Section 7

Pecuniary sanctions in the field of financial criminality and corruption in the public sector – Recovery of the proceeds of crime

I. Pecuniary sanctions and their relation to confiscation in the sanctioning system regarding financial criminality and corruption in the public sector

In both financial crimes and corruption against the public sector, the dominant element is the intention of the perpetrator to acquire financial benefits, which crucially links the countering of these offenses with the imposition of pecuniary sanctions.
To the extent that the legislature employs sanctions to introduce disincentives for both third parties (: general prevention) and the offender (: special prevention) as to the future recurrence of similar crimes, it is reasonable to impose not only custodial sentences, but also penalties that affect the offender's criminal target, i.e. his/her assets. Naturally, a prerequisite for the effectiveness of these disincentives is for the penalty to exceed the amount of the benefit criminally obtained by the offender.

It is problematic, however, that the above reasoning is not explicitly reflected in the law. Therefore, no clear legislative guidance is provided as to the minimum level of penalty surplus that ensures its anti-crime effectiveness. Furthermore, as the perpetrator's deprivation of his/her criminal gains seems to now be a goal served (primarily) by the ancillary measure of confiscation (whether imposed by the general provision of Art. 76 GPC, or by individual provisions in the Special Part of the GPC or special penal laws), the lack of an explicit regulation correlating both types of sanctions and defining their objectives is still an issue. This deficit creates risks regarding the compatibility of the offender's ultimate penal treatment to the constraints of the proportionality principle, which are exacerbated when the judge resorts to special provisions on surrogate confiscation or pecuniary sanction.

The above considerations demonstrate that interventions are required to the current legislation. Specifically: (a) the confiscation penalty should be redefined and acknowledged as the primary tool of criminal policy for depriving the perpetrators of their criminal assets gained. In this context, there should be a functional and terminological distinction between cases when *asset removal* occurs only for reasons of restoring the victims' property and in cases when the *initial seizure will result in confiscation*, i.e. a transfer of assets to the State; (b) given the key role of seizure/confiscation in recovering the proceeds of crime, whenever it is imposed, the possible concurrent pecuniary sanction should be limited to a role of supplementary penalty aiming to further impair the offender's property. Therefore, in defining the pecuniary sanction, any assets acquired by the perpetrator from his/her actions should not be re-calculated; (c) if confiscation and its supplementary measures go beyond impairing the offender's assets, i.e. when the law allows their imposition based not only on the increase of criminal assets, but also on preexisting crime-related property (e.g. Art. 140 §§ 1, 2, and 4 of Law 2960/2001 on imposing confiscation of smuggled goods and any means of transport used for smuggling and

on enforcing substitutes penalties equivalent to the CIF value of smuggled goods if the latter could not be confiscated), if the imposition of a concurrent "classical" pecuniary sanction is envisaged, the law-enforcers should account for completed or future property impairment against the perpetrator due to the cumulative imposition of confiscation or substitute pecuniary sentence when determining the penalty amount. However, in such cases it is more appropriate for the legislator to avoid the concurrent cumulative imposition of "classic" pecuniary sanctions; (d) when seizure/confiscation or surrogate capturing of assets does not seem possible (e.g. due to lack of traceable assets), the deprivation of property should be applied through substitute pecuniary sanctions, which may be imposed cumulatively with its "classic" counterparts; (e) in exceptional cases where the law does envisage confiscation and/or complementary measures, only then should the pecuniary sanction be allowed to function as a means of depriving the offender of the illicit benefits gained; (f) in executing both the substitute and the "classical" pecuniary sanction, if the victim has not been properly compensated through seizure and reimbursement, the victim's outstanding claims should be accounted for (by extending the scope of Art. 77 GPC); if the assets of the convicted offender are not sufficient to cover both the penalty and the victim's claims, the latter should be given priority over the prior.

II. Recovery of the proceeds of crime in Greek law: Criminal policy challenges and the limits of equitability

1. Introductory remarks

The broader issue of recovering proceeds of crime through confiscation (gradually acknowledged as a significant crime prevention objective in the national debate) calls for a demarcation of terms. The repressive role of criminal confiscation has long been (and still is, to some extent) relatively limited in the Greek legal order. Article 76 GPC was constructed in a different institutional and social environment, where criminal repression was mainly expressed via custodial sentences.

