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I RESEARCH QUESTIONNAIRE - II WORKPACKAGE "ESTABLISHING THE SUBJECT MATTER OF THE REGULATION": NATIONAL CONFISCATION MODELS COVERED BY THE REGULATION no. 1805/2018. TYPES, FEATURES AND SAFEGUARDS.

ITALY

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1. Introduction.

The Constitutional Court (n. 29/1961) and the Supreme Court[1] affirmed the polyfunctionalism / the "protean" nature of the confiscation, which «does not always appear of the same nature and in a single configuration, but assumes, depending on the different purposes that the law attributes to it, a different character, which can be of a penalty as well as a non-criminal measure» (n. 46 del 1964).

In the Italian legal system, art. 240 criminal code - supplemented by art. 236 c.p. (criminal code) - provides for the general discipline of confiscation in criminal law, applicable for each case for which there is no special discipline and, in any case, also applicable in this case where not expressly provided for. The introduction, notwithstanding, of new forms of special confiscation demonstrates how the discipline contemplated by art. 240 c.p. (criminal code) is now inadequate to the modern needs of the fight against crime, continuing to provide for the optional nature of the confiscation of profit - which no longer finds a rational justification in the ambit of modern criminal law, in which the fight against the accumulation of illicit capital has become a primary target - and maintaining the now obsolete distinction between price (mandatory confiscation) and profit.

The problem of the modern legislator is represented by the need to recover the assets accumulated over time by criminal organizations, which represent an instrument of infiltration in the lawful economy and in the vital nerve centres of politics; it is difficult to ascertain the connection between a specific asset and the source offence, so much so that the need emerges to provide for forms of lightening the burden of proof of illicit origin or to introduce the reversal of the burden of proof, and even the need to guarantee the subtraction of illicit profits also in lack of a conviction. In this direction, the first tool to facilitate the confiscation of the illicit profit is represented by the confiscation of the equivalent value, but in the art. 240 criminal code a general regulation of this form of confiscation has not yet been introduced and special forms of confiscation by equivalent continue to be introduced in the Italian legal system.

In reality, the awareness of the Italian legislator of the importance of confiscation as tool in the fight against crime, especially organized crime (mafia-type association), already emerged in 1982 with the Rognoni La Torre law which introduced the crime of "*mafiosa* association" with the mandatory confiscation of the instruments, products and profits of the crime, as well as of the assets that constitute the use of the profit (reinvestment) (art. 416 bis, § 7 criminal code[2]), but also one of the first forms of "extended" and non-conviction based confiscation in the international scene, introduced outside the constraints of the penal system as a preventive measure pursuant to art. 2-ter, Law no. 575/1965, today art. 24 of the "preventive measures code" introduced by the Legislative Decree n. 159/2011. For the rest, the enhancement of the role of confiscation in the fight against the crime of "profit" was achieved with the introduction of more and more special forms of mandatory confiscation of profit, and sometimes also of the instruments of the crime, as well as with the confiscation by equivalent, in addition to providing for a form of extended confiscation with art. 12-sexies Legislative Decree no. 306/1992, now art. 240-bis of the criminal code following Legislative Decree no. 21/2018.

2. Traditional confiscation: art. 240 c.p.

The main reference for the issue is article 240 of the Criminal Code, concerning the general conditions to apply the confiscation, included in the section of the code related to the assets security measures.

Art. 240 C.C., Confiscation

[1] n. 46 del 1964; Un. Sect., 2 July 2008, n. 26654, Fisia Italimpianti s.p.a., CED n. 239923

[2] In some judgements the "wealth" of the member of the criminal organisation is considered instrument of the crime for its destination.

"1. When a conviction occurs, the court may order the confiscation of the assets that were used or were intended to commit the crime, and of things which are the product or the profit of the crime.

2. The confiscation always concerns: 1) assets that constitute the price of the offense; 1bis) assets and computer devices used in whole or in part to commit the offenses referred to in articles 615-ter, 615- quater, 617-quinquies, 617-sexies, 635-bis, 635-ter, 635-quater, 635-quinquies, 640-ter and 640- quinquies5 ; 2) assets, the manufacture, the use, the carriage, the possession or the sale of which constitutes a criminal offense, even if a conviction is not made.

3. Paragraph 1 and numbers 1 and 1-bis of paragraph 2 shall not apply if the asset, the good or the computer device belong to a person unrelated to the crime. Paragraph 2, number 1-bis, shall also apply in case of application of the penalty on request of the parties pursuant to Article 444 of the Code of Criminal Procedure6 .

4. Paragraph 2 shall not apply if the asset belongs to a person unrelated to the crime and the manufacture, the use, the carriage, the possession or the disposal may be authorised by administrative approval.

This rule was very recently reformed in implementation of Dir. 2014/42/EU (entry into force of the provision on 11-24-2016 with Legislative Decree no. legislation no. 202/2016), which – with a discutible choice - has introduced in the general discipline a specific form of compulsory confiscation, also, for equivalent of the price, products, and of the goods and of the IT or telematic tools used for the commission of the crimes listed; this novella represents the umpteenth missed opportunity for an overall rationalization and modernization of the discipline of confiscation.

Art. 240 regulates confiscation as an asset security measure and contemplates two distinct figures: the optional and the mandatory confiscation.

In particular:

the optional confiscation of the instruments of the crime, the product and the profit (this is based on the perceived social dangerousness of the offender's possession of the assets that served or were used to commit the crime, and of the assets that constitute the product or the profit of the crime);

the mandatory confiscation of the assets constituting the price of the crime, or the compensation given or promised to induce, instigate or cause another person to commit the crime, unless the asset belongs to a person unrelated to the crime;

the compulsory confiscation of the IT or telematics tools that have been used to commit numerous computer crimes, as well as the assets constituting the profit or product of those crimes;

and, finally, the mandatory confiscation is also ordered (in this case regardless of a sentence of conviction) for the assets whose manufacture, use, carrying, possession, or disposal constitutes a crime (article 240 (2, no. 2) criminal code), unless they belong to a person unrelated to the crime and their use, etc. is permitted by administrative authorisation.

This distinction between mandatory and optional confiscation perpetuates the choice of the Zanardelli code, which envisaged the optionality to avoid excessive application rigor.

Paragraph 3 and 4 introduce protections for the third parties.

At the basis of a security measure is the concept of dangerousness, in relation to which the doctrine oscillates from the consideration of the dangerousness of the res to that of the person (social dangerousness), with positions that, however, tend to approach, where we speak of "dangerousness also of the person, but in a relative sense because it rests in an osmosis with the thing: it will be enough to interrupt this for the dangerous situation to cease"; the goods, left at the disposal of the offender, would constitute an incentive for him to commit further offenses.

3. Legal nature of the confiscation.

Notwithstanding the legislative definition of a security measure, in line with the Report on the criminal code draft which states that confiscation "consists in the elimination of things which,

deriving from criminal offenses or in any way connected to their execution , keep alive the idea or the attraction of the crime", part of the doctrine denies the preventive purpose of the measure in question, to attribute it a punitive or expropriative nature.

Despite, then, its definition in the code as a "security measure", the confiscation reveals, pursuant to art. 236 criminal code, a strongly differentiated statute with respect to personal security measures and since "the nature of an institution is function of the discipline that characterizes it", the identity of nature between confiscation and security measures can be questioned[3].

In the art. 240 c.p. and in the special forms of mandatory confiscation we can distinguish: hypotheses with a more marked preventive purpose, such as, for example, the confiscation of things that served or were intended to commit the crime, which are not alien, however, to repressive connotations; hypotheses to which "the very concept of criminal liability is foreign" and which constitute "a projection of the legal regime of a thing (the confiscation of things whose use, possession, etc., is absolutely forbidden)"; confiscation of the product or profit with the purpose of compensation or rebalancing of the violated economic order, restoring the patrimonial situation of the offender to the conditions in which it was before the commission of the crime and thus preventing the offender from enjoying the fruit of his activity on the basis of the fundamental principle that crime does not represent a legitimate right to purchase goods in rule of law. The removal of the ascertained profit of the crime does not, therefore, perform a repressive function, because it does not involve a patrimonial sacrifice or a limitation of the property right for the offender. It would be a sort of criminal law equivalent to the civil law institution of unjust enrichment pursuant to art. 2041 civil code.

