

Follow-the-money! criminal confiscation in economic crime

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Abstract:

Economic crime is profit-driven in the sense that it aims at generating a wealth that did not exist before. The best method to neutralize such consistent, continuous and apparently available gain seems to be confiscation. The new sanction which affects the patrimony rather than the person is in accordance with the new penal philosophy: penalties shift from the author (in personam) towards the act or its effects (in rem). The new penal policy intends to approach such penalties more firmly and efficiently. In order to achieve said goal, it needs a theoretical basis able to legitimize the new approach as being a useful social instrument. The new penal doctrine is subject to a critical analysis, capable of revealing the rationale it is based on, as well as the arguments that show that the enthusiasm for this doctrinary construct may be relativized.

Key words: *economic crime, proceeds of crime, confiscation, rationale, money laundering.*

Like any complex reality, economic crime allows several definitions. According to one definition, economic crime is the one committed in an economic environment¹, by using or abusing the means, the context or the economic mechanisms. This is not the meaning that the following study addresses. It seems more interesting to define economic crime by what it is driven to, namely generating profit. It is true that, as a general rule, any offense is associated with a benefit for its author, but what is of interest here is the continuous, systematic and conscious obtainment of an economic advantage by those involved in illegal activities. In other words, this is about introducing business principles into the criminal activity.

There are three types of economic crime². The one is purely predatory and implies a bilateral, involuntary relationship between the offender and victim, in which the former, through duress (force) or fraud, deprives the latter. The other is enterprise crime, where there is a relationship that perfectly renders a legitimate economic setting: there are suppliers of illegal goods and there are buyers (clients) of such goods. The parties enter into this relationship of their own will, voluntarily, being consumers of goods that can be found only on the black market (drugs, prostitution, weapons, etc.). The exchange-based relationship, freely consented to, determines that this type of crime does not have victims in the classical sense. Finally, commercial crime is committed by

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¹ F. Ciopec, *The Concept of Economic Crime in Romanian Criminal Legislation*, in V. Pașca, F. Ciopec, M. Roibu (eds.), *Economic Crime in the Context of Crisis*, Universul Juridic Publishers, Bucharest, 2013, p. 65.

² R.T. Naylor, *Towards a General Theory of Profit-Driven Crimes*, *British Journal of Criminology*, vol. 43, no. 1/2003, p. 84.

legitimate entities which function on a perfectly legal market, but which use illegal methods and techniques (mock auctions, underground labor, cheating the business partners etc.).

Modern criminal law has been focused on a rather constant paradigm, centered on the conditions in which the state might be entitled to refuse a human being his/her fundamental rights (to freedom, to property, and sometimes to life). In the area of profit-driven crime, there has been a gradual shift from traditional theory to a new paradigm. The new concept has challenged the classical paradigm, determining the amendment of several traditional approaches.

This policy of social control is no longer oriented towards the restriction of a person's rights, but rather on the pursuit of illegally obtained goods. Instead of focusing on the investigation and punishment of offenders, its main objective seems to be the undermining and neutralizing of the profits they obtained as a result of the criminal activity. First initiated in the USA, then adopted at international and European level, the pursuit and neutralization of benefits derived from crimes has ceased to be a mere alternative provided by the penal policy, but has become a genuine crusade. The doctrine in favor of using confiscation, under more and more extended forms, as an efficient instrument of the fight against crime has been called „*Follow-the-money!*“ The expression is no longer a mere movie line³, but has become the slogan of the fight against profit-driven crime.

The enthusiasm for such a policy aimed at confiscating the proceeds of crime, as a response of criminal law to a viral problem at social level should not interfere with an unemotional and impartial analysis of the grounds of such policy. The present study attempts to display the arguments that might temper such enthusiasm.

Essentially, there are five reasons⁴ for which the „*Follow-the-money!*“ policy should be promoted.

1. Profit is the only reason for committing economic crimes. If this reason is ignored, there remains no other incentive that may prompt offenders to insist in committing offenses. Confiscation of proceeds of crime and neutralization of profit should act as strongly dissuasive factors, able to lead to both special prevention (i.e. discourage the offender from persisting in his criminal activities for the future) and general prevention (i.e. demotivate other individuals from adopting a similar conduct). In reality, things are far more complicated.

