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DETERMINING THE LEGAL STATUS OF FORFEITURE

(ANNEX IV)

DETERMINING THE LEGAL STATUS OF FORFEITURE.

Their impact on the scope and objective of the subjective measure

INTRODUCTION- PREVIOUS CONSIDERATIONS

Taking into consideration the terms of the task given to the Uruguayan delegation on occasion of the XXXI Meeting of the GLAVEX Group, it must be pointed out that the following document does not pretend another thing that, on the basis of the consideration and development of jurisdiction and doctrine regarding the institution of forfeiture, to develop a support for the analysis and discussion which would allow to surpass difficulties which may turn out in the opportunity of the forfeiture of goods of an illicit origin, based upon its traditional conception as an accessory crime.

Given that the meaning given the term seizure is not the same in all legal systems and in order to prevent possible confusion, it is necessary to undertake a conceptual order accuracy: This analysis refers to the seizure and ultimate loss of property in favor of the state, relating to the commission of a crime by means of a court decision.

That finality is precisely what distinguishes the forfeiture of the precautionary measures that can be taken on certain assets at the beginning or during the conduct of criminal proceedings, which by definition have insured character and do not cause state.

Issues relating to the confiscation of assets of illicit origin are of particular relevance with the actions of criminal organizations involved in trafficking illicit drug trafficking, illicit arms trafficking, smuggling, etc., which increasingly operate in terms of leveraging corporate schemes and profiting from the benefits of a globalized world economy, generates large profits, in addition to the direct benefit they represent to its members, and that help continue to fund large-scale illegal activities.

Similarly, it is of fundamental importance to have tools suitable for the recovery of assets derived from crime corruption, which are considerable when such illegal crimes are committed at the higher institutional levels.

The legal patrimonial consequences played a secondary role in the Classic criminal law, whose main concern was located in the sanction of the author of the criminal offense as an individual, but now appears as necessary within the scope of the repression of organized crime and corruption as a profile oriented to the investigation of patrimony derived from criminal origin, their seizure and confiscation.

When the economic benefits that can be derived from this crime are of such magnitude, it can be said that the possibility of imprisonment as a result of criminal persecution appears as a calculated risk taken by the offender. The gains are then obtained to justify the risk.

In this context, compared to crimes that may affect both economic and social order as well as the same institutional foundations themselves of the rule of law, it prevails search of effective means to deprive those responsible of any economic benefit derived from the commission of such crimes.

But in that search should be present at all times the system of guarantees of rights and freedoms, since the situation deserves strong action by public authorities, stripped of innocence itself, but without yielding to the facilities offered by the temptation to prioritize efficiency over legitimacy, being that the latter should always be the hallmark of the democratic legal systems.

The effectiveness cannot be in conflict with constitutional guarantees. Ius puniendi should be implemented in conjunction with fundamental rights. Otherwise, it leads to the denial of the rule of law.

Among the instruments for the deprivation of illicit profits, it can be distinguished at continental level, two schools that differ substantially from the legal concept of seizure as has traditionally been enshrined in the legal systems of Latin American countries.

The laws of the United States of America for its part, provides for the confiscation civil "in rem" based substantially on the fiction that "the thing is the offender" as a result of the application of the theory of embodiment - that locates its origins in maritime law, under which an inanimate object is imbued with a personality that makes him responsible for his actions. the action pursues the object, regardless of its owner.

Even by leaving aside criticism that the application of civil forfeiture has deserved within the whole field of its establishment, it seems clear that this figure is completely alien to civil law legal systems, which leads us to the conclusion that such figure could represent for latin american countries, a plausible alternative for solving the problems presents the confiscation of criminal assets.

Later on, Colombian legislation developed the action of forfeiture. The Norm which established its creation- Law 333/996- finds its support in the reform of Article 34 of the Colombian Constitution of the year 1991, which allows the declaration by means of a judicial sentence of the forfeiture over all the assets acquired by illicit means, by harm to the Public Treasury or by a grave deterioration of social mores, starting from the basis that on Article 58 of the Fundamental Charter the property is one that is acquired according to law. The forfeiture action is defined as an action constitutional nature; real nature as the property lies independent of the operator and that there is criminal prosecution, being inalienable and retroactive application.