Next to the general provision under article 240 of Criminal Code, there are several provisions on special cases of confiscation of assets, included in the criminal code, in other codes and in special laws. In particular specialty can be related to: • specific offences which can trigger specific forms of confiscation; • different categories of assets which can be object of the confiscation; • mandatory hypothesis of confiscation.

4. The concept of proceed (surrogated and benefit/economic utility).

Further, according to consolidated case law, the notion of 'proceeds' of crime includes 'profit', 'product' and 'price' of crime (Court of Cassation, Unified Sections, No. 26654 of 27 March 2008). The profit relate to:

the 'economic advantage obtained directly and immediately way from the crime';

the product is the 'empiric result of the crime, namely the items created, transformed, adulterated or acquired through the crime'; and

the price is 'compensation given or promised to a determined person, as consideration for the execution of the crime'.

On the basis of the prevailing jurisprudential orientation, the "profit of the crime" must be identified with an "added benefit of a patrimonial type", "pertaining to the crime" according to a "cause-effect" relationship, in the sense that the profit must be "an immediate economic consequence derived from the crime": "an advantage can be identified, which in order to be such must represent a result achieved (and not a mere expectation which can only found the interest or motive for committing the crime but not the adoption of a real measure) and must be a positive result, i.e. a further benefit compared to those that the entity had prior to the offence" [4]. - .

Also recently, the Supreme Court has highlighted the need for an "aetiological link" between the asset to be confiscated and the crime, the confiscation "cannot affect the assets of the offender

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[3] Così G.GRASSO, *Commento all'art. 240 c.p.,* in ROMANO-GRASSO-PADOVANI, Commentario sistematico del codice penale, III, Milano 2011, 609; A.ALESSANDRI, voce *Confisca nel diritto penale*, in *Dig. Disc. Pen.*, III, Torino 1989, 39.

[4] Cass. S.U. 2.7.2008, n. 26654, Fisia Italimpianti; F.BONELLI, *D. lgs. 231/2001: tre sentenze in materia di "profitto" confiscabile/sequestrabile,* in *DPenCont* (1) 2012, 133.

to a greater extent than the economic advantage deriving from the commission of a specific crime" [5].

The interpretative problems that have arisen and that still return pertain to the admissibility of the confiscation of the so-called surrogates and other utilities.

The United Sections in the Caruso judgment established that the assumption that the profit from the crime presupposes the ascertainment of its direct causal derivation from the agent's conduct constitutes a «consolidated principle in legitimacy jurisprudence. The parameter of pertinence to the crime of profit represents the effective selection criterion of what can be confiscated for this reason". With this definition, the United Sections now peacefully include in the notion of confiscable profit also the surrogates, i.e. assets in which the original profit, of direct causal derivation from the crime, has been invested, substantially excluding further utilities, i.e. the resulting amounts from subsequent investments of the sums in other lawful activities or the proceeds of further activities extraneous to the essential structure of the crime[6]; orientation confirmed more recently by the United Sections in the Lucci case[7].

On the basis of another orientation, more compliant with the broad notion of income accepted in Directive 42/2014, in the Miragliotta decision[8], just prior to the U.S. Caruso, the Italian Supreme Court seems to include utilities in the notion of confiscable profit provided that the prosecution offers circumstantial proof of the pertinence link that connect, even through subsequent passages, the assets to be confiscated to the crime, thus putting a stop to an excessive expansion of the notion of indirect profit. The Court affirms that "The asset constituting a profit can be confiscated pursuant to articles 240 and 322 ter, paragraph I, first part of the Criminal Code whenever it can be causally linked in a precise way to the criminal activity carried out by the agent. Therefore, it is necessary to clearly indicate the circumstantial elements on the basis of which to determine how the seized assets can be considered in whole or in part the immediate product of a criminally relevant conduct or the indirect profit thereof, as the result of reuse by the offender of the money or other utilities directly obtained from the accused".

The interpretation provided by the Miragliotta sentence should, then, prevail today in the light of the Directive, in compliance with the obligations of conforming interpretation pursuant to articles 11 and 117 of the Constitution[9].

This interpretation was subsequently confirmed by the judgment of the United Chambers Gubert[10] and by the judgment of the United Chambers Thyssen[11]. This position is taken up verbatim by subsequent jurisprudence[12].

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[5] Cass. 12.4.2022 (dep. 18/05/2022) n. 19561; Cass. 15.7.2020, Ambrosini, n. 30899, *CEDCass,* 280029; Sez. II, 26.11.2021, n. 2879, *CEDCass,* 282519. Contra Cass. 7.12.2021, n. 7503.

[6] Cass. S.U. 27.3.2008, n. 26654, Fisia Italimpianti; Cass. 12.3.2014, n. 14600; Cass. 14.11.2013, n. 11918; Cass. 4.11.2003, n. 46780, Falci, *CEDCass,* 227326; T.EPIDENDIO, *La nozione di profitto oggetto di confisca a carico degli enti*, in *DPC* 2008, n. 10, 1272.

[7] Cass. S.U. 26.06.2015, Lucci, n. 31617, Rv. 264436.

[8] Cass. S.U. 6.3.2008, n. 10280, Miragliotta, rv. 23870. See A.M. MAUGERI, *La confisca per equivalente - ex art. 322 ter - tra obblighi di interpretazione conforme ed esigenze di razionalizzazione*, in *Riv. it. dir. proc. pen.* 2011, 794 ss.

[9] Cass. 6.11.2008 n. 45389, Perino, in *CP* 2010, 2714; Cass. 19.3.2013 n. 13061, in http://pluris-cedam.utetgiuridica.it. parla di profitto dinamico.

[10] Cass. S.U. 5.3.2014 n. 10561, Gubert.

[11] Cass. S.U. 24.4.2014, Thyssen, n. 38343, *CEDCass,* 261117.

[12] Per tutte Cass. 12.6.2018 n. 38917, in *FI* 2018, II, 715.

The Supreme Court has specified that the notion of profit does not include what is only the subject of compensation claims[13] or a merely financial and not patrimonial advantage[14]. Credits can be confiscated directly (and not by equivalent) provided they are certain, liquid and collectable[15].

4.1. Gross or net profit.

• Another problem encountered by the jurisprudence in the interpretation of the notion of profit concerns the adoption of the principle of net or gross levy. On the basis of the principle of the net levy, only the profits of the crime can be deducted, net of the expenses made by the offender for its consummation; the gross principle does not take realized expenditure into account.

• In reality it will be seen how the two positions tend to reconcile where the former do not take into account the illicit expenses (for committing the crime) and the latter take into account the legal expenses for performances on behalf of the victim. The problem arises, in fact, concretely for those forms of economic crime, connected to a lawful business activity in which conduct integrating a crime creeps in, such as fraud or corruption aimed at awarding a contract or obtaining payment from the public official of a higher consideration than that due in the context of a synallagmatic relationship stipulated between private company and public body[16]. In the event that the illegal activity does not involve the performance of any lawful counter-performance, the confiscable profit can only be identified with the entire value of the business, as it is wholly the result of an illegal activity, lacking any separable cost, because it is intrinsically illicit or in any case concerning instrumental and/or correlative activities with respect to the predicate offence.

The United Sections of the Supreme Court intervened in the famous Fisia case by accepting the gross principle, but then stating that, where a synallagmatic activity is carried out on the basis of a contract that remains valid (crimes in contract, as opposed to structurally illicit contract crimes), the profit cannot be subtracted tout court, as it constitutes the "consideration for a service regularly performed by the obligated", not distinguishing between gross or net profit, but between illicit profit and lawful profit. However, this drastic solution, which would even lead to the non-confiscation tout court of the profit of the crime "in the contract", is mitigated by the affirmation of the enigmatic principle on the basis of which the confiscable profit is "concretely determined net of the effective benefit possibly achieved by the injured party, in the ambit of the synallagmatic relationship with the entity"[17].

This orientation is criticized in doctrine because this notion of "effective utility" is difficult to calculate [18], to the point of risking making it impossible to confiscate the profit deriving from the so-called crime in contract with synallagmatic services or in any case to make the interpretation of

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[13] Cass. 17.6.2010, n. 35748.

