Asset recovery – case study

Case Study: Asset recovery

(based on ECHR from 02.05.2017, Application no. 38977/15//

Rosario SOFIA against San Marino)

Facts/ 1 (background):

On 01.12.2020, Mr. Antonio Rosso (A), an Italian national, who lives in Marseille/ France and his brother, Mr. Benno Rosso (B), who lives in Catania/ Italy, arrived at a San Marinese bank (Banca di San Marino) where B held a current account which he had opened on 30.10.2018. B withdrew EUR 850 000 which had been deposited in the current account earlier and A then asked the bank employee dealing with them to issue 68 bearer savings books in his name. The two brothers asked the bank employee then to deposit the money B had just withdrawn into the 68 bearer savings books (with an equal amount of EUR 12 500 for each savings book). When asked by the bank employee for the reason for such operations, A and B explained that they feared ongoing criminal proceedings against B in Italy which could lead the Italian judicial authorities "to request information". The director of the bank branch gave his consent to carry out the requested transactions, despite his duty under anti-money laundering laws not to engage in operations that appear suspicious. However, he later reported them to the Financial Intelligence Agency (Agenzia di Informazione Finanziaria, AIF), the national authority responsible for combatting money laundering.

In a report of 17.02.2021, received by the San Marinese courts the day after, the AIF informed the investigating judge (G) of the above-mentioned facts. In addition, the AIF had found out that B had deposited the money in the current account, mostly in or after 2020, by paying in several cheques. According to the professional and commercial activities he had provided to the bank in 2018, B´s job consisted of trading in clocks, silver and items made from gold. The trading had originally been done in his own name, as a natural person, and subsequently through a company, which had been liquidated in 2008. After that, it had continued through another company in which he had never held any administrative position or share capital (the company had in formal terms been administered by his wife). That company had ceased business in 2020.

Questions/ Discussion 1:

- Would you suspect any criminal act? Which one? *(money laundering)*

- Would you suspect that the money did not come from the source B had stated towards the bank? Why? *(since most of the cheques which had made up the mentioned sum had been deposited in or after 2008, the transactions were considered not to have been justified by or in line with the above-mentioned facts).*

- How would you react to these facts as the investigating judge (J)?

Facts/ 2 (first-instance proceedings):

On 19.02.2021, the authorities in San Marino launched criminal proceedings against A for money laundering. On 09.03.2021, G reported the suspected operations to the Italian National Prosecutor against the Mafia (*Procura Nazionale Antimafia*) and requested information concerning A and B. On 13.10.2021, the requested judicial authority in Italy informed G that there were ongoing proceedings for usury against B and others following a criminal complaint submitted by a jewellery trader and that A was considered by the Italian financial police (*Guardia di Finanza*) to be very close to various members of a local Mafia group in Catania.
This information was also sent to the French authorities in Marseille where A lives. On the basis of the information, the French European Delegated Prosecutor (EDP) at once instituted criminal proceedings against A as well and asked the public prosecutor in Catania on 23.10.2021 for assistance in finding out if the money deposited in the current account in the San Marinese bank could possibly have been related to the offence of usury or to any other crimes affecting the EU's financial interests, in any way related to B. By a note of 21.11.2021, the Catania public prosecutor replied to EDP that after examining the San Marinese bank documents and comparing those documents with information at his disposal, the money deposited in the San Marinese current account had to be considered as proceeds of the offence of usury or related to it. By a decision of 04.02.2022, the competent French investigating judge (J) informed A by judicial notice, that he was under investigation for money laundering for the actions taken in San Marino on 01.12.2020 because the opening of the bearer savings books and the deposit of the money from the current account, held by B, into the bearer savings books in equal shares of EUR 12 500 each for an overall sum of EUR 850 000 had constituted acts of concealment, transfer and substitution of money, aimed at hiding the criminal origin of the funds, which were the proceeds of the offence of usury.