It should be noted that even in the particular circumstances that led to the approval of original standard, one aspect of which was the termination of criminal proceedings by death which prevented adjudication of property acquired with money derived from illicit activities, the implementation of this model was not was simple, requiring that the Supreme Court should rule in various opportunities over whether some of its provisions could be considered enforceable It should be noted that even in the particular circumstances that led to the approval of original standard, one aspect of which was the termination of criminal proceedings by death which prevented adjudication of property acquired with

money derived from illicit activities, the implementation of this model was not was simple, requiring that the Supreme Court should rule in various opportunities over whether some of its provisions could be considered enforceable and first determined the suspension of the Law 333/996 By Decree 1975/2002 covered in the declaration of state of internal disturbance August 2002 and, afterwards, its substitution by the Law 793 of December 27, 2002.

The forfeiture action has managed an ultimately successful operation in the Colombian context and if it is true that his model has been picked up by other legislation, however its extrapolation has proven to be not quite so simple, generating quite a resistance in these new areas, which has made it very difficult to give it a practical application.

Therefore, we consider as a necessary task to explore other roads which offer a different alternative for obtaining the goal established at the beginning and towards that direction we consider that the model adopted by the Spanish legislation, placing forfeiture as an additional juridical consequence of an illicit activity, presents itself as an interesting model for analysis, given the similarities of its judicial system to that of the great majority of judicial systems of latin american countries.

Finally, it is clear that this work does not address the issue concerning precautionary measures in view of responding to a different purpose than the institution of forfeiture and that ultimately determine the scope and scope of it, and also ultimately will have an impact on the scope and extent of precautionary measures against the property in criminal proceedings. neither will it touch upon it due to reasons of length and because it would justify a separate treatment for the issue of punitive measures for juridical persons.

THE JURIDICAL NATURE OF FORFEITURE

The importance of determining the legal nature of this institution, resides in that which is also ultimately assigned, and will determine its scope, both from an objective and subjective point, as we shall see.

Traditionally forfeiture has been considered as an additional penalty, and therefore related to a conviction, orienting itself towards the deprivation of material objects employed for carrying out such objectives- the instruments of crime- as well as its effects, that is the objects which are obtained by achieving the typical conduct.

The latter can involve both immediate objects from the crime as those stemming immediately from it as long as the legislation does not set restrictions. Some jurisdictions such as the Spanish one refer particularly the confiscation of profits.

The seizure has also been described as a security measure or a special security measures based on an objective danger, instrumental.

Thus the basis of the seizure, may be placed on the danger objective of certain assets, in order to prevent such objects be used in the commission of future crimes, it can be clearly seen in the case of instruments-or the inability to respond to consenting to the acquisition and preservation of heritage enrichment achieved through

the commission of a crime, as in the case confiscation of proceeds broadly speaking and more specifically the profits.

Within this context, questions have arisen regarding the conceptualization of forfeiture as a penalty or security measure.

This has indicated that it would be a penalty, because it seeks to impose a evil that is felt as-such retributive function to some extent meet the penalties depending on the degree of culpability of the perpetrator, but only preventive, obeying its imposition of the need to avoid or prevent effects and instruments can be used to commit new crimes. neither will it touch upon a security measure, either because it has no functions of re-education or improvement, is not based on the dangerousness of the person, or considering that any equity security measure is incompatible with the purpose of rehabilitation or safety of the offender.

In this sense, its worth pointing out that the European Court of Human Rights who had initially viewed the confiscation as a penalty (Welch case), currently denies in its pronouncements a punitive character giving substantially the quality of preventive measure designed to remove outstanding assets linked to the commission of a crime.

In the same vein, the German Constitutional Court has held that a asset forfeiture of benefits from the crime does not seek to blame the accused the commission of the unlawful act, but aims to get establish means of order of the patrimony and stabilization of the norm standards, for the purposes of remedy an unlawful financial position following the commission of a crime that generates economic benefits and correct the disruption of the legal norm derived from the growth of patrimony through the commission of crimes.

FORFEITURE IN INTERNATIONAL INSTRUMENTS

The need to facilitate the prosecution of illicit proceeds within a context which we made reference at the beginning has led to the international legal instruments insisting on the extension of forfeiture both from the objective and subjective point.