[14] App. Milano 25.1.2012, Banca Italease S.p.A., in *DPC* 11.4.2012, with note of M. SCOLETTA; Cass. 29.11.2013 (4.3.2014), n. 10265; così F. BONELLI, *op. cit.*, 136; C.E. PALIERO, *False comunicazioni e profitto confiscabile: connessione problematica o correlazione impossibile?*, in *Le Società* 2012, 80.

[15] Cass. S.U. 2.7.2008 n. 26654, Fisia Italimpianti, § 7; in the same direction Cass. 16.11.2012 n. 8740 and 2016, n. 23013. Cfr. S. BELTRANI, *Profitto degli enti e diritti di credito nella giurisprudenza di legittimità*, in *Resp. ammin. delle società e degli enti (La)*, 2015, v. 10. n. 2, 185 ss.

[16] A. SCARCELLA, *Il profitto sequestrabile all'Ente nei reati a prestazioni corrispettive (commento a Cass. pen., n. 23013, 31 maggio 2016)*, in *Responsabilità amministrativa delle società e degli enti* (La), 2016, v. 11, n. 4, 253 ss.; R. BORSARI, *Percorsi interpretativi in tema di profitto del reato nella confisca*, in *LP* 8-9-2019, 16 ss.

[17] Cass. S.U. 2.7.2008 n. 26654, Fisia Italimpianti, § 7; conf. 2016, n. 23013; sez. VI, 8 aprile 2013, n. 24277; Sez. 6, n. 33226 del 14/07/2015, Azienda Agraria Geenfarm di Guido Leopardi, in the same proceeding and Sez. 2, n. 20506 del 16/04/2009, Società Impregilo Spa, Rv. 243198; Sez. U, n. 31617 del 26/06/2015, Lucci, Rv. 264436; 2008, n. 42300; Sez. 2, del 16/04/2009, n. 20506 ; Sez. 02, del 12/11/2013, n. 8339.

[18] E.LORENZETTO, *Sequestro preventivo* contra societatem *per un valore equivalente al profitto del reato*, in *Riv. it. dir. proc. pen.* 2008, 1795; T. TRINCHERA, *Confiscare senza punire? Uno studio sullo statuto di garanzia della confisca della ricchezza illecita*, Giappichelli, 2020, 398; V. MONGILLO, voce *Profitto confiscabile*, in EG Treccani, 2018; S. FINOCCHIARO, *Riflessioni sulla quantificazione del profitto illecito e sulla natura giuridica della confisca diretta e per equivalente*, in *DPC Riv. trim.* 2020, n. 3, 333.

the notion of confiscable profit absolutely obscure [19]; as, moreover, emerges in practice where the jurisprudence renounces calculating the profit [20]. On the other hand, the doctrinal position which, on the basis of a structural concept of profit (by components) [21], allows the deductibility only of the costs realized for lawful services, not only seems juridically founded and easily applicable, since they are accounted costs, but ends up by agreeing the opposing positions, i.e. both those who, starting from the gross principle, admit the deductibility of only lawful expenses [22], and of those who, even if they accept the principle of the net withdrawal, deny the deductibility of the so-called expenses illicit [23].

However, some judgments return to the "net profit" criterion, at least where it concerns a lawful business activity in which a contractual offense is committed [24], while maintaining the distinction, introduced by the Supreme Court, between contract crimes and crimes in contract for the purpose of determining the notion of confiscable profit[25]. This distinction is acceptable to the extent that the term contract crimes refers to cases in which the very stipulation of the contract materializes the crime from which the illicit profit follows, in the absence of lawful services in favor of the community or the victim, for example fraud against the State aimed at obtaining undue financing; for the rest, this distinction seems questionable where in any case the person who commits the offense performs lawful services, apart from the ambiguity of the same distinction in question, which is the subject of conflicting jurisprudence.

Lastly, the orientation is interesting which clearly specifies that in calculating the victim's utility, the so-called out-of-pocket costs must be considered [26] and recent jurisprudence highlights, beyond the issue of the notion of gross or net profit, that the lawful services performed by the offender must be correctly compensated[27].

5. Third party ownership

In the Italian legal system, the confiscation of asset belonging to persons unrelated to the commission of a crime is generally excluded, both for confiscation pursuant to art. 240 c.p., as well as for special hypotheses relating to particular types of offences[28].

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[19] Cfr. M.BONTEMPELLI, *L'accertamento del profitto nel sequestro preventivo, fra contratto di appalto e reati di corruzione e truffa,* in *DPC* 2012, p. 149.

[20] Cass., sez. VI, 8 aprile 2013, n. 24277,

[21] Per tale definizione T.EPIDENDIO, *La nozione di profitto*, cit., 1267 – 1278 ss.

[22] BOTTALICO, *Confisca del profitto e responsabilità degli enti tra diritto ed economia: paradigmi a confronto*, in *Riv. it. dir. e proc. pen.*, 2009, p. 1760; MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano 2001, 564 ss.; EPIDENDIO, *La nozione di profitto*, cit., 1267 ss.; AMATO, *Precisati i requisiti e le condizioni per sostenere la responsabilità degli enti*, in *Guida al dir.* 2006, n. 42, 69; FUSCO, *La sanzione della confisca in applicazione del d.lgs. 231/2001*, in *Resp. amm. soc. enti*, 2007, I, p. 65; STICCHI, *Strumenti di contrasto alla criminalità d'impresa e nozione di profitto confiscabile*, in *Resp. amm. soc. enti* 2008, 112.

[23] FORNARI, *La confisca del profitto nei confronti dell'ente responsabile di corruzione: profili problematici*, in *Riv. trim dir. pen. ec.* 2005, 83; ALESSANDRI, *Criminalità economica*, cit., p. 2153; ACQUAROLI, *Confisca e tassazione. Proposte di riforma e ipotesi di un modello integrato di disciplina della ricchezza "di origine illecita"*, in *La riforma del sistema sanzionatorio fiscale*, a cura di ACQUAROLI, Macerata 2007, 170 – 171; LOTTINI, *Il calcolo del profitto del reato ex art. 19 D.Lgs. n. 231/2001*, in *Le società*, 2009, 366 ss.; PIERGALLINI, *L'apparato sanzionatorio* in *Reati e responsabilità degli enti – Guida al d. lgs. 8 giugno 2001, n. 231*, a cura di LATTANZI, Milano 2010, 244.

[24] Cass., section VI, 19 March 2013, 13061; Court of Cassation, Section II, December 20, 2011, Angelucci, n. 11808; Cass., Section III, April 4, 2012, n. 17451, Mastro Birraio and other.

[25] See MANTOVANI, *Concorso e conflitto di norme nel diritto penale,* Bologna 1966, 377; LEONCINI, *I rapporti tra contratto, reati-contratto e reati in contratto*, in *Riv. it. dir. proc. pen.* 1990, 999.

[26] Cass., sez. VI, 27/01/2015, n. 9988: the confiscable profit must be calculated "by excluding - within the limits of the so-called out-of-pocket costs - any income obtained as a result of lawful services actually performed in favor of the contractor in the context of the synallagmatic relationship, equal to the "utilitas" of which benefited the other party

[27] Cass. 21.10.2020 n. 6607.

[28] L.CAPRARO, *Disponibilità della res e tutela del terzo estraneo*, in M.MONTAGNA, *Sequestro e confisca*, Torino, Giappichelli 2017, 335 s.

The confiscation referred to under Article 240 (1) of the Italian Penal Code does not enter into effect if it would affect belonging to a person unrelated to the crime (art. 240 (3) c.p.). This limitation does not apply, however, for "intrinsically dangerous" assets (art. 240 (2, n. 2) c.p.), such as those whose manufacture, use, carrying, etc., constitutes a crime[29].

