made of the possibility to confiscate criminal properties and to use them for social purposes.

Contemporary criminal organizations are nothing but illegal enterprises whose goal is the multiplication of capital. So what better threat to their profits than a legal instrument that – through a juridical order – results in the seizure of property? Confiscation of criminal proceeds has a twofold value: It reduces the risk of financial destabilization and corruption while at the same time working as a deterrent of crime by making it unprofitable. Beyond being a sanction, the confiscation of criminal assets is also a preventive tool that shows potential offenders that they will not be allowed to enjoy their illicit wealth.

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The law that enables confiscation of criminal proceeds is named after its two authors, Virginio Rognoni and Pio La Torre. But Italy paid a high price for the "Rognoni–La Torre" law. In 1982, after gaining fame for promoting innovative Mafia-combating measures in parliament, La Torre died in a hail of bullets. His assassination was followed by the killing of another anti-Mafia crusader, General Carlo Alberto Dalla Chiesa, who was murdered in Palermo later that year. The deaths prompted parliament to adopt the Rognoni–La Torre law along with other emergency measures.

For a decade, however, the legislation languished – until the early 1990s, when there was a resurgence in Mafia-related killings of government officials and internal feuding. The 1992 slayings of activist judges Giovanni Falcone and Paolo Borsellino, most notably, shook the nation to its core and galvanized public opinion.

The killing of Falcone and Borsellino also led to the founding of Libera, a nation-wide association that represents all strata of society – from police and lawyers to social workers, politicians, youth activists, and ordinary citizens. Libera's first act was to collect signatures for implementing the possibility of giving confiscated assets to civic groups according to the Rognoni–La Torre law. More than one million signatures were collected throughout the country, which gave parliament the impetus to strengthen the Rognoni–La Torre law and allowed for confiscated Mafia assets to be turned over to community groups for socially beneficial purposes.

As of January 9, 2012, about 12,000 properties (real estate as well as companies) had been confiscated, of which more than 700 are now used to run social projects: shelters, youth hostels, cooperatives, as well as fruit and vegetable farms stand on grounds that once belonged to ruthless criminals.

This is a heavy blow to the Mafias. Many Mafia repentants stated to authorities that they would rather go to jail than see their assets used in such a way. It is humiliating for them and an incredible sign to local communities that says "the Mafia has been defeated here." Once the only rulers of a territory, they are now perceived as a conquerable beast. In fact, Mafia bosses and criminals count very much on the social consensus of populations to freely run their illegal businesses and provide illegal labor. The social use of confiscated properties undermines this prospect.

Europe's role against organized crime

In past years, the European Union has shown genuine interest in enhancing its fight against organized crime. Mafias need to be fought using supranational countermeasures that are capable of harmonizing all EU members states' national legislations into a single legal framework. Organized crime syndicates have been benefiting greatly from the inefficiency of linking law enforcement measures between countries, whereas they have no difficulty in connecting with other international criminal groups or laundering money abroad.

The use of confiscation as a tool in the fight against organized crime had initially been conceived within the EU as a useful measure in the fight against drug trafficking. Once the great offensive potential against criminal wealth was realized, it was quickly extended to non-drug-related crimes, especially to criminal proceeds.

For more than a decade, the EU had considered confiscation. The EU Action Plan to combat organized crime of April 1997 states: "The European Council stresses the importance for each Member State of having well developed and wide-ranging legislation in the field of confiscation of the proceeds from crime."[1] Three years later the Millennium Strategy reiterated this by stating as fundamental "that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime."[2]

After those initial declarations, concrete steps were made to introduce the confiscation of criminal assets at the European level. With the 2001 Framework Decision on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of the Instruments of and the Proceeds from Crime,[3] member states are obliged to introduce systems of value confiscation, meaning the confiscation of a sum of money that corresponds to the value of the criminal gain. This means that instead of confiscating the specific assets derived from crime, states are merely required to confiscate a sum of money equal to the value of these assets, thereby facilitating the process. Where the confiscation of money is not feasible, the claim may be realized on any property available.

Furthermore, member states are required to ensure that all requests from other member states relating to assets identification, tracing, freezing, and confiscation, are processed with the same priority as is given to such measures in purely domestic proceedings. The 2003 Framework Decision on Mutual Recognition of Orders Freezing Property or Evidence[4] extends the mutual recognition to pre-trial orders, thus accelerating the execution of freezing orders between member states. The 2006 Council Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders[5] applies the principle of mutual recognition to confiscation orders. This is intended to strengthen cooperation between member states by enabling judicial decisions to be executed immediately, obviating the need for the decision to be reviewed by the requesting state.