The statement that profit is the engine of criminal conduct draws the attention on an aspect which it considers as obvious. It is presumed that all offenders, in their rush for profit, are also able to make fortunes in this way. By making fortunes, they become visible and are exposed to confiscation laws if the authorities reach the persuasion that property should be confiscated, judging precisely by the exterior appearances of a property that cannot be justified. However, the great majority of offenders prove to be big spenders. This may be due either to hedonistic reasons, to a will to impress, or to the awareness of the fact that a criminal career is usually short. The choice of the present and the wish to live the moment determines that the profit obtained from the

³ Robert Redford as journalist Bob Woodward in the movie *All the President's Men* (1976) directed by Alan J. Pakula.

⁴ R.T. Naylor, *Wash-out: A critique of follow the money methods in crime control policy*, Crime, Law & Social Change, vol. 32, 1999, pp. 11-15.

commission of crimes become volatile on a rather short notice, which leaves almost no room for confiscation by the state.

Confiscation of goods does not seem to discourage offenders, on the contrary it appears to prompt them to continue their criminal activities since their range of professional skills is quite narrow and they are not able to requalify for an activity which is socially accepted. Continuation of the criminal activity is necessary since it is their only source of income. Additionally, confiscation may even lead to the acquisition of professional skills, translating into the identification of new techniques or the improvement of existing ones in order to protect criminal profits from the actions of authorities, for the future.

In other circumstances, the infliction of confiscation may even lead to unacceptable situations. Criminology explains the relation between the conduct of individuals and the source of their income. Thus, when it comes to labor-related income, most individuals are concerned about the way in which they can spend their money. The same persons, who are cautious about their lawful income, shall adopt a totally different behavior when it comes to illegally obtained income, by gambling or playing numbers game. The latter are spent strictly on private pleasures, even if the lawful income is insufficient to support the family. Therefore, confiscation shall target precisely this income which is visible and easy to pursue, which causes the person in question to be highly unlikely to give up his/her criminal lifestyle. Applying the law in an undifferentiated manner may determine the exact opposite result from what the lawmaker initially expected. From another perspective, if an offender chooses not to spend the money obtained from illegal activities on private pleasures, but to invest it in government bonds which even assure the funds for financing the fight against crime, confiscation becomes much more ambiguous. Finally, if the infliction of confiscation had a truly dissuasive effect, its extension to a large scale, should lead, at least in the case of economic crime, to a decrease in the number of inmates from penitentiaries and in the rate of incarceration. This relationship does not work in real life. Statistically, the USA have lately experienced⁵ a significant increase in the rate of incarceration, although they are the country where the policy of confiscation emerged and was continuously applied.

2. Confiscation of proceeds of crime protects the infiltration into and corruption of legitimate economy. Understanding this statement implies an explanation of the aims pursued by the movers and shakers of criminal policy. Thus, if the aim is to punish some criminal acts that were committed in the past, then indeed the goods obtained by using income derived from illicit activities need to be removed from the offender's patrimony, through confiscation. This consequence results from the moral principle according to which the offender should not enjoy or take a benefit from his acts (*crime should not pay*).

If, however, the aim is different, for instance special prevention or control of recidivism, then it should perhaps be better to leave the goods that are derived from criminal activities in the possession of the offender, in order to encourage the shift from illegal activities to those which are allowed by the law. Possessing goods that may assure the development of a lawful activity may be a strong incentive for the farewell to

⁵ J. Travis, B. Western, S. Redburn (eds.), *The Growth of Incarceration in the United States. Exploring Causes and Consequences*, Committee on Causes and Consequences of High Rates of Incarceration, The National Academies Press, Washington, D.C., 2014, pp. 1-5.

old habits. Non-confiscation is a sign of amnesty for those who are willing to correct their behavior in accordance with legal norms. Finally, if the aim is to sabotage the underground economy, then the transfer of goods from the underground economy into the legitimate one should also be stimulated. With each transfer or investment into the lawful economy, there takes place a diminution of the underground economy and a maximization of the legal economy. This conversion of goods equals to becoming legitimate, and such process should be encouraged, and not treated as money laundering (recycling of dirty money).