The general principle (with a few exemptions) is that confiscation does not take place when the ownership of the items subject to potential confiscation is of a 'person extraneous to the crime' (a third party in good faith). In this case, the items should be handed over to the third party. However, case law is consolidated in adopting a strict notion of a 'person extraneous to the crime', according to which any subject who – although not being criminally liable – has, through his or her conduct, made the commission of the crime easier, cannot be considered extraneous to the crime, and therefore is not entitled to prevent confiscation and to obtain the restitution of the relevant items. In particular, according to case law, the only subject who can be considered extraneous to the crime is the subject who does not have any kind of negligent link – direct or indirect, owing to a lack of vigilance or other causes – with the commission of the crime[30].

Also the beneficiary of the crime is not considered „extraneous to the crime' in case law, with the exception of cases in which the third party has innocently benefited from the crime in good faith[31]. „The third party shall have the burden of proving the facts constituting his/her claim to the asset, providing all the elements constituting the conditions of „ownership" and „unrelatedness to the crime", regarding the absence of a link between his/her claim and the criminal conduct of others, or, in the event that the third party has in any way benefited from the latter, regarding the fact that this was done innocently and in good faith"[32].

Under these principles, only in limited situations has case law maintained that close relatives could be considered 'persons extraneous to the crime' and as such had title to prevent confiscation.

6. Value-based confiscation

In the Italian system of law there is not a general discipline or provision for the confiscation by equivalent, but only special forms. Confiscation for equivalent is allowed by special provisions only concerning a compulsory list of crimes (eg, corruption[33], money laundering, tax fraud, market manipulation, insider trading, usury, etc.), where recovery of the direct profit or price of crime is impossible. There are several hypothesis where the confiscated assets do not correspond to the actual product or profit of the crime and they need to be substituted by some assets which have an equal value. This rule is provided under articles 322ter, 600septies, 640quater, 644, 648quater of the Criminal Code, article 2641 of the Civil Code, article 187sexies of Consolidated Act on Financial Intermediation, article 11 of Law to ratify and implement the Convention and the Protocols of the United Nations Convention against Transnational Organised Crime.

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[29] F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* in A.Bernardi (ed.), F.Rossi (cordinated by), *Improving confiscation procedures in European Union*, Napoli 2019, 330.

[30] Court of Cassation, No. 16405 of 21 April 2008

[31] Cass. pen., Sez. V, Sent. 21 giugno 2021 (ud. 14 maggio 2021), n. 24248; Trib. del riesame di Milano, Unicredit, resulted in Cass., 10.1.2013, n. 1256; contra Cass., 19.9.2012, n. 1256, P.a. e altro, in *DPC* 2013, 464, with note of D'AVIRRO; T.E.EPIDENDIO, *La confisca nel diritto penale e nel sistema delle responsabilità degli enti*, Padua, Cedam, 164 s. On the protection of thirds' rights Court of Justice EU, 21 October 2021 (C-845/19 e C-863/19)

[32] F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy, cit.*

[33] Art. 322 ter c.p. Confiscation of profit and price is mandatory for crimes provided under articles 314 (embezzlement), 315 (embezzlement against a private person), 316 (embezzlement taking advantage of other's error), 316-bis (embezzlement against the State), 316-ter (misappropriation of funds against the State), 317 (concussion7), 318 (corruption to exercise the function), 319 (corruption for an activity against the function), 319-ter (corruption in judicial acts), 319-quarter (improper induction to give or promise utility), 320 (corruption of a person in charge of public service). «In the case of a conviction, or application of the penalty at the request of the parties pursuant to Article 444 of the Code of Criminal Procedure, for the crimes… the confiscation of the assets constituting the profit or the price is always ordered, unless they belong to a person unrelated to the crime,or, when this is not possible, the confiscation of assets, of which the offender has the availability, for a value corresponding to this price or profit

Confiscation for equivalent is also allowed on the company assets, under the same conditions, concerning the particular responsibility of companies for certain crimes committed by their managers or employees in the interest or for the benefit of the company (article 19 of Legislative Decree No. 231/2001).

The value assessment of assets to be confiscated is first made by the public prosecutor (even at a pretrial stage, for the interim measure of preventive seizure) by determining the quantum of the relevant proceeds of crime, where necessary by appointing an expert witness for the task. This determination, however, must be confirmed (or amended) by the competent court, when granting the interim measure, and subsequently when ordering confiscation.

In the opinion of the Constitutional Court[34] and the Supreme Court the confiscation of the value is a punitive sanction; the lack of dangerousness of the assets that are the subject of it, together with the absence of a "pertinent relationship" (intended as a direct, current and instrumental link) between the crime and the assets reveals a predominantly afflictive connotation and has, therefore, an "eminently sanctioning" nature, such as to prevent the applicability of the general principle of retroactivity of security measures, sanctioned by art. 200 c.p.

Considering the confiscation of the value a punishment, the Supreme Court applied it as a real penalty, for example: against each abetter (accessory, partner in the crime), transforming the confiscation into a real pecuniary penalty in blatant disregard for the principles of legality, guilt and proportionality[35]; establishing that the confiscation by equivalent relating to the crime of corruption (art. 322 ter, § 2 c.p.) does not necessarily presuppose the achievement, by the briber, of a profit, given the sanctioning nature of the measure"[36].

In the prevalent case law the confiscation of money is always direct; this means that it is possible to apply the confiscation by equivalent only in relation to non-fungible goods. "If the price or the so-called profit accretive deriving from the crime consists of money, the confiscation of the sums deposited on a bank current account, of which the subject has the availability, must be qualified as direct confiscation and, in consideration of the nature of the asset, does not require proof of the connection of derivation direct between the sum materially subject to ablation and the crime"[37]. This position is criticized by the authors because it dosn't consider the necessity to ascertain the "pertinent relationship" between the profit and the crime in order to apply the direct confiscation.

7. The application of confiscation without conviction (in case of prescription and amnesty)

The Article 240 (2, n. 2) c.p. allows the confiscation of „intrinsically dangerous" assets whose manufacture, use, carrying, possession, or disposal constitutes a crime, even in the case of acquittal.

According to the most recent ruling of the Supreme Court, also United Sections (26 June 2015, n. 31617, Lucci), in case of extinction of the crime due to amnesty or statute of limitations intervened in the appeal or in the trial of cassation, the judge may order the compulsory confiscation of the price or profit (in particular pursuant to art. 240, § 2, no. 1, c.p., the confiscation of the price and, pursuant to art. 322-ter Criminal Code, the direct confiscation of the price or profit of the crime) "provided that there has been a previous conviction and that the assessment relating to the existence of the crime, the criminal liability of the defendant and the classification of the asset to be confiscate as a price or profit, remains unchanged on the merits in the subsequent levels of judgment" (CSU, 15/31617, Lucci; contra CSU 08/38834; CSU 93/5; cfr. C 11/39756) .

The law 161/2017 has introduced the art. 578 bis criminal procedual code (c.p.p.) to allows the application of the extended confiscation (art. 240 bis c.p.) also when the crime is statute barred or amnistied. The rule establishes that when the confiscation in particular cases provided for by the

[34] Costitutional Court 02/04/2009, n.97 e 20/11/2009, n. 30

[35] Supreme Court, July 28, 2009, n. 33409, Alloum; 2010/21027), against Supreme Court, sez. VI, 20/01/2021, n.4727

[36] Cass., May 13, 2010, n. 21027; against sez. VI, 21/01/2016, n. 8044.

[37] Supreme Court 2014, n. 10561, Gubert; C 15/31617 Lucci; section VI, 18/02/2016, n. 10708; 04/02/2021, n.6391.

first paragraph of Article 240- bis of the Criminal Code and other provisions of the law has been ordered,"the Court of Appeal or Supreme Court, in declaring the crime extinguished by prescription or amnesty, decide on the appeal solely for the effects of the confiscation, after ascertaining the accused's responsibility". In order to apply this rule, the judge must have already ordered the confiscation before the offence is extinguished; in the end, if the confiscation has not already been ordered, it will still be possible to initiate the preventive proceedings for the purposes of applying confiscation as a patrimonial preventive measure[38].

In the opinion of some judgements this rule have to be applied also to each form of mandatory confiscation, even if the rule is clearly applicable only to the extended confiscation ex art. 240 bis c.p. and to the forms of extended confiscation provided for in other laws (e.g., in Consolidated Customs Act art. 301, in the Consolidated law on narcotic drugs, art. 85-bis, art. 12-*ter* d.lgs. 74/2000 for tax crimes); this is an analogical and in malam partem application of the law against the principle of legality.