In this regard, the Vienna Convention (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on December 20, 1988), after defining the seizure as "the deprivation with a definitive character of property by order of a court or other competent authority "requires the adoption by States, of measures that give a broader scope than traditionally attributed with the only limitation of the rights of third parties in good faith. This also provides confiscation of the instruments used or intended to be used in any form to commit the offenses under it and the product derived from them, that of:

- Equivalent assets;
- Assets that have been transformed, converted or the product blended, in this latter case to the assessed value of the mixed product;
- Income or other benefits derived from proceeds and property in which it is been transformed, converted or mixed in the same manner and at the same as the product mix.

It is understood by product "*the goods obtained or derived directly or indirectly from the commission of a crime"* and by goods "*the assets of any type, corporeal or incorporeal, real state, tangible or intangible, and documents or legal instruments which prove property or other rights over the said assets*".

The Vienna Convention also provides that States to consider reverse the burden of proof regarding the illicit origin of proceeds or other property subject to confiscation, to the extent compatible with its domestic law.

The terms set forth in the Palermo Convention (UN Convention Against Transnational Organized Crime, signed in Palermo in December 2000), essentially agree with those reported previously, and Similarly, those contained in the Merida Convention (UN Convention Against against Corruption, signed in Merida in December 2003).

In Europe, the Framework Decision 2005/212/JHA Council of the European Union, considers that the effective prevention and crime organized requires a focus on tracing, freezing, seizure and confiscation of the proceeds of crime and particularly in scope, provides that necessary measures shall be taken in order to enable confiscation, at least when "*a national court, based on facts particular, is convinced that the goods in question come criminal activity carried out by the convicted person for a period prior to conviction for the offense (...), the court considers reasonable in the circumstances of the case "or regarding "similar criminal activities carried out by the person convicted for a previous period*" or "it is known that the value of the property is disproportionate to the lawful income of the convicted person and (...) Be fully convinced that the goods in question come from the criminal activity of the person convicted. "

It also states that consideration should be given to adopt the "*forfeiture in whole or in part, of property acquired by the relatives of the person concerned and property transferred to a legal person in which the person concerned exercise effective control individually or together with their stakeholders"*.

This coincides with the lines established in the proposed norms drawn in the framework of the Falcone Project coordinated by the city of Palermo and the Max-Planck Institute developed between 1998 and 2001, that regarding the forfeiture of the earnings of criminal organizations establishes that "*the Judge will order the forfeiture of the earnings of criminal organizations, its goods and other effects upon which the accused has power of disposal and of whose lawful origin has not been able to provide a justification capable of contradict the proof collected by the accusing party, as long as the value of the said goods is disproportioned regarding the rent declared or the economic activity that it develops"*. being able confiscate property acquired earlier in the day on which it has kept the convicted criminal activity, when "*the judge available fit facts to justify a reasonable connection with the same criminal activity, "states that" be considered in the power of disposition of the offender appear fictitious goods on behalf of others, or otherwise possess legal person through intermediate "*

Also in the same direction to expand the scope of the seizure, we can locate the Recommendations of the Financial Action Task Force (FATF / FATF) and CICAD Model Regulations on Money Laundering Crimes Related with Illicit Drug Trafficking and other serious crimes.

SEIZURE AS AN ACCESORY CONSEQUENCE

As we have seen, the seizure as a penalty conceptualization determines that it necessarily requires a conviction and that its imposition, given the personal character of the sentence, is limited exclusively to the person responsible of the crime, and from the objective standpoint, the assets, proceeds or instrumentalities linked to the crime for which he was convicted in preventing or hindering greatly expanded the possibility of for an amplified forfeiture.

In order to make progress in overcoming such limitations, and from the doctrinal questions to the traditional positions in their legal nature, the Spanish Penal Code of 1995, inspired by the German legislation goes on to consider the seizure as a legal consequence incidentally, the penalties as well as security measures, constitute a penalty "sui generis", a third gender, whose foundation is outside the criminal culpability and dangerousness of the subject, but subject to the principle of proportionality.

This body of law, as amended by Law No. 15/2003, of November 25, 2003 and the Organic Law No. 5 / 2010 of June 22 2010, establishes general rules in Arts. 127, 128 and 129-this latter dedicated to specific measures applicable to legal persons, 'and specifically for the crimes of drug trafficking and money laundering, in art. 374.