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1 | 1997 Council Action Plan, Political Guideline No. 11.

2 | Council Strategy on the Prevention and Control of Organised Crime: a Strategy for the Beginning of the New Millennium (EU), May 3, 2000, O.J. (C 124).

3 | Council Framework Decision on Confiscation of Crime- Related Proceeds, Instrumentalities and Property (EU), June 26, 2001 (2001/500/JHA).

4 | Council Framework Decision on Mutual Recognition of Orders Freezing Property or Evidence (EU), July 22, 2003 (2003/577/JHA).

5 | Council Framework Decision on Confiscation of Crime- Related Proceeds, Instrumentalities and Property (EU), February 24, 2005 (2005/212/JHA).

A 2007 Council decision[6] obliges member states to designate at least one national Asset Recovery Office (ARO) and to ensure effective and simplified cooperation. The AROs are to share best practices, thereby improving confiscation procedure all over Europe. Whether the ARO is established as an administrative, law enforcement, or judicial body is left to the discretion of the member states. But not all member states of the European Union have established AROs – and those that exist are equipped with varying powers, structures, and practices.

The main legal instruments used by the European Union are the above-mentioned framework decisions, which are to be adopted unanimously by the member states and which are used to approximate the laws and regulations of the nations. Framework decisions are binding for the member states in terms of results to be achieved, however they allow national authorities to choose the forms and methods.

The downside of this system is that huge differences persist and some member states might only do the absolute minimum to comply with the European framework, thus affecting the efficiency of Europe as a unified entity against organized crime.

A potential milestone?

On March 12 2012, a crucial step was taken by the European Commission in the fight against organized crime by publishing a law proposal[7] – a so-called Directive – to confiscate criminal assets around Europe.

During the official press conference, the EU Commissioner for Home Affairs, Cecilia Malmstrom, said: "We need to hit criminals where it hurts, by going after the money, and we have to get their profits back into the legal economy, especially in these times of crisis." She also added that the new legislation will simplify existing rules and fill gaps in judicial member states' legislations. The aim is to *harmonize* more efficient tools for the fight against criminals and to retrieve the profits and assets acquired through illegal activities. Such an initiative could prove to be even more important in times of crisis, as the money may be invested in the welfare sector, healthcare, schools, or it can be returned to victims. "Law enforcement and judicial authorities must have better tools to follow the money trail," concluded the Commissioner.

There are many norms included in the law proposal. One of them is based on the experience of both Dutch and Italian legislation, and offers the possibility to expand the measure to cybercrime and corruption-related crimes. The originality

6 | Council Framework Decision concerning Cooperation between Asset Recovery Offices of the Member States in the Field of Tracing and Identification of Proceeds from, or other Property related to, Crime, December 6, 2007 (2007/845/JHA).

7 | http://ec.europa.eu/home-affairs/news/intro/docs/20120312/1_en_act_part1_v8_1.pdf#zoom=100

of the legislative proposal is its call for non-conviction-based confiscation, which applies in the following cases:

- assets that are not linked to a specific crime, but clearly result from similar criminal activity (extended confiscation)
- assets transferred by the criminal to a third party who should have realized that they were derived from criminal activity
- when the suspect is deceased, permanently ill, or has fled
- allowing law enforcement authorities to freeze assets that risk disappearing.

Enhancing the EU directive

Aggressive actions taken against criminal wealth constitute, one of the key issues in the fight against organized crime. Organized crime – and in particular Mafia-style organized crime – does not represent a mere "gangster" phenomenon any more. Indeed, it embodies a real (counter)power system, to which the accumulation of assets, properties, and monetary and financial resources offers a significant incentive to exist and ability to flourish. Aggressive action to retrieve such riches is therefore essential for neutralizing the strength and vitality of organized crime.

Therefore, the elaboration of legislation might improve the pre-existent normative scheme on confiscation and recovery of the proceeds that criminals draw from serious cross-border crimes. On the other hand, the proposed text has some deficiencies that – if not properly addressed – risk markedly reducing the impact of the initiative and, ultimately, could undermine the overall efficacy of the Union's action in this area.

