

Ukraine-Krieg und Recht

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criminal surcharge is subject to adjustment, and therefore these amounts may fluctuate, depending on the surcharge applicable at the time of the enforcement.

[15] Officers of the judicial police, officers of the Customs and Excise Administration, and officers of the General Administration of the Treasury (SPF Finance) are competent to investigate and identify violations of UN¹⁵ and EU¹⁶ sanctions.

[16] The violation of national sanctions carries the same consequences as non-compliance with EU sanctions.¹⁷ Belgian national sanctions are enforced by the Minister of Justice, the Minister of Finance, the Minister of Internal Affairs, the Minister of Foreign Affairs, and the Minister of Defence.¹⁸

¹⁵ Article 5 Law of 11 May 1995.

¹⁶ Article 7 Law of 13 May 2003.

¹⁷ Law of 11 May 1995.

¹⁸ Article 10 Royal Decree of 28 December 2006.

Sara Armella, Stefano Comisi*

The freezing of Russian assets under Italian law

Die praktische Umsetzung von Maßnahmen zum Einfrieren von Vermögenswerten in Italien richtet sich nach dem Dekret Nr. 109/2007. Das Dekret Nr. 109/2007 und die sich daraus ergebenden Bestimmungen finden Anwendung auf alle Fälle, in denen die Vereinten Nationen und die Europäische Union Sanktionen erlassen, die das Einfrieren von Vermögenswerten von Personen vorsehen, einschließlich der EU-Sanktionen gegen Russland.

Das Dekret sieht zwei verschiedene Möglichkeiten für das Einfrieren von Vermögenswerten vor. Vermögenswerte, die sich in Italien befinden, werden durch ein spezielles Sanktionsdekret des Wirtschafts- und Finanzministeriums (MEF) eingefroren. Außerdem kann das Wirtschafts- und Finanzministerium (MEF) spezifische nationale Maßnahmen zum Einfrieren von Vermögenswerten von Personen erlassen, die noch nicht in den EU-Listen aufgeführt sind. Diese wirken für sechs Monate und können bis zur Listung durch die EU immer wieder verlängert werden, wobei die MEF gehalten ist, die Listung bei der EU zu beantragen. Ohne den Antrag, entfällt der vorläufige bzw. präventive Charakter der Maßnahme und sie wäre aus internationaler Sicht rechtswidrig (Article 4 ter of the Legislative Decree No 109/2007).

Die italienischen Behörden haben diese spezifischen präventiven Maßnahmen in jüngster Zeit in allen Fällen angewandt, in denen große russische Vermögenswerte gefunden wurden, die nominell im Besitz von Personen waren, die aber nicht unter die Sanktionen fielen und eine Verbindung zur politischen Klasse der Russischen Föderation aufwiesen. Das Wirtschaftsministerium hat daraufhin jeweils die EU-Kommission aufgefordert, diese Personen in die Listen der Verordnung 269/2014 aufzunehmen.

Die betroffenen Personen haben immer die Möglichkeit, gegen die vom MEF durchgeführten Maßnahmen

Rechtsmittel einzulegen und die Entscheidungen vor dem „Tribunal of Rome“ anzufechten. Das Tribunal of Rome ist ausschließlich dafür zuständig, über die Rechtmäßigkeit der vom Wirtschaftsministerium auf der Grundlage des nationalen Einfrierungsbeschlusses erlassenen Maßnahmen endgültig oder vorläufig zu entscheiden. Dieser Rechtsbehelf kann sich sowohl gegen die korrekte Identifizierung der in den internationalen Maßnahmen genannten Vermögenswerte richten sowie gegen die Begründung und Voraussetzungen, die zum Erlass der spezifischen nationalen Maßnahme und dem Antrag auf Listung bei der EU führten. Das Tribunal prüft nicht, ob Personen zurecht auf der EU-Sanktionsliste stehen. Hierfür ist das Gericht der Europäischen Union zuständig.

Die Verwaltung eingefrorener Vermögenswerte obliegt der Agentur für Staatsvermögen (Agenzia del Demanio), die selbst oder durch einen von ihr bestimmten Verwalter tätig wird. Die Kosten der Verwaltung trägt zunächst die Agentur für Staatsvermögen, wobei sie diese vorrangig aus den Einnahmen aus den eingefrorenen Vermögenswerten deckt. Reichen die Einnahmen nicht zur Deckung der Kosten, können diese anschließend vom Eigentümer der eingefrorenen Vermögenswerte eingefordert werden. Notfalls ist auch der Verkauf der Vermögenswerte nach Außerkrafttreten der Maßnahmen möglich.