Confiscation carried a special retributive and stigmatizing function. Therefore, it was detached from a "balancing" cost-benefit analysis, did not until recently make crime unprofitable for the offender, and did not fulfill relevant general prevention targets.

This explains the traditional limitation of confiscation to tangible criminal proceeds or means used for the perpetration, and its practically marginal sanctioning role in the field of property crimes.

On the other hand, the Greek law long lacked (and still does) an overall strategic perception of the criminal proceeds and their handling in criminal proceedings.

Therefore, and regardless of recent international developments which somehow explain Greek legislative initiatives, the Greek legal order should have and now must be equipped with a reliable and equitably defined criminal revenue recovery system.

2. The international advancement of confiscation and the fragmentary reaction of the Greek legislator

Since the beginning of the previous decade, various initiatives were taken in Greek law to keep up with numerous relevant international regulations, many of which binding the national legislature.

A peak development in the area refers to the worldwide promotion of anti money-laundering legislation.

Many aspects of this shift are now apparent in Greek law, although the "general" provision of Art. 76 GPC remains unaltered in its traditional form.

Over time, money-laundering laws incorporated "special" provisions for confiscation (e.g. the current Art. 46 of Law 3691/2008), adopting in particular the compulsory nature of the sanction and its expansion to the gains and indirect proceeds of the original "illegal" assets. It is also critical that the same legislative framework adopts a system of early seizure of the criminal assets, delegating new authorities (and obligations) between the prosecution, the judicial council and the Anti-Money Laundering Authority. In view of the potential indirect reference of the money laundering legislation to almost all crimes generating property benefits, it actually constructs a secondary "general part" that coexists with the traditional relevant outlook of the GPC and the GCCP.

Divergent provisions on the same issue also exist in other fields, a typical example being the current Art. 238 GPC on confiscation for crimes of active and passive bribery.

Extensive confiscatory powers have not yet been openly adopted in Greek law except indirectly, through Art. 47 of Law 3691/2008, which envisages the hybrid institution of "State reimbursement" in an attempt to offset the reluctance to impose extended confiscation found in Art. 46 of Law 3691/2008.

As to the ratification of confiscation, the indirect influence of criminal legislation on money laundering is also noteworthy.

Broadening criminality for money laundering practically restricts the necessity to envisage provisions for confiscation against "third parties" only where the latter are not positively aware of the illicit nature of the "dirty" assets. Of course, similar provisions are even more redundant in legal orders that acknowledge criminal liability for negligent money laundering.

In a nutshell, one can say is that the Greek legislator's efforts to adhere to the latest international trends on confiscation are *fragmented and institutionally immature*.

Similar attributes can be detected in the recent law on "*seized or confiscated pecuniary claims and cash*" that attempts to address the whole problem as an issue of distribution of seized money.

3. The need to introduce a new recovery system for criminal assets

The attempt to reform the provisions on confiscation in Greek law cannot be reduced to a sterile effort to "cover" the country's international obligations.

It requires a coherent "national" recovery system for criminal proceeds adapted to the contemporary social reality, encompassing all forms of criminal behavior that produce financial gains, but is additionally important in the relevant fields herein, i.e. acts of corruption and violations of public property.

Under such a new strategy, the Greek legislature must definitely be critical of the respective international developments, and not blindly fulfill the duty of compliance to our international commitments.

4. Single "general" provision

The general characteristics of confiscation (its objective and subjective scope, substitute confiscation, its compulsory or optional nature, the issue of "mixed" assets, the destiny of illicit assets when acquired by a third party to which no offense is attributed) must be uniformly set in the general part of the GPC, with further reference to the acts of corruption and violations against the public property.

Special provisions could exist (e.g. on organized crime or systematic criminal activity), which are nevertheless better reflected in a single "general" provision.