The penetration of legal economy is performed not only by offenders who try to legitimize their business for the reasons mentioned above, but also, as it could be very well argued, by the actors of legal economy. Thus, the entrepreneur who uses duress in order to intimidate and control the employees or his direct competitors, or who offers bribe in order to win a contract or cheats his business partners (suppliers or consumers) can be considered to perform, to an equal extent, an act of corruption of the legitimate economy. All these happen in order to raise one's profit margin, by exploiting the weaknesses of the other actors on the market. Therefore, should such profits also be confiscated or should such techniques of survival be accepted as being part of the rules of a free market?

Why should offenders invest into the legitimate economy?

a. A possible answer might be that they want to save money for the moment when they retire. To that end, they shall resort to professional intermediaries of good reputation (investment brokers) or shall choose legitimate investments into companies with a clear rate of profit. Once the investment is made, it shall be subject to the general rules of the respective financial market, with no risk of interference or control over the former. The offender disguised as investor shall not be able to pretend a position which may allow him to manipulate the market on which he made the investment. That is why it is difficult to affirm whether the investment made is able to corrupt the legitimate economy, although, morally speaking, it is correct to object to the fact that, in this way the offender secures himself an illegally obtained profit.

b. Another hypothesis is the possibility of an offender to assure the transfer of his unlawfully obtained patrimony to his descendants. The success of a legitimate conveyance of patrimony to descendants, upon disappearance of the delinquent holder, implies the transfer of rights and liabilities into the visible economy. Neither in this case can it be stated that the penetration of economy would corrupt the business setting.

c. An entrepreneur may choose to diversify his portfolio as an alternative to the risk-bearing activity in the underground area. Thus, the higher the risk of entering into a fierce competition with other offenders or of the law being strictly applied by the authorities, the more attractive the idea of running a business that is clean, legitimate and free of any interference from the underground world. In any situation, this legitimate business can guarantee a satisfactory financial refuge, deprived of the stress of risk management on the criminal market. It cannot be stated that a business which is conducted by orthodox rules and which has no compromising affiliation may alter the legitimate economy, even if it is managed by individuals of bad reputation.

d. Obviously, there are also less benign reasons for which people invest into the lawful economy.

On the one hand, the legal entity (the company) can be used to recycle dirty money, providing an alibi for the latter. Money laundering is not a way to obtain profit from an illicit activity, but a means of redirecting the existing profit towards lawful destinations: for instance, recycled money is used to make investments into a pension fund. On the other hand, a legal business can be used as a logistic support for the development of underground operations. In this case, the front company represents in fact a component of the illicit system.

Unfortunately, the confiscation policy does not promote different solutions for the distinct hypotheses that may appear in real life. This lack of adaptation is a negative calling card for the coherence of the approach.

3. Confiscation deprives the offenders of financial support and assures their removal out of business. The argument is subject to debate, since confiscation may be inflicted on an individual or a company (the plural is also valid), but does not affect the underground economy itself. As shown before, where there is a demand, there shall be an offer and a supplier who shall undertake to satisfy that demand. Consequently, the disappearance of a supplier, as a result of the confiscation of his illegal property, shall be shortly covered by another supplier able to assume the same risks. The hunting of just one player on the black market does not seem to discourage the market as a whole. It is proven that organized crime has a remarkable capacity to regenerate, as well as vitality and resilience. Therefore, the objective needs to be rather the hunting of the underground market as a whole, the criminal industry and the structures existent on this market, instead of the discouragement of individuals to adhere to such structures.

In order to determine the extent to which the confiscation of proceeds of crime has a measurable influence on the underground economy as a whole, two types of measurements are necessary.

On the one hand, there should be calculated the percentage that the confiscated goods represent among all illegally obtained goods, for each year of the test period. On the other hand, there should be determined the growth rate of illegal income per time unit (year) as compared with the growth of national legal income. This must be done in order to remove from the equation the influence of the general economic conditions and to identify the direct effect which a measure of criminal policy has on the unlawful income.