Notwithstanding the jurisprudence didn't allow the application of the confiscation of the value when the crime was time barred because the confiscation of the value is considered a punishment, the law 3/2019 has extended this rule (art. 578 bis c.p.p.) to the mandatory confiscation of art. 322 ter c.p. ("or the confiscation provided for by Article 322-ter of the Crim.Code"), also in the form by equivalent.

In any case, the recent reform of the criminal trial (law 134/2020) has modified the rules regarding statute limitation period, which is now definitely interrupted after the verdict of first instance (l. 3/2019). This means that the expiration of the statute limitation period during the appeal judgement will be no longer possible, but there will be a bar to prosecution after a certain period (from 2 to 3 years for the second instance judgment).

After this reform, the Legislative Decree 10 October 2022, n. 150 (so called Cartabia Reform) has introduced the art. 578 ter c.p.p. which establishes that "(1) The judge of appeal or the Court of Cassation, in declaring the penal action *unproceedable* pursuant to article 344 bis, orders the confiscation in cases where the law compulsorily provides for it even when no conviction has been pronounced. 2. Except for the cases referred to in paragraph 1, if there are assets in seizure for which confiscation has been ordered, the judge of appeal or the Court of Cassation, in declaring the criminal action *unproceedable* pursuant to article 344-bis, order the transmission of the documents to the public prosecutor at the court of the district capital or to the national anti-mafia and anti-terrorism prosecutor competent to propose the patrimonial measures referred to in title II of Book I of legislative decree 6 September 2011, n. 159". This means that in any case when the criminal action is *unproceedable*, in presence of a not final conviction will be possible to apply the preventive confiscation

8. The principle of non-retroactivity.

On the basis of art. 200 Criminal Code „The security measures are governed by the law in force at the time of their application. If the law of the time in which the security measure is to be carried out is different, the law in force at the time of the execution shall apply". This means that the principle of non-retroactivity (art. 25, § 2 Constitution and art. 2 Criminal Code) is not applied to security measures in the Italian system of law.

With particular reference to confiscation, it can be recalled that the Constitutional Court did not recognize the punitive nature of security measures and the consequent applicability of the principle of non-retroactivity to all security measures, however, in a specific case, on the basis to the substantive notion of the criminal matter of the ECtHR, declared the unconstitutionality of the regulation of the confiscation of the vehicle in relation to the crime of driving while intoxicated (186, c. 2 letter c) of Legislative Decree 285/1992, as amended by art. 4, c. 1, lit. b, d.l. 92/'08), in

[38] A.M.MAUGERI, *La riforma della confisca (d.lgs. 202/2016). Lo statuto della confisca allargata ex art. 240 bis c.p.: spada di Damocle sine die sottratta alla prescrizione (dalla l. 161/2017 al d.lgs. n. 21/2018),* in *Arch. Pen.* 2018, suppl. 1, 31.

the part in which its retroactive application was permitted pursuant to art. 200 criminal code, for violation of the principle of non-retroactivity of criminal sanctions pursuant to art. 7 of the ECHR and, therefore, of the art. 117 of the Constitution[39] .

Overcoming a contrary orientation[40], the Supreme Court has instead applied the principle of non-retroactivity, pursuant to art. 25, § 2 of the Constitution, to the confiscation by equivalent introduced by art. 1, c. 143, of the law no. 244/2007, which extends the discipline of art. 322 ter criminal code to the tax crimes contemplated by Legislative Decree no. 74 of 2000, deeming inapplicable to this case the art. 200 criminal code in consideration of "the eminently sanctioning nature of the exceptional institution under examination"[41]. This orientation was then solemnly sanctioned by the Constitutional Court which rejected the question of constitutional legitimacy of art. 200, 322 ter criminal code and 1, c. 143, of the law no. 244/2007, for violation of the art. 117 of the Constitution due to the contrast with the art. 7 of the ECHR, as it held that by virtue of the punitive nature of confiscation by equivalent, the prohibition of retroactive application derives from art. 25, § 2 of the Constitution and the jurisprudence of the ECHR in relation to art. 7[42]. Despite the perplexities that the affirmation of the punitive nature of confiscation by equivalent arouses, this orientation appears absolutely acceptable in terms of guarantees. The Supreme Court, in the Barilari sentence, consequently applied this principle also to the confiscation by equivalent of the preventive measure confiscation, art. 2-ter, c. 10, l. no. 575/'65, as amended by d.l. no. 92/'08 (now art. 24 Antimafia Code)[43].

It follows that the confiscation security measure can also be ordered with reference to crimes committed at a time when it was not provided for by law or was provided for in different ways in terms of type, quality and duration. Part of the doctrine and jurisprudence, recognizing in this orientation profiles of constitutional illegitimacy, leans towards a restrictive reading of Article 200 of the Criminal Code, such as not to harm the fundamental guarantees of the citizen. They demand that the security measure has to be provided for a specific crime before the perpetration and it is only possible to modify the executive aspects; this in order to respect the principle of legality ex art. 25, § 2 Constitution or, at least, art. 7 ECHR, considering the confiscation included in the notion of criminal matter[44].

9. Procedural aspects

The Italian Code of Criminal Procedure does not contain a comprehensive framework on the topic of confiscations: the institution is referred to by several provisions, many of which are relegated to the implementing and transitional provisions (Disp. Att. CPP, i.e. Italian Legislative Decree no. 271 of 1989).

A confiscation procedure (in broad terms) often starts at the pretrial stage, by freezing the proceeds and instrumentalities of the crime through a preventive seizure (article 321 et seq. of the Criminal Procedure Code).

As a general rule, confiscation is ordered where a conviction judgment is issued (through the same judgment) and is executed when that judgment becomes final.

Confiscation (art. 240 c.p. and special forms of confiscations) can or must be ordered by the trial judge who pronounces the sentence of conviction, or by the enforcement judge (the judge

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[39] Corte Cost., 4 giugno 2010, n. 196, P.T., in *Foro it.* 2010, 9, I, 2306; MAUGERI, *La confisca per equivalente*, cit.

[40] Already the art. 15 of law 300/2000 had expressly provided for the non-retroactivity of art. 322 ter criminal code; but the Cassation had established that the prohibition of retroactive application was valid only for the new crimes envisaged by art. 322 bis (introduced by the first paragraph of law 300), Cass. 3.6.2001, Curtò, in *Cass. pen.* 2002, 581; cfr. Corte Cost. 27.7.2002, n. 394 e 24.6.2004, 186.

[41] Cass. 8.5.2008, n. 21566, Pulzella, in *Dejure*; in the same direction Cass., 5.6.2008, n. 28685, *ivi*; Cass. 24.9.2008, n. 39172, Canisto; Cass., S.U., 31.1.2013, n. 18374, Adami, Rv. 255037.

[42] Corte Cost., 2.4.2009, n. 97, S.B., in *Giur. cost.* 2009, 2, 984; Corte Cost., 20.11.2009, n. 301.

[43] Cass., Sez. I, 28.2.2012, Barilari, n. 11768, Rv 252297.

[44] In this last direction G.GRASSO, *Commento all'art. 240 c.p.*, 609.

responsible for deciding on issues relating to the effective enforcement of the sentence, and coincides with the judge who has ruled on the relative provision), if mandatory. In this case, the enforcement judge has the duty to order the confiscation during the enforcement phase, if the jurisdictional judge hasn't rule on it (Court of Cassation, sec. III, 10 September 2015, no. 43397, Lombardo, in C.e.d., no. 265093)"[45].

As examined, case law is consolidated in the sense that confiscation applies not only to the proceeds directly and immediately derived from crime, but also to any other property acquired by the offender through the investment of such unlawful proceeds; however, the burden to strictly prove all the transfers and modifications deriving from the original proceeds of crime lies with the public prosecutor.

The confiscation can be ordered even after a plea bargain. In Italian „legal system, the so-called plea bargain, referred to in the code as the „Application of the penalty at the request" of the parties (Article 444 et seq. Of the Italian Code of Criminal Procedure), is a special proceeding that consists of an agreement between the accused and the prosecutor, not on the indictment, but on the extent of the sentence, which can be reduced by up to one third, as the main, but not the only, reward arising from the choice of this proceeding"[46]. The sentence issued at the end of the plea bargain is treated – in the opinion of the most authors - as a judgment of conviction.