In art. 127 two types of confiscation can be distinguished: the instruments and effects of crime (the standard also includes faults) and earnings derived from it, although it is the same regulation, which has earned it some criticism, considering that both consequences have different purposes and are governed by different principles, particularly in the case of gains in the context of organized crime. It should be noted that while maintaining a single regulation, the latter hypothesis was expressly provided from the LO 5 / 2010 cited by the inclusion of a second paragraph to paragraph 1 of art. 127, referring specifically to the seizure of "effects, assets and profits proceeds from criminal activities committed in the context of an organization or criminal or terrorist group, or a crime of terrorism. "

While still requiring the existence of a relationship between the seizure and criminal offense, particularly since the reform done by The LO 15/2003, the measure ceases to be subject to the imposition of a penalty-which originally required that the transgression of reference was a typical fact, unlawful, guilty and punishable, being enough that it would be an typical and unlawful action.

By not demanding the imposition of a sentence in a ruling that may be established for the forfeiture, the link is broken between the institute linking the with the principles of personality and incidental nature, allowing the measure to transcend the goods directly related to the offense subject to prosecution and even when there is evidence of an illicit financial position, can be adopted, as we will see, when a cause of exemption or

extinction of criminal liability is also present.

The regulation for an amplified forfeiture as an accessory result adopted by Spanish law, contained in the current general and special rules relating to the above, then serves to determine the expansion of both the scope and objective subjective application of the measure.

OBJECTIVE SCOPE OF FORFEITURE

From the perspective of the property subject to for an amplified forfeiture, the measure will include:

-Toxic drugs, narcotics or psychotropic substances; EQUIPMENT, MATERIALS AND SUBSTANCES PROHIBITED (RULE 374.1) 33 .- Based on the dangerousness of the object and peacefully accepted traditional view of the institute, this hypothesis does not deserves further comment. Art. 374.1 in the development established by the LO 15/2003, provides for particularly in the If the offenses of drug trafficking and money laundering arising from such crimes, the confiscation of property, instrumentalities and proceeds, referring to the general regulation of art. 127, for whose the considerations apply to be formulated below.

THE EFFECTS DERIVED FROM THE CRIME OR FAULT (RULE 127.1) 34 .- Refers particularly the direct product of the offense, being understood by such as those that are created, changed or altered through the same as any object or that is in the possession of the offender as result of it, even those that are object of the typical action.

PROPERTY, FACILITIES OR INSTRUMENTS TO HAVE BEEN PREPARED OR EXECUTED (RULE 127.1) .- This hypothesis includes the tools and means used in preparatory acts, was built by the LO 15/2003, dispelling any doubts that could be presented seize on the possibility of what has been used in a stage prior to the execution, whether simple attempt or preparatory act punishable. the reform also included the words "property" and "media," which earned it some criticism for considering the definition of instrument, as sufficiently comprehensive of all kinds of "medium" or "good."

Profits from the crime or offense, regardless THOSE PROCESSING IT MIGHT EXPERIENCE (art.374.1 and art. 127.1). It is thus clearly established as a punitive result the loss of economic benefit obtained directly or indirectly with the crime.

Now, in this scenario and in order to prevent a restricted interpretation, the term profits will be identified with the benefits obtained by the specific fact that has been the subject of the sentence, leading a major limitation if not to the derogation from the norm in most cases, the Plenum of the Criminal Chamber of the Supreme Court, adopted on 5 October 1998, an agreement assuming a broader interpretation, enabling the application of confiscation and property owned by the offender prior to the act for which he was convicted, provided that: a) the illicit origin of the goods is proven, and b) the accusatory principle is respected. The illicit origin may be proved by circumstantial evidence, not requiring the identification of specific operations for which the goods originate, being enough for this purpose that is sufficiently and the criminal activity generally proven.

Constitute evidence to consider, those such as:

(a) that the accused had been for some time devoting himself to the criminal activity for which he was convicted;
(b) that the goods were acquired during the period in which the convicted was dedicated to the criminal activity in question;
(c) that the goods to be seized have not been proven legally financed, this is income, business or economic activities capable of justifying the increase in equity;
(d) the existence of circumstances or procedures other than normal traffic of economic mechanisms such as opacity in the ownership and transfer of assets, operating through transfers to tax havens, excessive cash flows, and so on.