5. Recognizing the need to recover the proceeds of crime: Clarifying the restorative and sanctioning character within the deprivation of the offender's property

Giving back the perpetrator's financial gains (e.g. through a fraud or embezzlement) to the State or the individual victim mainly serves a restorative function and is a self-evident imperative of the legal order, basically problem-free, especially as regards the direct produce of criminal conduct.

Implementing this aim was until recently certainly not linked to criminal repression (at least in the Greek legal order), as confiscation was traditionally limited to tangible proceeds of crime, while the recovery of illegal gains and losses incurred was mainly pursued through private law.

This prospect did not prove successful.

In recovering the direct property gains of crime, the proportionality principle does not seem influential in principle, while confiscation's mandatory nature seems principally inevitable as regards such proceeds. This broad scope of confiscation, which includes assets firstly generated through crime, should be clearly reflected in the law.

An express legal provision should also regulate the imposition of confiscation for attempted offenses, if the attempt generated illegal assets, together with preserving the sanction as security measure along the lines of Art. 76 § 2 GPC.

From the moment one decides that the anti-crime apparatus cannot stand generally indifferent against the criminally-induced gains, it is necessary to design a system that allows for the co-assessment of civil claims as to the "distribution" of assets.

It is likely that the benefit gained remains at the hands of the offender or is even sufficient for the recovery of an amount equal to the original criminal proceeds.

However, apart from the individual victim -or the absence thereof- relevant claims on the same assets may be brought by other creditors (victims or not of other offenses) who may not be included in the field of the specific criminal proceedings. The “preferential” option to satisfy the State or the individual victim from the same property is, therefore, not always a given assumption.

In light of these considerations, one could articulate the following solutions:

The deprivation of criminal assets should be imposed on the offender as a sanction. If they are salvaged unaffected in the offender’s ownership (e.g. fraud-generated cash kept in a bank safety deposit box, robbery money found in full in the criminal’s hideout, etc.), upon his/her conviction the court orders their reimbursement to the victim, as long as they are equal or part of the financial loss suffered as a result of the criminal conduct. Third parties that did no raise any claims in the criminal proceedings retain the right to file civil suits according to Articles 310 § 2 & 373 GCCP. The primarily compulsory nature of the sanction should not, however, deprive the court from weighing up according to the proportionality principle, particularly when the accrual of illicit financial gains is accompanied by a significant property offset against the offender (e.g. awarding a public works contract following a bribery or complicity to misappropriation and implementation of the contract).

In case of criminal participation, the deprivation affects the gains of every single perpetrator.

If the discovered direct financial gain is neither linked to an impairment of the victim’s property, nor is it reimbursable (e.g. payment given to the perpetrator by a third party or an instigator in order to commit the crime, proceeds from dealing drugs, etc.), along with the deprivation the court orders a confiscation, i.e. a retention by the State of the illegal assets, their substitutes, and produces.

The management of this property could be assigned to the subsequently proposed Agency for the Recovery and Management of Criminal Assets (ARMCA), which should incorporate effective compensation mechanisms for crime victims.

6. Combination of illicit produces and legally obtained assets – Means of crime commission

Stripping the perpetrator of the produces of illicit assets or/and any combined legally obtained property is of partially sanctioning nature. This deprivation is better left *potential*, so the judge may weigh up, as the removal of all the offender’s assets may be a disproportionate measure (e.g. investment of illegally obtained gains amounting to €100.000 to an existing legitimate corporation with a share capital in the millions).

Moreover, the victim’s restitution via these assets is not automatic. Because of the possible need to satisfy third-party claims, the criminal court should limit itself to the relevant deprivation, leaving the final allocation of these assets to civil justice, through the temporary delegation of their management to the relevant Criminal Asset Management Service (see relevant section on procedural reforms).

A possibility rather than an obligation to impose confiscation should be provided with reference to the means employed to commit the crime, giving the judge the ability to customize the decision respecting the proportionality principle (e.g. confiscation of expensive vehicles). An exception could be made for gifts in all bribery offenses, the deprivation of which should always be compulsory.