Appellate remedies can be used against the confiscation provision, while the enforcement hearing (Article 676 of the Italian Code of Criminal Procedure) will be able to be used to contest the validity of the enforcement order. The enforcement judge has the power to ensure compliance with the requirements and conditions legitimizing the measure, resolving the issues relating to the enforcement order, and ruling on the extent and the methods of the confiscation.

„Since confiscations are applied following a conviction, the accused will have enjoyed the right to cross-examination during the trial, and, in particular, the possibility of challenging the confiscation in his/her own legitimate interests. An appeal against the rulings of the enforcement judge may be filed with the Court of Cassation[47].

All the costs of a criminal proceeding (with some exceptions) in the case of conviction are attributed to and enforced against the defendant, including the costs relating to the tracing and confiscating of the assets (see Presidential Decree No. 115/2002). At a pretrial stage, the credits of the state against the defendant (including all the costs of the criminal proceeding and the potential fines) can be secured by the interim measure of the conservative seizure (article 316 et seq of the Criminal Procedure Code), which is ordered by the competent court on the application of the public prosecutor, to prevent the dissipation of the defendant's assets.

9.1. Seizures in the Italian penal system.

"The 1988 Italian code of criminal procedure provides for three distinct forms of seizure, each with a different purpose and its own legal framework. Two are precautionary measures on property, restrictions upon the free availability of an asset, imposed during criminal proceedings, and therefore prior to final conviction.

The first of these scenarios consists of conservative seizure (Articles 316-320 of the Italian Code of Criminal Procedure), which protects the patrimonial guarantees of the State and the civil party (the person to whom the offence has caused damage, who may present him/herself during the criminal trial in order to claim compensation or repayment)[48]. In this regard, it should be noted

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[45] F.DIAMANTI, *Confiscation in Italy,* in *Improving Confiscation Procedures in the European Union* : *final publication of the research project Improving Cooperation between EU Member States in Confiscation Procedures*, ed. Alessandro Bernardi, Napoli 2019, p. 612 ss.

[46] F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 323.

[47] A.M. MAUGERI, *La riforma della confisca*, cit., 22.

[48] F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 315 ss.:„Conservative seizure is ordered by the judge at the request of the public prosecutor whenever there are „reasonable grounds to believe

that the 1988 Italian legislature drew a distinction between the concepts of "procedure" and "trial" within the code. The term "trial" is to be understood as the judicial phase following the issuance of the indictment. This therefore includes (with the exception of the multiple special proceedings envisaged by the system: e.g. summary trial, plea bargain/application of the penalty at the request of the parties, which will be described further ahead) the preliminary hearing, the trial, and any appellate remedies. "Procedure", on the other hand, originates from a notitia criminis and concludes with the final judgment. It therefore also includes the phase of the preliminary investigations: the initial phase where, generally, no evidence is formed, but sources of evidence are sought that will sustain the prosecution in court[49].

Likewise, preventive seizure falls within the category of precautionary measures on property (Articles 321-323 of the Italian Code of Criminal Procedure), but in this case the provision is aimed at preventing the availability of the asset from creating an aggravating factor, extending the consequences of the offence, or facilitating the commission of other crimes (so-called "impeditive" preventive seizure).

Book III of the code, concerning evidence, regulates criminal seizure for evidentiary purposes (Articles 253-263 of the Italian Code of Criminal Procedure). The latter is a means of seeking evidence that consists of the acquisition of certain movable or immovable assets that can be used as evidence in the trial.

In addition to the different rationale that distinguishes each of the scenarios mentioned, they have also been regulated differently within the code in terms of (by way of example) the form of the generic provision, the authority competent for adopting it, the time at which it becomes applicable, and the legal remedies available.

The scenarios mentioned, however, do not provide a comprehensive overview of the cases of seizure envisaged by the system. In fact, there are additional seizure scenarios falling outside the code. For example, with regard to the administrative liability of legal entities (introduced, as mentioned above, with Italian Legislative Decree n. 231 of 2001), there is the possibility of imposing the preventive seizure of the same items that the decree allows to be confiscated (Art. 53 of Italian Legislative Decree no. 231 of 2001), as well as the seizure of the organisation's assets, as collateral on the amounts owed to the State (Art. 54 of Italian Legislative Decree no. 231 of 2001).

Furthemore, the so-called Anti-Mafia Code allows for preventive seizure, which is intrumental for subsequent confiscation (Art. 20 of Italian Legislative Decree no. 159 of 2011). As mentioned above, the preventive measures are ordered (regardless of whether a crime has been committed) with a procedure that does not have the same guarantees as the criminal trial. In fact, the relative legal action can be taken before the Court even independently of the criminal prosecution. This procedure is characterised by the fact that the evidence, which can be used in the trial, is collected by the police and the public prosecutor in secret and without hearing the parties, with fewer defensive guarantees[50].

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that the guarantees for the payment of the pecuniary penalties, court costs, or any other sums owed to the Treasury of the State are lacking or will be dispersed" (Article 316 of the Italian Code of Criminal Procedure). In the presence of these conditions, the public prosecutor is obliged to ask the judge to apply this precautionary measure. A civil party may also request the judge to order a conservative seizure in order to guarantee the civil obligations arising from a crime. Whatever the case, the conservative seizure ordered at the request of the public prosecutor also benefits the civil party.

[49] M.CHIAVARIO, „*Il nuovo codice al varco tra l'approvazione e l'entrata in vigore*", in M.CHIAVARIO (ed.), *Commento al nuovo codice di procedura penale*, vol. I, Torino, Utet, 1989, 6 – 8, which reveals that the legislature has not always managed to firmly maintain this distinction.

[50] In this regard, see L.FILIPPI, *Il procedimento di prevenzione*, in Various Authors, *Procedura penale*, Torino, Giappichelli, 2017, 1029. F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy, cit.*, 312 ss. „Evidentiary seizure.

9.1.1. Preventive seizure.

„Preventive seizure is ordered with a motivated decree by the judge, who, at the request (ne procedat iudex ex officio) of the public prosecutor, proceeds when there is a risk that the free availability of an asset pertinent to the crime could aggravate or prolong the consequences of the crime itself, or facilitate the commission of other crimes (so-called impeditive preventive seizure, pursuant to Article 321(1) of the Italian Code of Criminal Procedure). If the conditions envisaged by law have been met, the seizure is mandatory[51].

During the preliminry investigation phase, if it is not possible to wait for the judge's preliminary ruling due to particular urgency, the seizure is ordered by the public prosecutor with a motivated decree. The seizure can also be ordered by judicial police officers in the same emergency situations.

The judge can also order the seizure od assets that are allowed to be confiscated, even by equivalent (in this latter case, the seizure is optional) (Article 321(2) of the Italian Code of Criminal Procedure). The request for the preventive seizure of assets for which confiscation is permitted is, on the other hand, mandatory in proceedings concerning certain crimes against the public administration by public officials[52].

Unlike conservative seizure, preventive seizure can also be ordered during preliminary investigations. If it is not possible to wait for the judge's preliminary ruling due to particular urgency, the seizure is ordered with a motivated decree by the public prosecutor. In the same emergency situations, the seizure can also be carried out by judicial police officers and agents, who must transmit the seizure report to the public prosecutor of the place where the provision was taken within the subsequent forty-eight hours. After having verified that the asset does not have to be returned to the owner, the public prosecutor asks the judge to validate the seizure and to issue a motivated decree of preventive seizure within forty-eight hours, starting from the time of the

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Evidentiary seizure, otherwise known as criminal seizure, is a means of seeking evidence that's envisaged and regulated by BOOK III of the Code. Like inspections and searches, criminal seizures are „surprise" acts, for which the suspect's defender has the right to witness the execution of the act, but not to be notified in advance.