Proof by evidence requires: a) a plurality of base facts or evidence, or as an exception a single fact of a unique proof potential b) need that these facts-base are accredited by direct evidence; c) that are peripheral or concomitant with the factual data to be proven d) there is interaction of evidences, so that they are mutually reinforcing; e) rationality of the inference that requires the existence of a precise and direct link under the rules of standard and human experience between base facts and the fact accordingly and that in turn, leaves no doubt as a reasonable inference other than that obtained, and f) the expression of the intellectual process through which the judgment of inference has being been reached.

The constitutionality of the Agreement on the Supreme Court, was endorsed by the Constitutional Tribunal when it came to resolve disputes holding that the the same temperament, implied an impairment of the right to effective judicial protection and the presumption of innocence.

In this sense, the court held that the presumption of innocence operates as "the defendant's right not to be convicted unless proved guilty been established beyond reasonable doubt ", so that the accused right to presumption of innocence is no longer in question, where there is evidence from which judges and courts have deemed "reasonably credited" the guilt of the subject, that is, when it has already been convicted.

And as it regards the right to effective judicial protection, the Constitutional Court understood to be checked whenever there is founded a reasoned decision, this is, when based on a plurality of fully accredited evidences and trough the means of a reasoned statement on its resolutions which could not be qualified as patently wrong in its factual assumptions, illogical or unreasonable, the judicial organs conclude that such goods of the accused were acquires, or in the cases judged by the Tribunal, with money derived from the sale of narcotic drugs.

Such an assumption is in line with the arguments put forward by the European Human Rights Court in cases of confiscation under the English and Dutch legislation providing similar assumptions of order, noting substantially that the right to presumption of innocence only deploys its effects in relation to a specific offense of which defendant is accused, while the procedures for ordering the seizure are not intended to conviction or acquittal thereof, that is, do not decide on the basis of a charge on criminal, but whether the assets that have been shown to have been obtained are of a criminal origin, and if so, specify the amount to be confiscated (cases Phillips c. Royaume-Uni, Butler c. Royaume-Uni and Geerings v. The Netherlands).

However, there is the observation that the agreement of the Full Supreme Court refers exclusively to crimes related to drugs, thus it limits its scope. In accordance with the provisions of the rule of art. 127.1, any transformations of the property or assets that are proceeds of crime, does not preclude in any way their confiscation.

The term "transformations which have been able to experience" should not be understood only in a purely factual or descriptive sense, but also legally, which enables confiscation of assets that have been invested in the proceeds of crime (confiscation by subrogation).

EFFECTS, property, instrumentalities and proceeds from COMMITTED CRIMINAL ACTIVITIES COMMITTED IN THE FRAMEWORK OF AN ORGANIZATION OR CRIMINAL OR TERRORIST GROUP OR A CRIME OF TERRORISM (art. 127.1, second paragraph , incorporated by LO 5 / 201043) .- To this end, establishing a presumption understanding that comes from criminal activity, the assets of each and every one of those sentenced for offenses committed within the criminal organization or terrorist group or whose value is disproportionate in respect to income earned legally through each of these people.

The inclusion of this paragraph is, as expressed in the "Report of Audit Committee on the Draft Law amending the Law 10/1995, of November 23 of the Penal Code ", the" implementation in the national legislation for the adaptation to Spanish law directives to the 2005/212/JHA Framework Decision (...) and the very doctrine of the Criminal Division of the Supreme Court ruled in the House of 5-X-1998 ", this being the statement referred by us above.

Regarding the presumption of illicit origin, the Report quoted points that “the inclusion of the legal presumption (...) does not affect by itself the fundamental right to the presumption of innocence” since “ it is a presumption which does not incides neither in the nucleus of the criminal action being judged nor in the accusation of such action to given persons” operating “with regards to persons condemned in a trial carried out with all due guarantees and in which the accused has carried out his right to defend itself from the accusations” thus the consequences “are exclusively of a patrimonial and economic character, derived in any case of the determination of illicit activities related to organized crime, being also susceptible to being proven by proof to the contrary which asserts or justifies the licit origin of the patrimony in question”.

These concepts are repeated after the adoption of the law in the quoted Circular No. 4 / 2010 of the Attorney General. It is also worth to have reproduced here, the references made above with respect to the position of the European Court of Human Rights and the Spanish Constitutional Court.