I. The freezing of assets: Italian legislation of reference

[1] In Italian law, the freezing measures ordered by the European Union are concretely executed in compliance with the regulations set out in Legislative Decree No. 109/2007. This legislation concerns, in particular, the

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prevention, countering and repression of the financing of terrorism and the activities of countries that threaten international peace and security. This legislative decree was adopted in implementation of the EU Law (Directive 2005/60/EC, replaced by EU Directive 2015/849) as well as in compliance with UN regulations (Security Council Resolution No. 1373/2001), issued under the International Convention against the Financing of Terrorism of 8 December 1999.

[2] Legislative Decree No. 109/2007, and the rules resulting from it, are, therefore, applied in all cases in which the UN and the EU adopt sanctions, entailing the freezing of assets owned by people specifically identified in the consolidated lists internationally established, in which are indicated the names of the promoters or financiers of countries threatening global peace and security.

[3] So, this legislative decree is also used to implement the freezing of Russian assets imposed by the recent EU sanctions.

II. The freezing measures

[4] Italian law foresees two distinct hypotheses for the freezing of assets. On the one hand, assets located in Italy owned by people or legal entities expressly named in the relevant EU Regulations or in the relevant United Nations resolutions are frozen by means of a specific sanctioning decree issued by the Ministry of Economy and Finance (MEF), the competent body on the basis of article 4 of Legislative Decree No. 109/2007.

[5] Article 4 *bis* of Legislative Decree No. 109/2007, on the other hand, provides the possibility for the MEF to issue specific national freezing measures, applied to subjects not yet listed by the competent international authorities.

[6] In this case, the freezing measure is ordered within a period of six months, renewable until the formal inclusion of the subjects in the European or international lists.

[7] In this regard, article 4 *bis* Legislative Decree No. 109/2007 provides, in fact, that the Italian authorities should submit to the EU Commission (or to the UN authorities) an explicit request for the inclusion of the owners of the assets in the various reference lists, in order to give a basis to the Italian freezing measure, which would otherwise lack legitimacy from the international point of view.

[8] On an operational level, it should be noted that this preventive national measure has recently been applied by the Italian Authorities, in all cases in which important Russian assets, nominally owned by subjects not included in the sanctions, were, by virtue of presumptive connections, abstractly ascribable to the political elite of the Russian Federation. In such hypotheses,

therefore, the Ministry of Economy adopted such national emergency decrees, demanding the EU Commission to include the subjects nominally owning the frozen assets, indirectly linked to the Russian government, in the lists under Reg. EU 269/2014.

[9] It is always possible for the parties concerned to lodge an appeal against the measures applied by the MEF, challenging the freezing decrees in front of the Court of Rome¹, which is exclusively competent to judge the legitimacy of the measures ordered both definitively and provisionally, on the basis of the national decree issued pursuant to article 4 *bis* and 4 *ter* of Legislative Decree No. 109/2007.

[10] This appeal may concern both the correct identification of the assets indicated by the international regulations and the lawfulness of the simple presumptions underlying the Italian request for inclusion of the owners of the assets in the European freezing lists, in the case of national measures. On the other hand, it is not possible to ask the Court of Rome to judge the correct inclusion of a subject in the EU measures which has been already issued, since this matter is the exclusive competence of the EU authorities. An appeal on this issue must, therefore, be submitted to the EU General Court.

III. The competent authority for the implementation of measures

[11] Article 3 of Legislative Decree 109/2007 establishes the Financial Security Committee (FSC), which must adopt any act necessary for the proper and timely implementation of freezing measures ordered by the United Nations, the European Union and the Ministry of Economy and Finance. The Committee consists of 15 members and their alternates and is chaired by the General Director of the Italian Treasury. The members of the Committee are appointed by decree of the Minister of Economy and Finance, on the basis of designations made by various Ministries and other bodies such as the Bank of Italy and the National Commission for Companies and the Stock Exchange. Police bodies and Tax Agencies are also part of the Committee. In order to perform its tasks concerning the freezing of economic resources, the Committee is supplemented by a representative of the Italian State Property Agency.² It may request inspections from the bodies represented in it, taking into account their respective powers, and, by its own resolution, may also request further information that the public administrations are obliged to transmit to it. The Committee shall also ask the Italian State Property Agency for any necessary or useful information on the custody, administration and management of the frozen assets carried out.³

¹ Art. 14 Legislative Decree No. 109/2007.

² Art. 3 Legislative Decree No. 109/2007.

³ Art. 12 Legislative Decree No. 109/2007.