7. Surrogate confiscation

Surrogate confiscation is supported by a primarily correct argument: the perpetrator who managed to conceal the criminal assets or even to consume them until the trial should not be rewarded. To the extent that its imposition requires an unambiguous judicial conclusion on the acquisition of the initial assets by the offender, surrogate confiscation does not carry the serious equitability problems generated by extensive powers of confiscation.

In light of this, however, surrogate confiscation is not unproblematic. Its repressive advantage over the pecuniary sanction certainly lies in the fact that its imposition by the court will directly ensure the "recovery" of criminal proceeds without necessarily employing measures of forced recovery against the offender's assets, as in the case of the pecuniary sanction.

However, this leaves significant leeway to infringe the proportionality principle. For example, confiscating real estate that was evidently legally purchased (as when the court imposes surrogate confiscation) is linked to the possibility of confiscating -even fractionally- an asset of significantly superior value compared to the amount of proceeds laundered.

Therefore, this sanction should remain either a possibility or an initial obligation, with a clause of non-enforcement when it disproportionately encumbers the offender, at which instant an equivalent fine should be imposed.

The destiny of the assets that "replenish" the confiscation of the -missing- direct pecuniary gain is more challenging; those being legally obtained, the State's claim to their appropriation (as an equivalent to confiscation of the pecuniary gain) is likely to coexist with claims of the victim or of third parties on the same property. Hence, the State's "preference" to implement surrogate confiscation is not equally apparent.

For this reason the *deprivation* of the relevant assets from the offender's property through the guilty verdict judgment and the "transferring" of its management to the Agency for the Recovery and Management of Criminal Assets would be recommended. Within the deadline and retaining the necessary publicity, interested parties may submit their claims to ARMCA. If the reasonable time limit expires, the assets will accrue to the State.

8. The State's access to criminal assets of third parties

The destiny of criminal assets transferred to third parties before the offender's criminal apprehension should also be shaped in a uniform, efficient and equitably safe manner.

As already mentioned, the problem is primarily linked to the range of punishability adopted for money laundering by a given legal order.

In an economy such as the Greek, with its extensive informal economic activity, the demarcation of negligent money laundering would risk the targeting of criminal enforcement against a particularly large number of citizens, with dubious repressive effects. Generally speaking, the necessary transformation of national economic activity towards a more transparent configuration cannot be achieved by employing criminal law as its main vehicle.

Therefore, the punishability of money laundering should not be extended, but rather focus on acts of "genuine" laundering, i.e. on deliberate concealments or attempts to cloak the source of illegal assets. In any case, it is imperative to require an undeniable knowledge of the reprehensible nature of the property as a condition to establish criminal liability of acquiring third parties.

The problem persists in this rendition.

In this field, one should first take in to account whether the offender's property still incorporates any payment received for transferring the illegal property to a third party. When the third party cannot be adjudicated for money laundering, it seems appropriate for the criminal court to order the seizure of the third party's assets and transfer their management to ARMCA, given the existence of sufficient evidence that the assets were transferred to avoid confiscation and the third party was aware of this possibility or was required to be aware of the specific purpose, especially when the assets switched hands either free of charge or at an apparently low price. The final decision on the destiny of the property should be left to civil courts, after the State has filed a relevant claim and after the rights of other individuals who may intervene in the process or exercise independent legal remedies have been assessed. A similar claim should be filed by the State if no assets are salvaged, because they were either spent or transferred. The reservation of civil justice jurisdiction is favored by the nature of the relevant issues (good faith of third parties, conditions of property acquisition, reasonableness of the quid pro quo, etc.), de-stigmatizes the deprivation of property from criminal proceedings and thus provides a doctrinally more satisfactory solution to the existing provisions, and smoothly incorporates the relevant EU rules in Greek legislation.

As this particular seizure of property and its referral to the proposed Agency may impose a prolonged burden on those involved, it is appropriate to appoint the "third party" as a trustee of the seized property and generally seek alternative measures to facilitate the use of assets until the final settlement (e.g. the rendering of an equal value in collateral and the "release" of the assets, when they are not real-estate property but a business, bond, etc.).