It will not be necessary from the LO 5 / 2010, the proof of the cause-effect relationship or specific connection between the crime that the sentence declared proven and property whose forfeiture is ordered, but will be necessary to prove and thus shown in the sentence, that the subject has been conducting illegal activities within the framework of a criminal organization, criminal or terrorist group or has made a crime terrorism and that the value of his possessions is disproportionate in relation to income which has been obtained legally by the defendant. Such budgets constitute a rebuttable presumption of the origin of

this patrimony, which can be controversial and unnerved by a justification of lawful origin of the goods concerned, or even proving they do not come from activities carried out within the framework of an organization, group or criminal terrorist or derived from the conduct of a terrorism offense.

According to the formula used by the Spanish legislator in the second paragraph Art. 127.1, concrete acts of the owner of the property are detached from the origin of good itself, being sufficient the membership in the organization and the holding of assets in order to relate these properties to the criminal activities of the organization, without having to prove the effective participation (in the criminal and technical sense) of the holder thereof in a particular criminal act. of all However, one comment that has been made is that the possibility of seize the assets disproportionate to income, should serve as criteria for offenders which are not integrated into any kind of organization (eg. in cases of corruption).

THE EFFECTS, PROPERTY, FACILITIES, INSTRUMENTS ANDPROFITS - REGARDLESS OF THE PROCESSING they could have EXPERIENCED-FROM THE COMMISSION OF A RECKLESS CRIME WITH AN ESTIMATED imprisonment exceeding one year (art.127.2 built by LO 5 / 201047) .- Unlike other cases of art. 127 127.4, except as we shall see, this accessory consequence can be empowered by the judge or court, and only reckless crimes
legally contemplated under a sentence with more than one year, excluding reckless misconduct.

REAL EQUIVALENT VALUE (374.1 4º, 127 348) - If it turns impossible to carry out the confiscation of proceeds of crime effects, or goods, means or instruments which had been prepared or executed or profits from the infringement, agreed incidentally as a result of sentence for intentional crime or misdemeanor, becomes from that of other goods belonging to persons criminally responsible.

The provision of the confiscation of equivalent value, allows a response appropriate to the circumstances in which the proceeds for any reason no longer at at the disposal of the subject, either because the object of seizure has been consumed, destroyed or hidden in order, or because it is a decrease in patrimony or because for any other reason it is impossible to proceed with the forfeiture. It also allows for resolving cases of goods that can not be confiscated because they were
legally contemplated acquired by a third party in good faith and not responsible for the crime being possible in such cases, to order the forfeiture of other assets belonging to the criminally responsible for an equivalent value to the object which has been legally acquired by the third party in good faith.

SUBJECTIVE SCOPE OF THE APPLICATION OF FORFEITURE

In accordance with the requirement of the second sentence of art.127.1, the limit on their application is determined by their belonging to third parties in good faith and not responsible for the crime, which have been acquired legally, which means that, for the protection which the legal system gives to be effective, it requires the concurrence of four conditions: 1) that the goods belong to a third party; 2 º) that ownership is flaunted in good faith, this is that the third party should have

acted under the rules of ethics, 3 º) the acquisition is conducted legally, and 4) that the owner of the property is not responsible for the crime. Therefore, when the effects, instruments, products and profits liable to be confiscated property of others not guilty of the crime who have not acted in good faith in its acquisition or transmission, or when having acted in good faith, had not acquired them legally, the seizure must be accorded, notwithstanding that they must be called to the process for purposes of exercising the defense of their interests.

It is appropriate to briefly mention a particular figure contained in the Spanish law, which is that of participation for profit, regulated by art. 122 of the Penal Code, under which anyone who has obtained an asset derived from either a felony or misdemeanor for free, without a consideration that warranted it, must return it, with the difference between this figure and possession of property derived from laundering proceeds of crime or its reception, is in the subjective element, i.e. in the absence of fraud, since the figure is that the subject is unaware of the illicit origin of the property.

In this context, property belonging to the purchaser in good faith for profit, also would be in condition to be seized, subject to compliance with guarantees of due process.

APPLICATION OF SEIZURE-Even when not imposing a penalty TO ANY PERSON TO BE EXEMPT FROM CRIMINAL LIABILITY OR HAVE Extinguish the criminal responsibility (art. 127.4) 55 .- This is one of the hypotheses that are most clearly demonstrates the separation between forfeiture and sentencing, and therefore the principle of guilt, from its consideration as an accessory . It is not an imposition of a prescriptive nature but is an option of the judge.

