

SOME LEGAL CONTROVERSIES IN ESTABLISHING CRIMINAL ASSET FREEZING MEASURES AGAINST ENFORCED EXECUTION

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Abstract: *This paper looks at the conflict between the criminal distraint established upon the asset freezing and the enforced execution initiated on the basis of a civil enforcement order by a creditor because there are many controversies in both the doctrine and the judicial practice. We believe that in such legal situations priority should be given to the measures ordered by the criminal justice bodies, especially for the reasons given in the present article, in order to respect the public interest.*

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JEL Classification: K14, K29

1. Introduction

In the legal doctrine the asset freezing is defined as procedural measures of a real nature which have the effect of rendering / freezing the movable and immovable assets belonging to the suspect, the defendant or the civilian party for the purpose of special confiscation or extended confiscation, or for securing the penalty by fine enforcement or for paying court fees or compensating damages caused by the committed offense. (see, for example, Neagu, 2010, p. 622).

The asset freezing has a *provisional character* in order to *prevent* the destruction or the alienation of the assets that could compensate for the damage caused by committing an act provided by the criminal law or to cover the legal expenses or even the payment of the fine ordered by a final sentence. By imposing the asset freezing, a temporary unavailability of the

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assets to be subjected to confiscation takes place. This prevents the conclusion of any civil legal acts aimed at removing property from the patrimony of the persons suspected of having committed criminal offenses.

According to the definition given by the Romanian explanatory dictionary, the term ‘unavailable’ means something that cannot be available, cannot be used at will, is not free. In the legal sense, *unavailable* is understood as ‘not disposable’.

2. Arguments of the evoked thesis

We believe that the unavailability effect affects the entire legal reality of the assets in question, even in the case of a possible forced execution, assuming the creation of some real guarantees in favour of third parties.

Thus, during the criminal trial, the State, in its capacity as a representative and holder of the asset freezing, by establishing the legal instrument regulated by Art. 249 Criminal Procedure Code, prevents any form of alienation of the asset in view of protecting the concerned persons’ rights.

It is obvious, therefore, that the forced execution and the enforcement acts can only take place after a final appeal based on the provisions of Art. 250 of the Criminal Procedure Code rap. to Art. 13 of the European Convention on Human Rights (see Criminal Decision no. 1207/A/14.10.2014).

In the case of a possible forced execution of the asset subject to indemnification by the establishment of the criminal distraint established upon the asset freezing, we believe that it would be possible only after the definitive lifting of the asset freezing ordered as a result of the final sentence given in the criminal case.

We consider that by accepting the contrary thesis, the provisions of art. 249 of the Criminal Procedure Code would be eluded. The reasons why we consider such an assertion to be valid is determined by the fact that the criminal procedural provisions, by applying the legal syllogism, have a special character in relation to the forced execution procedure governed by the Civil Procedure Code.

Unlike the civil procedural rule (the rule of common law governing the private obligations of the parties), the asset freezing measures instituted during the criminal trial presuppose the observance of special rules that

protect the general interest, being derogations from the common law (see Civil Sentence no. 19109 / 07.10.2013)

Therefore, the unavailability arising from the establishment and the activity of the asset freezing measures obstructs legally and imperatively any procedural and / or procedural steps (including the initiation of forced execution) that would affect their material and / or legal object and which would circumvent the seized assets from the special action they have been subjected to by acts / procedural measures ordered by the competent criminal bodies (see Civil Sentence no. 19109 / 07.10.2013). For precisely these factual and legal reasons, until the judgement is final in the criminal trial, both the established asset freezing and the way it is implemented can be challenged and implicitly verified by way of action or by way of exception (as defence) only in the terms and conditions of the special rule (see Civil Sentence no. 19109 / 07.10.2013).

The unavailability regulated by the criminal distraint established upon the asset freezing according to Art. 249 of Criminal Procedure Code is not an alternative to be ignored, but an absolute requirement in law enforcement.

Directly, by establishing the measure we are talking about, the assets concerned are temporarily removed from the civil circuit during the criminal trial, which means implicitly that they can not be sold at auction even if there are forced execution requests formulated by mortgage or gajist creditors who have previously registered their claims in the Land Book (Civil Sentence No. 15722 / 09.12.2013) or in the Electronic Archive of Securities. As the measure is enforceable, the assets are out of the civil circuit until the case is finally settled, as provided by Art. 397 of Criminal Procedure Code.

Therefore, in the case of the establishment of the criminal distraint established upon the asset freezing on the basis of art. 249 Criminal Procedure Code, the right of preferential prosecution of the mortgagee or pledgee is not removed, but there is, *ope legis*, an adjournment of the forced execution. (see Civil Sentence No. 15722 / 09.12.2013). In other words, the forced execution in favour of the mortgagee or pledgee stops in the case of the establishment of a criminal distraint established upon the asset freezing, which is imperatively according to the new Criminal Procedure Code, Art. 249 par. 2.

Controversy exists both in the doctrine and in the judicial practice as some support the thesis that the establishment of a criminal asset freezing measure is not circumscribed to the cases of suspension of the forced execution stipulated by art. 701 Civil Procedure Code which provides that *forced execution is suspended in cases where it is prescribed by law or ordered by the court.*

Bailiffs, having to deal with such legal situations, are placed in the position to suspend any form of enforced execution of the assets upon which a criminal distraint has been seized, which obviously damages the interests of the creditors directly interested in the use/sale of the asset with the help of the enforced execution.

We believe that, in such cases, the measures ordered by the bailiffs are sheltered from any criticism since the civil court will not subsequently have the necessary functional competence to resolve such a criticism of the measure ordered by them if a possible appeal against execution takes place. Because there are two distinct legal institutions, one of a criminal procedural nature, and the other of substantive, civil law, we state that only the criminal court is competent to rule on any issue related to criminal distraint.

Otherwise, as we have already shown, an unlawful substitution of functional competence would arise which would create the premises of fraudulent alienation of assets and implicitly would irreparably damage the interests of the owner of the frozen assets.

Last but not least, beyond the application of the principle ‘the criminal holds the civilian’, we must also mention that the establishment of the criminal asset freezing measure is aimed, first of all, at ensuring the increased protection of the interests of the State represented by the Public Ministry. Therefore, it is imperative to refer to the general and public interest with priority over the private interest promoted by a creditor who seeks to capitalize on his own claim. In the case of such a contest of circumstances, it is obvious that the State must be given priority, as a guarantor of the observance and application of the legal provisions, in order to protect the general interest, whose ultimate beneficiary will ultimately be the entire population.

Conclusion

We point out that, until the criminal distraint established upon the asset freezing is not cancelled by the competent criminal justice body

following a final judgment, no other legal procedure can be initiated in respect of the seized property, as this would mean not taking into consideration the law by making the assets available through a way unforeseeable by the law, thus eluding the imperative legal provisions.

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