The relative provision is taken in the form of a reasoned decree ordered by the „judicial authority": this means that it can be ordered by both judicial magistrates and investigating magistrates (public prosecutors). During the preliminary investigation phase – which extends from the registration of the notitia criminis in the criminal records registry (Article 335 of the Italian Code of Criminal Procedure) to the issuance of the indictment -, the seizure in question is usually arranged by the public prosecutor, or else by the judge overseeing the preliminary investigations themselves. During the preliminary investigation phase, the judicial police can only proceed with the seizure of evidence in cases of urgency, if a delay poses a hazard and the public prosecutor can not promptly intervene, or if the public prosecutor has not yet taken over the investigation (Article 354(2) of the Italian Code of Criminal Procedure).

In these cases, the judicial police carry out the seizure and, within fortyeight hours, either return the seized items or else transmit the report to the prosecutor of the place where the seizure was carried out for validation (Article 355 of the Italian Code of Criminal Procedure). During the trial stage, on the other hand, the trial judge is responsible for ordering the seizure at the prosecutor's request.

Evidentiary seizure deals with the „body of the crime", the items upon which or via which the crime was committed and those that constitute the price, the product, or the profit, or the „items pertinent to the crime" and necessary to ascertain the facts of the case (Article 253 of the Italian Code of Criminal Procedure). Unlike the term „body of the crime", the code does not provide a definition of „items pertinent to the crime"; this notion must therefore be inferred from the jurisprudence. According to the latter, all movable or immovable items that serve to ascertain (even indirectly) how the crime was committed, the perpetrator, and any other circumstances relevant to the case, must be considered Court of Cassation, sec. III, 22 April 2009, Bortoli, in CED n. 243721. The items to be seized, which fall under the aformentioned categories, must be indicated in the decree, unless the seizure is ordered within the context of a search".

[51] With regard to this notice, in the case law, see N. TRIGGIANI, *La misura volta ad evitare il reiterarsi del reato o l'inadempimento dei suoi effetti*, in M. MONTAGNA (ed.), *Sequestro e confisca*, Torino, Giappichelli, 2017, 143.

[52] Art. 321(2-bis) of the Italian Code of Criminal Procedure: „During the course of the criminal proceedings concerning crimes covered under Chapter I, Title II of the second book of the Italian Penal Code, the judge shall order the seizure of the assets for which confiscation is permitted".

seizure, if ordered by the public prosecutor, or from the time at which the report was received, if carried out by the judicial police.

The judge must validate the seizure and issue the relative order within ten days of receiving the request, under penalty of the seizure already ordered ceasing to have effect; in the same manner, the preventive seizure shall cease to have effect if the deadlines for tramsmitting the documents to the public prosecutor or for submitting the validation request to the judge are not respected. If these deadlines are respected, precautionary seizures do not have a duration limit. However, the measure is immediately revoked, at the request of the concerned party or the public prosecutor, whenever the conditions for applicability cease to exist, even due to unforeseen events. The preventive seizure subsequently ceases to have effect in the event that a sentence of acquittal or barring the opening of the trial phase (acquittal at the end of the preliminary hearing) is issued, even if subject to appeal. Once a sentence of conviction has been issued, the preventive seizure is maintained if the confiscation of the seized assets has been ordered, otherwise the assets are returned. At the request of the public prosecutor or the civil party, a preventive seizure can be converted into a conservative seizure in order to guarantee the credits held by the State or the civil party itself.

The question of the evidentiary standard required for impeditive preventive seizure and for the purpose of confiscation is particularly complex.

With regard to the former, fumus commissi delicti and periculum in mora are necessary to order a preventive seizure. In terms of the *fumus, there is no need for serious evidence of guilt* (which is required to apply a personal precautionary measure, such as custody in prison). For the purposes of preventive seizure, however, the jurisprudence is satisfied with the consistency between the hypothesised legal situation and the actual situation, and does not require that the case be proven at this stage of the proceedings, nor does it require the elements from which the commission of the crime is deduced to be indicated. The periculum in mora consists of the concrete and actual possibility (deduced from the nature of the asset and all the circumstances of the case) that the asset could be instrumental to aggravating or prolonging the consequences of the crime, or to facilitating the commission of other crimes. In fact, the pertinence must be excluded if there is only a casual relationship between the asset and the crime[53].

With regard to preventive seizure aimed at confiscation (Article 321(2) of the Italian Code of Criminal Procedure), the possibility of confiscating the asset was considered sufficient. Within this context, however, the Joint Chambers of the Court of Cassation clarified that, while the evidence does not necessarily concern the responsibility of the suspect, it must always refer to the existence of a concrete crime[54]. In the case at hand, according to the jurisprudence, the fumus commissi delict would consist of the abstract possibility of the deed being subsumed within the commission of a crime, that is the possibility of framing the concrete deed within a hypothetical criminal offence envisaged by the legislature. From the standpoint of periculum in mora, seizure for confiscation purposes would require an assessment of the asset's dangerousness and its association with the crime, in the sense that the asset must have an instrumental link to the crime, and not merely a casual association[55]. The asset can be considered „instrumental", for example, if it has undergone any structural changes in order to render it useful for the commission of the crime (e.g.: a car that has been modified in order to conceal drug trafficking).

Otherwise, in the case of seizure for the purposes of confiscation by equivalent or extended confiscation, in which there is no link between the assets to be seized and the crime itself, the prerequisite for applying the measure is the presence of serious clues as to the existence of the conditions required for the application of confiscation[56], in addition to the abstract possibility that a crime has been committed in relation to which the measure is permitted.

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[53] Court of Cassation, sec. V, 30 October 2014, no 52251, Bianchi, in *C.e.d.*, no. 262164

[54] Court of Cassation, JC, 31 March 2016, Capasso, in *Cass. Pen.*, 2016, 3149-3150.

[55] Court of Cassation, sec. V, 28 February 2014, Policarp, no. 21882, in *C.e.d.*, no. 260001.

[56] Court of Cassation, JC, 17 December 2003, no. 920, Montella, in *C.e.d.*, no. 226492.

9.2. The procedural aspects and the remedies available to third parties.

The third party shall have the burden of proving the facts constituting his/her claim to the asset, providing all the elements constituting the conditions of "ownership" and "unrelatedness to the crime", regarding the absence of a link between his/her claim and the criminal conduct of others, or, in the event that the third party has in any way benefited from the latter, regarding the fact that this was done innocently and in good faith. Third party protection is considerably weakened, however, when the confiscation not only regards a single asset, but potentially a person's entire estate.

Unrelated third parties are among those entitled to challenge seizure orders: in fact, pursuant to Articles 322 and 322-bis of the Italian Code of Criminal Procedures, both the person from whom the assets have been seized and the person entitled to their return can request a re-examination or appeal. Furthermore, the third party can request the revocation of the measure pending the seizure order (Article 321(3) of the Italian Code of Criminal Procedure).

9.2 Using confiscated property to settle claims

If a crime has caused damage, the 'person injured by the crime' is entitled to bring the civil action for the related restitution and damages not only before a civil court but also in a criminal proceeding, by 'standing as a civil party' in the latter. Where a standing as civil party takes place, the victim of the crime is entitled to request and obtain from the competent court conservative seizure (article 316 et seq of the Criminal Procedure Code).

The law provides that 'where there is grounded reason to believe that the guarantees of the civil obligations deriving from crime will lack or will be dissipated, the civil party can request the conservative seizure of the defendant's assets' (article 316(2)), and the following:

'conservative seizure ordered by request of the public prosecutor also benefits the civil party' (article 316(3));

under the seizure, the credits of the state and the civil party are considered 'privileged' (article 316(4)); and

a criminal conservative seizure is executed under the civil procedure provided for its enforcement on movable goods and real estate (article 317).

Furthermore, the law expressly provides that criminal conservative seizure is converted into garnishment when the judgment convicting the defendant to pay a fine becomes final, and to oblige the defendant to pay civil damages to the civil party (article 320(1)). The law provides as follows:

the forced enforcement on the assets seized takes place under the provisions of the Civil Procedure Code; and

the money derived from the sale of the assets is first paid to the civil party under the title of damages and its refund costs for the proceeding, and subsequently, it is used for the fines, costs of the proceeding and any other amount to be paid by the defendant to the state (article 320(2)).