Not imposing a sentence of a person due to it being exempt from criminal responsibility may be due to the person having acted without guilt or capacity of innocence due to the lack of an objective condition of criminality or the presence of an excuse for acquittal. In this case, to concur in the illicit financial condition the measure of forfeiture may be imposed, but always it will require the performance of a typical and unlawful conduct.

The cases of extinction of criminal responsibility referred to by the norm are those that take place before or without a penalty imposed by final sentence, because once this fact is verified, apply the provisions mandatory contained in art. 127.1 or 127.3.

The Spanish doctrine, discusses essentially two hypotheses: the death of the person responsible and the statute of limitations, pointing out that anyway the appreciation of forfeiture in these cases is limited.

In this regard it is noted that the subject's death not only extinguishes the liability but also the criminal prosecution, so there being no justiceable, there is also no statement of facts that may have less incardinate or intervene and conduct in a criminal type expected in criminal law. It Therefore, whether the subject had died before the criminal proceedings in the pre-trial or during trial there will be no resolution that proves that he has made a crime, so to appreciate whether the seizure is necessary the realization of an unlawful and a typical conduct with a subsequent criminal proceeding, the absence of such conduct, would be closing the applicability of the measure.

For what has been said, procedural reasons would be preventing the imposition of forfeiture if it is a single subject. Now if there were others prosecuted as well as the deceased that have made atypical and an unlawful behavior, the process will end with a ruling that will demonstrate the commission of a crime specified the instruments used to it and the profits and it would be permissible the imposition of the forfeiture of property used or obtained, even by the deceased. Although there remained the presumption of innocence on him, this corresponds to impose the measure of items that were in his power , provided it is proved that they had been used to commit the crime or were derived from proceeds from the same.

Then, untying the seizure with the imposition of a sentence, would allow the application when the extinction of criminal liability by prescription of a crime takes place. However, in practice, based on the supposition of finding an unlawful conduct and a typical antijuridical conduct, this hypothesis would be operating if the prescription is alleged in a trial phase, in which the judge or court have reached a conclusion in this regard, since nothing would prevent the extinction rule prescription, the court would decree the confiscation of effects, instruments and proceeds of the criminal forfeiture or the equivalent value.

THE VALIDITY OF THE ADVERSARIAL PRINCIPLE

The nature of the seizure as an accessory result does not undermine the full effectiveness of the regulation of the adversarial principle and the principle of contradiction, which makes it imperative that its imposition is specifically requested by the plaintiffs when appropriate.

This results in an opportunity to bring charges, prosecutors must identify the effects, media, property or earnings to extend the application specifying the factual circumstances of the resulting connection with the offense, either because they have served in the preparation, execution or because they come from the same, indicating where appropriate, changes have been verified in each scenario and invoking the applicable regulations. It should also be seen the full force of the right of defense of all who may be affected by the accessory consequence of the forfeiture , including those that may be exempt from criminal liability or whose liability may have been extinguished.

THE PRINCIPLE OF PROPORTIONALITY

In accordance with the provision contained in art. 128 of C. Penal, the judge may not order the forfeiture or order it only in part if the effects and instruments of lawful commerce and its value are not proportional to the nature and severity of criminal offense and civil liabilities are satisfied.

DECLARATION OF INVALIDITY OF LEGAL ACTS OR BUSINESSES

Without prejudice as to the powers of criminal jurisdiction in order to define fraud or verify the true reality behind stacker apparent legal title, that is, the application of the doctrine of "piercing the veil," Spanish jurisprudence maintains the existence of sufficient regulatory mechanisms for this purpose, the special legislation contained in art. 374.3 of C. Criminal expressly attributes to the criminal courts the power to declare the nullity of the acts or legal transactions under which they transfer, encumber or modify real ownership or rights relating to goods and property subject to forfeiture.

BRIEF REFERENCE TO THE URUGUAYAN LEGISLATION CONCERNING SEIZURES

Law No. 18,494 of June 5, 2009, introduced, following the Spanish model, the conceptualization of incidental seizure as a result of unlawful activity, by modifying the art. 63 of Decree Law 14,294 on the illicit drug trafficking, applicable by reference to money laundering and related crimes. The current text, which also define which determines the objective and subjective areas of application of the measure and instituted forfeiture hypothesis full rights, states:

"ARTICLE 63. (Confiscation) .
63.1. (Concept). The seizure is the permanent deprivation of property, proceeds or instrumentalities, by decision of the competent criminal court at the request of the Public Prosecutor, the legal consequence of unlawful activity accessory. The ruling will be forceable as provided by way of transfer of the domain and will be recorded in the corresponding Public Registry.