9. Defendant's passing away – Termination or suspension of criminal proceedings without a verdict on guilt

The imposition of confiscation by the judicial council that permanently ceases prosecution due to death of the defendant is currently possible in Greek criminal

procedure (Art. 310 § 2 GPC on confiscation as a security measure). Such a possibility is unanimously recognized when the prosecutor closes the case without further action and for any reason, albeit with a problem of deciding on the competent party to order the confiscation (prosecutor or judicial council).

Nevertheless, the need for State "access" to the declared illegal assets of the deceased "perpetrator" is not satisfactorily addressed by these general provisions, although it is sometimes essentially irrefutable (e.g. when millions are found in the deceased public official's bank account at following his/her first instance conviction for money laundering with bribery as the predicate offense).

The Greek legislator attempted to regulate this issue in Art. 46 § 3 of Law 3691/2008, by establishing a Judicial Council competence for all such occasions, including cases when the defendant's death occurred before prosecution.

In such cases, as the "reprehensible" property cannot be linked to endangering attributes, it is impossible to provide a basis for enforcement of confiscation as a security measure.

This unstable foundation is evident if one considers that the competent body is essentially asked to decide whether money laundering was actually committed, if the property derived came from it or from a predicate offense, and on all other substantive conditions for imposing a ancillary sanction, without the presence of the defendant and possibly without him/her ever having had the opportunity to present his/her arguments on the case prior to his/her passing away.

In terms of systemization, the "special" and initially marginal regulation of a general issue does not seem justifiable.

Related to the subject and referring to cases of defendant escape or illness, Art. 4 § 2 of the new Directive on confiscation cannot be considered correct. Its hybrid estimation on conviction ("if the suspect or defendant was able to attend trial") is incompatible with the guilt principle and violates the presumption of innocence, as it leads to the imposition of a criminal sanction without prior trial.

In most cases of defendant escape or sickness, the Greek law provides for a hearing by representation or in absentia, thus not requiring additional special provisions. If the defendant for a felony has unknown residence, the suspension of proceedings and the possibility of future confiscation seem to fulfill the related repression objective, maintaining any seizure of illegal assets. One could consider property management by ARMCA to avoid long-term neutralization of significant assets. The same applies when the defendant suffers from a disease causing mental disturbance and leading to the suspension of proceedings according to Art. 80 GPC. In such cases, the civil procedure regarding the rights of third parties may proceed normally and even lead to an earlier asset allocation in relation to the criminal procedure, after a relevant Enforcement has been issued.

Upon death of the defendant, it seems preferable to delegate the temporary asset management to ARMCA and leave the final distribution to relevant judgments of civil

courts following suits filed by stakeholders, including the relatives of the defendant, the State, or any third party.

10. "Extensive" confiscation

Increased attention to the confiscation of criminal assets has led several European jurisdictions to adopt the so-called "extensive confiscation powers"; for substantially each investigated case, they are utilized to impose a more comprehensive "retribution" against the offender for his/her apparent enduring past criminal behavior, which is not subject to evidentiary verification in the criminal process.

This logic is now adopted in Art. 5 of the Directive 2014/42/EU. The direct incorporation of this highly problematic provision, in Greek law (together with the relevant assignment of sanction imposition to the criminal courts) is constitutionally infeasible, as it envisages punishment on the basis of probability, even for acts that are not examined during the criminal proceedings.

The obligation of criminal courts to refer the case to competent tax authorities and/or the Prosecutor of Financial Crime and Corruption for further investigation of any liability for fraud or other offenses (if so necessary due to the disproportionately large property owned by the offender) is worthwhile and compatible with EU law. In such investigations, it will be possible to impose further freezing and/or confiscation of illicit assets, for which the referring criminal court could retain any seizure imposed at the pre-trial stage, at least for cases of organized crime or any of the other offenses included in Art. 3 of the Directive 2014/42/EU.

Nevertheless, the implementation of such a provision would require the actual examination of all assets belonging to persons involved (at least) in serious cases of property infringement, as proposed below (see relevant section on procedural reforms).