For the first measurement, the value of the confiscated goods needs to be known. Theoretically, it can be very easily obtained by adding the statistics drawn up by the authorities duly appointed in the field. In reality, the situation is more complicated. The statistical values provided by authorities do not reflect the goods that were effectively confiscated, but rather some assessments of the confiscated goods. The final result may be disappointing as compared to the initial evaluation. This is firstly due to the fact that seized goods are not subject to effective confiscation, because their value considerably decreases as time goes by. Or it is justified by the fact that their value has been overestimated from the beginning due to a flawed assessment or due to reasons of public image. Secondly, due to the fact that the seized goods are burdened with encumbrances whose impact seriously or completely diminishes the intrinsic value of goods. Finally, there can be noticed a different approach to the value of confiscated assets, depending on the authority who reports the statistics. The police and prosecutor's departments report certain statistics, while different ones are reported by tax authorities. The need for a single authority in the field is justified also from this point of view.

The value of confiscated goods must be further correlated with that of all illicit income for the reference period. Here, even the most rigorous assessments are nothing but pale reflections of reality. This is due to the fact that publicizing certain values always depends on a series of conditions imposed on the person who makes the public announcement. The police are interested to report higher values because the budget destined for the suppression of the criminal phenomenon is dependent on the former. Approvers report apocalyptic figures in order to maximize their importance before the judicial authorities for whom they provide the information. Offenders themselves may support this variant, in order to raise their popularity and boost their self-respect. Politicians act as protectors of communities from the social evil thus estimated, while researchers are granted funds depending on the complexity of same phenomenon.

The aspects presented above create a strong impression that we are confronted with a reality that has such variable geometry that the idea of controlling it or at least of rationally approaching it seems to be destined to failure.

4. The pursuit of benefits that are derived from crimes allows the capturing of the heads of criminal organizations, since it is reasonable to presume that the former develop their activity in the proximity of the money they generate. A leader of the mafia keeps himself away from current transactions, precisely in order to avoid a chain of causation being proved between him and the executants, yet he plausibly remains committed to the result of the business which he coordinates. The proceeds of crime are able to lead to the discovery of crime, by the retrospective unfolding of the chain of causation that exists between the two. Thus, by the rules on preventing and combating money laundering, there have been imposed periodical and detailed duties to report financial transactions, able to identify cash flows and to allow their pursuit, and finally, their confiscation. The discovery and identification of crimes, starting from their consequences, are the legal basis for initiating procedures that may eventually allow prosecution of their authors. Thus, the legislation against money laundering supports confiscation, which otherwise could not be achieved or would be considerably impeded.

Although correct as a principle, the argument can be overturned by using the same reasons analyzed above (section 3), since the attempt to undermine the top management of organized crime has not amounted to long-lasting victories, as long as the neutralization of a drug lord by, for instance, putting him in prison, did not hinder the coherence of his illicit business. This is either due to the fact that once a *capo* was caught he was immediately replaced, like a hydra which, although beheaded of one head, immediately generated another to replace the former, or it is due to the fact that isolation in a penitentiary was not a genuine obstacle for the management of the business from the inside.

5. Finally, confiscation guarantees the principle according to which “crime should not pay”⁶.

Essentially, this seems to be the strongest argument of the *Follow-the-money!* policy, since it takes its force from a moral principle that allows no objections. However,

⁶ Communication from the Commission to the European Parliament and the Council, *Proceeds of Organized Crime. Ensuring that “crime should not pay”*, Bruxelles, 20.11.2008, COM (2008) 0766 final, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2008/RO/1-2008-766-RO-F1-1.Pdf>.

the incidence of the moral principle presently depends, to a large extent, on the intension of the concept of criminality. Currently, fraud and duress have become more refined and insidious, so that it is quite difficult to distinguish them from legitimate methods. The border between legitimate and illegitimate is now much more volatile, which induces a strong sense of equivocity.

Thus, can manipulating marketing techniques or misleading advertising be interpreted as fraud or should they be regarded as acceptable practices? Sales agents are trained to learn that putting pressure on a client to buy, using persuasion techniques, is called help provided to the client in order to take the best decision, while asking the client to buy is a favor done to the client. How far can these practices go in the name of maximization of profit? Up to what point does the legitimate intention to do business extend itself and where does the fraud start?

Clarifying these issues is crucial, since they are meaningful for the very notion of criminality. Choosing to interpret an act as an offense, when it appears to be nothing else but entrepreneurial excess of diligence, is in fact a structural matter.