63.2. (Objective scope). In the final sentence of conviction for any offense under this law or related crimes, the competent criminal court shall, upon request of the Public Ministry, dispose the confiscation of: a) narcotics and psychotropic substances that were seized in the process; b) the assets or instruments used to commit the offense or punishable preparatory activity; c) goods and products from the criminal act;
d) goods and products derived from the application of those from the criminal offense, including: the goods and products which have been transformed or converted from the criminal offense and the goods and products that are mixed from the offense until arriving at estimated value thereof; e) Income or other benefits derived from goods and products from the criminal offense.

63.3. (Confiscation by equivalent). When such goods, products and instruments can not be confiscated, the competent criminal court will dispose the forfeiture of any other property of equivalent value convicted or, if not possible provide that they pay a fine of equal value.

63.4. (Forfeiture of right). Notwithstanding the foregoing, the competent criminal court at any stage of the process in which the defendant was not investigated, will deliver the imprisonment order and after six months respectively without having changed the situation, all rights will expire that the same may have on goods, products or instruments that had been seized as a precautionary measure, operating the forfeiture of right.

In cases where the competent criminal court had ordered the freezing of assets pursuant to the edict by Article 6 of Law No.17, 835 of 23 September 2004, if the holders did not offer proof that they have an origin different to the offenses under this law or related crimes within six-month will expire any right they may have on those frozen funds, operating the full forfeiture.

In cases where the competent criminal court had ordered the seizure of funds or securities not reported, pursuant to the edict by Article 19 of Law N º 17,835 of 23 September 2004, if the holders did not provide evidence that themselves have a different origin of the crimes enumerated in this law or related crimes within six months, any right they may have on those frozen funds expires, operating the full forfeiture.

In cases where the occurrence of the discovery of assets or proceeds from crimes under this law or related crimes, if within six months does not appear any interested party, will operate the forfeiture.

63.5. (Personal Scope). The seizure can reach the property listed in the preceding paragraphs of which the person convicted of any offense under this law or related crimes is the final beneficiary and for whose illegitimate origin has not provided a justification able to contradict the evidence collected in the indictment, provided that the value of such property is disproportionate to the lawful activity that develops and declared.

May be subject to forfeiture money, goods and other effects acquired earlier in the year in which it has developed the defendant's criminal activity, provided that the competent criminal court have elements available to justify a reasonable connection to the same criminal activity

For the purposes of the forfeiture shall be deemed guilty of offenses under this Act or related to these, the final recipient of goods, even when appearing on behalf of third parties or otherwise possess, through individual intermediate or entity.
The determination and objective and subjective scope of the forfeiture shall be decided by the competent criminal court. "

As can be seen, stating that it is an accessory consequence of unlawful activity, in both the Uruguayan and Spanish legislations-is conceptually independent of the penalty the full forfeiture and hence a decision to declare a responsible person of a crime.

This has allowed us to extend the extent of forfeiture to property that may not be directly linked to the criminal offense subject to prosecution and forfeiture assumptions to be fully enabled on four scenarios: a) escape of the suspect or imputed (Article 63.4paragraph one); b) disinterest of the holder of fixed assets at the request of the Unit of Financial Information and analysis (Article 63.4second paragraph), c) disinterest of the holder of funds or securities by undeclared border crossing (Article 63.4 third paragraph), and d)abandonment of property (Article 63.4 paragraph four).

It also establishes the concept of beneficial owner, to prevent the frustration of the measure against fraudulent transfers or by the use of legal persons.

Unlike the Spanish Penal Code is not expected in the possibility Uruguayan law enforcement exemption in case of forfeiture or termination of the criminal responsibility, but once it was disconnected as the principle of guilt and the imposition of a sentence, leaving the door open to enter in the analysis of such assumptions.

At the time, which corresponds to point out, is that the legislation referred to has been implemented smoothly, particularly in the jurisdiction of the Criminal Justice Specialized in Organized Crime.

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