Questions/ Discussion 2:

- In what form and under what judicial regime can G have reported (on 09.03.2021) the suspected operations to the Italian National Prosecutor against the Mafia and have requested information? *(Article 29 of the 1939 bilateral Convention on Friendship and Good Neighbourhood between San Marino and Italy (Convenzione bilaterale di Amicizia e Buon Vicinato tra San Marino e Italia > always think of specific bilateral rules!)*

- In what form and under what judicial regime can the information have been sent to the French authorities? *(spontaneous information in the EU/ with third countries)*

- In what form and under what judicial regime can EDP have asked the Italian public prosecutor for assistance on 23.10.2021? *(formal letter of request/ EIO)*

- What are the pertinent rules for the criminal acts at stake in your country? *(in the case: investigation for money laundering under Article 199 bis of the Criminal Code of San Marino and under Article 324-1 of the French Criminal Code)*

- In addition to the judicial notice of 04.02.2022, what else should J have ordered simultaneously? *(by the same date, J also ordered the seizure of the EUR 850,000 deposited in the sixty-eight bearer savings books as well as the physical seizure of the savings books themselves, if they were in the possession of the bank, considering the money to be the corpus delicti of the offence of money laundering. Moreover, J ordered the bank to transfer to him within fifteen days a copy of all the documents relating to the savings books and to provide any other useful information (including the precise final balance of each book)).*

Facts/ 3 (complaint against the seizure decision):

On 21.04.2022, the AIF reported that B had opened a first bearer savings book on 12.03.2002 and had deposited EUR 579 352.36 through three deposits of cash. Following a series of other operations that bearer savings book had been closed on 30.10.2018. On the same day, B had opened a current account, in which he had deposited the money left in bearer savings book and had over time deposited 683 cheques worth a total EUR 1 817 406.14. According to the AIF, seven of the above-mentioned cheques for an overall sum of EUR 37 890 concerned the jewellery trader.

A subsequently lodged a complaint to the Court of Criminal Appeals against J´s decision of 04.02.2022., He sought the annulment of the seizure for various reasons. He argued that it lacked the requisite "*fumus delicti"* (presumption of a sufficient legal basis) and claimed that J had seized all the money in the applicant's bank accounts and not just that directly linked with the alleged "predicate offence" (usury). In A's opinion, J should have – if at all - seized only EUR 37 890 and not the entire EUR 850,000 given that in the report submitted by the AIF on 21.04.2021, only EUR 37 890 had definitely been considered as the proceeds of usury against the jewellery trader. In particular, he highlighted the lack of proportion between the amount of money seized and the sum considered, in the Italian proceedings and the AIF report, to have been the proceeds of usury.

Questions/ Discussion 3:

- Under your legal regime, what other reasons could be brought forward by someone filing a complaint against a seizure decision? *(in the ECHR-case: A wanted to have the whole decision annulled on the ground that it had not complied with the time-limit provided by domestic law)*

- How would you react to A´s arguments? *(in the real case: a Judge of Civil Appeals in his capacity as Judge of Criminal Appeals dismissed the complaint. He held that the two prerequisites for the application of the disputed seizure, namely fumus delicti and periculum in mora (a danger in delay), had been in place. Moreover, the judge noted that even if the AIF report had limited the corpus delicti of the usury in question to EUR 37,890, such a limitation did not exclude the possibility that further amounts of money transferred into the savings books could also possibly have been profits from the alleged predicate offence. In the judge's view, if that were not the case it was difficult to fathom why the applicant had transferred the whole sum into the savings books and not just EUR 37,890. The Third-Instance Criminal Judge dismissed the appeal after an oral hearing held the same day. He noted that there was no reason to believe that the predicate offence (usury) in the criminal proceedings in Italy against B was the only offence ascribable to him.)*

- Under your legal regime, what procedural rights can A use to appeal a decision of seizure? *(in San Marino, there were 3 legal instances)*