Two issues stand out in this regard:

- the need to avoid the adoption of substantive rules on confiscation, which represents a backward step if compared with the *acquis communautaire*
- the choice to focus on just one of the pillars comprising the so-called European confiscation system.

1) The need to avoid the adoption of substantive rules on confiscation, which represents a backward step if compared with the *acquis communautaire*.

A first problematic issue is raised by the proposal's content. On some points, indeed, the initiative falls short of the EU *acquis* on confiscation measures.

In general terms, it is necessary to underline that the proposed norms are drafted in quite general terms. This reflects, on the one hand, the manifold nature of confiscation measures, which vary from state to state. On the other hand, it entails the perpetuation of past and current shortcomings, as regards the mutual recognition of jurisdictional decisions.

A key issue in this regard is represented by the "extended powers of confiscation." Article 4 of the proposal qualifies these measures as an ancillary instrument complementing the "ordinary" confiscation of the means and proceeds of crime. However, Article 4 allows for extended confiscation only if the judge considers the condemned person's assets to have derived – more probably than not – from offenses similar to those the sentence has been issued for. Therefore, Article 4 sharply differs from the provision set out in Article 3.2 of the Framework Decision 2005/212/JHA on the confiscation of goods, proceeds, and instruments of crime, since it does not permit extended confiscation when the value of goods is disproportional to the convicted person's legitimate incomes.

This is a troublesome gap. Experience shows that it is difficult – if not impossible – to collect evidence (even just in terms of probability) on the illicit origin of criminal organizations' wealth. In the majority of cases, this wealth is the sum of both illegal activities and reinvestments in the ordinary and legal economic circuit. In such a situation, determining a gap between the value of assets and the legal incomes turns out to be a fundamental criterion to ensure a more efficient fight against crime. In the meantime, this does not entail any violation of concerned individuals' rights, because the fundamental right to defense in criminal proceedings implies the possibility to provide evidence – or even just the serious and verifiable allegation – that this wealth, even if disproportionate, has a lawful origin.

A second weakness affecting the proposal's content concerns the "value confiscation," provided for by Article 3.2, which allows for confiscation of assets amounting to a value equivalent to that of the proceeds of the crime. This type of confiscation aims at neutralizing the effects of maneuvers of dispersal and concealment of the crime's economic advantages. The provision under consideration, however, excludes "value confiscation" in relation to the instruments used to commit the crime. This is a gap that must be filled in order to safeguard the proper functioning of the system. In fact, organized crime benefits from huge liquid assets and material resources, such as warehouses, means of transport, houses, and companies, mostly located in different states and often used to commit criminal offenses. In this respect, "value confiscation" is an effective tool if these goods cannot be directly seized through judicial measures because they have been sold, reinvested, or concealed.

2) The need for a holistic approach toward a proper "European confiscation system"

In the report accompanying the proposal, the Commission rightly put great emphasis on the need to establish a "more effective and diffused system of confiscation of crime proceedings." Nonetheless, the choice to focus only on minimum substantive rules concerning confiscation seems inadequate to achieve such a grand objective. Indeed, it is necessary to set up a more comprehensive legal framework, articulated on (at least) four complementary levels:

(i) The substantive provisions on confiscation
All member states shall adopt common minimum rules about the conditions for utilizing seizures (provisional measure) and confiscations (definitive measure), as well as about their legal nature and effects

(ii) Judicial cooperation
Seizure and confiscation, when ordered by a state's judicial authorities, must be promptly executed in the state(s) where the assets are located; any delay might frustrate the effectiveness of such measures, considering that criminal organizations are capable of transferring and/or concealing these goods, especially movables and financial assets

(iii) Investigative cooperation
Prior to seizure and confiscation, assets must be sought out and found by specialized investigative services

(iv) The destination of confiscated assets
Once seized and confiscated, assets must be entrusted to special administrative services, which should be equipped with all the necessary resources to face the – often delicate – financial, legal, and administrative tasks that the management of these goods entails.

However, the Directive's only aims at a minimum harmonization of member states' substantive rules on the matter. The Commission's initiative, albeit certainly praiseworthy, may lead to the adoption of an isolated instrument with a limited capacity to attain the objectives it declares to pursue.

Therefore, it is essential to widen the scope of application of the proposal by also taking into account the other three pillars of the European confiscation system. This may greatly enhance the chance to achieve, in the near future, a comprehensive corpus of coherent acts that touch upon all the different levels of the system.