The Committee is also empowered to request from the judicial authorities any information deemed useful to counter the activities of countries that threaten international peace and security.⁴

IV. Reporting obligations

[12] It is important to point out that the Italian legislation foresees specific reporting obligations to the UIF (Financial Information Unit for Italy). In fact, article 7 of Legislative Decree No. 109/2007 provides that certain specifically identified subjects⁵ are required to notify the UIF of the people affected by the freezing measures, the amount and nature of the frozen funds or economic resources within 30 days from the date of entry into force of the Union regulations, the decisions of the international bodies and of the European Union referred to in article 4-ter and the decrees referred to in articles 4 and 4-bis or, if later, from the date on which the funds and economic resources are held. Such persons shall also promptly communicate to the UIF the data concerning transactions or relationships, as well as any other available information attributable to the designated persons or to those in the process of designation of freezing measures, also on the basis of the indications provided by the Committee. Violation of the reporting requirements set out in article 7 is punishable by an administrative pecuniary sanction ranging from € 500 to € 25,000.

V. Asset Management

[13] Italian law provides that the management of the frozen assets formally belongs to the Italian State Property Agency, which is responsible for the management, of the assets subject to measures, directly or through a specifically designed⁶ administrator.

[14] The expenses for the management of the assets, in accordance with the provisions of article 12 of Legislative Decree 109/2007, are borne by the state property Agency, on the basis of what is taken from the frozen assets for any reason. In order to sustain the expenses, priority is, therefore, given to the use of the frozen funds, however, in the absence thereof, it is the taxpayers who must provide the Agency with the necessary resources for the management of the assets⁷, with the subsequent right to recover the expenses sustained directly from the owner of the asset, also through the sale on the market⁸ of the products object of the freezing, if the measure ceases to be effective.

VI. The sanctions system

[15] Article 13 of Legislative Decree 109/2007 establishes that, in case of violation of the restrictions deriving from the freezing of assets, it is applied only a

pecuniary administrative sanction, from 5,000 euro to 500,000 euro, '*unless the act constitutes a criminal offence*'. It is not entirely clear, therefore, when criminal liability arises; according to part of the commentaries⁹, it would be entailed with the occurrence of the offence of 'Failure to comply with the measures of the Authority', referred to in article 650 of the Criminal Code. This article punishes '*anyone who does not observe a measure legally given by the Authority for reasons of justice or public safety, or public order or hygiene, [...] with imprisonment of up to three months or a fine of up to 206 euro*'.

[16] Generally, this provision is applied when a certain fact is not provided as a crime by a specific legal provision. In the present case, in order for article 650 of the Criminal Code to be applicable, it is, therefore, necessary to prove that the measures issued by the Ministry of Economy and Finance to include the names of the subjects of the freezing measures in the lists can be considered as measures issued for reasons of public safety or public order.

[17] In any case, pursuant to article 13 bis of Legislative Decree 109/2007, in the application of administrative pecuniary sanctions, every relevant circumstance is taken into account, such as: the value of the transaction carried out in breach of the provisions; the seriousness and duration of the breach; the degree of responsibility of the natural or legal person; and the financial capacity of the natural or legal person responsible.

[18] Sanctions may be reduced by up to one-third if the sanctioned person actively cooperates with the competent authorities during the investigation¹⁰ or they may be increased up to threefold in cases of serious or repeated or systematic or multiple violations of the provisions indicated in article 13¹¹ of Legislative Decree 109/2007.

[19] Finally, whoever commits, even at different times, several violations of the same or different provisions set out in article 13 of Legislative Decree 109/2007 with several actions or omissions executing the same criminal plan, shall be subject to the sanction provided for the most serious violation, increased by up to three times.¹²

⁴ Art. 2 Legislative Decree No. 109/2007.

⁵ Referred to in article 3 of Legislative Decree 231/2007, including, for example, banking and financial intermediaries, other financial operators, professionals in the exercise of their profession in individual, associated or corporate form, other non-financial operators, providers of gaming services, centralised management companies of financial instruments and management companies of regulated markets for financial instruments.

⁶ Art. 12(2), Legislative Decree No. 109/2007.

⁷ Art 12(8), Legislative Decree No. 109/2007.

⁸ Art 12, 13 bis, Legislative Decree No. 109/2007.

⁹ B. Firrincielli, *La crisi Russia-Ucraina: misure restrittive e panorama sanzionatorio*, *Giurisprudenza Penale*, 2022, n. 4.

¹⁰ Art. 13 ter (2), Legislative Decree No. 109/2007.

¹¹ Art 13 ter (3), Legislative Decree No. 109/2007.

¹² Art 13 ter, (4), Legislative Decree No. 109/2007.