If the victim of the crime does not request to stand as a civil party in the criminal proceeding, it can claim the ownership of the assets subject to confiscation by intervening before the court of execution of the confiscation (as a third party in good faith or a person extraneous to the crime). If a dispute arises about the ownership of the assets to be confiscated, the court of execution shall remit the case to the civil court of first instance, to determine legitimate ownership.

10. Destination of the criminal confiscated assets.

Article 86 of the Executive Provisions of the Code of Criminal Procedure15 provides for the sell of confiscated assets, with procedures expressed in the Consolidated Law on Justice Expenses at articles 149 and subsequent. The sale is made through the institutes for judicial sales with incomes

deposited in the Fine Deposit; article 149 specifies that sell is the general rule, unless it is differently provided under special provisions: under articles 100 and 101 of Decree of President of Republic 309/1990, concerning drugs, law provides that crafts, boats, planes seized can be entrusted to police forces for the fight against drugs-trafficking.

When the assets are sold, the income is used by the Ministry of Health for assistance and recovery of drug-addicted people. As to the sums of money confiscated, they are used to reinforce the activities against drug trafficking.

Income from the sale of assets confiscated for usury crimes are deposited in the Solidarity Fund for the victims of usury crimes.

For smuggling crimes: articles 301 and 301bis of Decree of President of Republic 43/1973 provide that if the sale of vehicles used for these crimes is unsuccessful, these enter the State property. Seized recorded movable assets can be assigned in judicial custody to police forces for anti-smuggling activities. The same rules are applicable for crimes related to illegal immigration[57].

11. The confiscation pursuant to art. 416 bis, § 7, c.p.

A particularly interesting hypothesis of special confiscation envisaged in the Italian legal system is that pursuant to art. 416 bis of the criminal code, § 7, which provides for the compulsory confiscation of the things that served or were intended to commit the crime and of the assets that are its price, profit or which constitute its reuse, representing one of the first forms of compulsory special confiscation introduced by the Italian legislator, innovative where it provides for the confiscation of re-employment[58]; it is a security measure (which also assumes a punitive connotation) as a consequence of the conviction for mafia association, pursuant to art. 416-bis.

This form of confiscation requires the prosecution to demonstrate either a relationship of instrumentality with respect to the activity of the criminal association (the things that served or were intended) or a causal link with this activity (product, price, profit or reuse)[59]; "does not disregard the classic derivative and instrumental links between the thing and the crime considered in the general rule of art. 240 criminal code" [60]. As stated by the Supreme Court, the confiscation in question "does not concern all the goods purchased by the individual associates in a given period, but must refer exclusively to the goods that served .. or which constitute their use" [61]; the provision of "obligatory nature of the confiscation does not imply any presumption in terms of the instrumentality of the things to be seized", but requires the ascertainment of "a specific and stable relationship" between the good and the offense "which testifies to the existence of a structural and instrumental relationship"[62].

Even if the doubts are overcome about the possibility of applying the mandatory confiscation pursuant to art. 416 bis to goods deriving from the purpose crimes, for which the mandatory character of the confiscation is not sanctioned[63], because art. 416 bis, third paragraph, represents a special rule which sanctions the mandatory confiscation of what has been achieved through the commission of crimes within a mafia associative structure (what thus achieved becomes, in fact,

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[57] As provided under Legislative Decree July 25th, 1998, n.286, Consolidated Law on immigrations and provisions on the status of foreign people.

[58] Così FIANDACA, *Commento all'art. 1 l. 13 settembre 1982 n. 646,* in *Leg. pen.* 1983, 267 - 268.

[59] TURONE, *Problematiche giuridiche attinenti alla dimensione economica delle associazioni mafiose,* in *Quad. del C.S.M.* 1998, I, 481 ss.; BARAZZETTA, *Art. 416 bis*, in DOLCINI – MARINUCCI, *op. cit.*, 4310.

[60] PICCIRILLO, *Art. 416 bis - Ipotesi speciali di confisca,* in *Codice delle confische e dei sequestri. Illeciti penali e amministrativi*, a cura di TARTAGLIA, Roma 2012, 686; PISA, *Art. 416 bis*, in *Commentario breve al codice penale*, edited by CRESPI-FORTI-ZUCCALÀ, Cedam 2011, 1437; Cass. sez. un., 26.10.1985, Piromalli, in *Giur. it.* 1986, II, c. 209; Cass., 26.10.1985, Avignone, in *Ced Cass.* 00007, rv. 171063; Cass., 6.6.1992, in *Ced Cass.* n. 06784., rv. 190545.

[61] Cass., sez. I, 1.4.1992, Bruno e altro, in *Cass. pen.* 1993, 1987.

[62] Cass., sez. II, 4.3.2005, n. 9954, De Gregorio, in *Cass. pen.* 2006, 2, 607, C.E.D. 231029.

[63] Cfr. FIANDACA, *Commento all'art. 1,* cit., 268; ALESSANDRI, voce *Confisca*, cit., 49; GRASSO, *Art. 240 c.p.*, *cit.*, 629.

the profit of the crime referred to in art. 416 bis) [64], one cannot disregard the proof of the link of pertinence in question [65]. The prosecution must ascertain that the assets to be confiscated represent the result of the specific crime of mafia association, and not of any illegal activity as occurs, however, at least on the basis of a certain interpretation, in relation to the confiscation pursuant to art. 24 Antimafia code [66].

As specified by the Supreme Court (United Sections) in the Montella case[67], the form of confiscation in question, therefore, does not extend to all the assets of the association members, whose origin cannot be demonstrated, - as instead provided for by the discipline of the extended confiscation envisaged in our legal system, i.e. by art. 240 bis c.p. and by art. 24 Antimafia code; so much so that today it is believed that the confiscation pursuant to art. 416 bis, par. 7th, "has now assumed a residual intervention space within the plurality of patrimonial prevention measures that stand out in the current" [68].

However, the Supreme Court uses the form of confiscation in question as a sort of real patrimonial penalty, general confiscation of assets, when it confiscates entire assets or companies as instruments of the crime of mafia-type association or, in any case, on the basis of the assumption that where profits of illicit origin are invested in the company it is no longer possible to distinguish legal from illicit, and therefore the entire "contaminated" company can be confiscated[69].

An identical provision of mandatory confiscation is contemplated by art. 270 bis, par. 4, against the person convicted of the crime of association for the purpose of terrorism, including international terrorism, or subversion of the democratic order.

12. Urban confiscation.

Among the special forms of confiscation, the urban confiscation deserves a particular examination. This form of confiscation is provided for by art. 44, § 2, of the d.P.R. 380/2001 (The consolidated Law on Construction), against the crime of unlawful site development. In the Italian case law it was considered an administrative measure which was possible to apply regardless of the outcome of the criminal trial and also against third parties (who have become owners of the property) [70].

In the Sud Fondi case the European Court of Human Rights has recognized the punitive nature of this form of confiscation because pursuant to Engel criteria it is included in the "criminal matter"; Italian jurisprudence react demanding the culpability of the perpetrator, but in any case in the opinion of the Constitutional Court it is possible to apply this form of confiscation when the crime is statute barred, without the definitive conviction[71]. Solution criticized by the European Court in the Varvara case, which has considered the application of the confiscation in case of prescription a violation of the principle of legality sanctioned by art. 7 ECHR, which is not limited to requiring a legal basis for crimes and penalties, but also implies the illegitimacy of the application of criminal sanctions for facts…not "legitimized by a guilty verdict".

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[64] TURONE, *Problematiche giuridiche*, *cit.,* p. 479 nota 18.

[65] *Contra* GIALANELLA, , *I patrimoni di mafia-La prova, il sequestro, la confisca, le garanzie*, Esi, 1998, 38; cfr. PICCIRILLO, *op. cit*., 689.

[66] BORRELLI, *Art. 416 bis,* in *Trattato di Diritto penale*, edited by LATTANZI – LUPO, Milano 2010, 212; Corte d'Assise S.Maria Capua V., 9.10.2004, in *Giur. merito* 2005, 10, 2211

[67] Cass., S.U., 17.12.2003 (19.1.2004), Montella, in *Cass. pen.* 2004, 1187,

[68] LEINERI, *Associazioni di tipo mafioso anche straniere*, in *Enc. giur. Treccani*, 2009, 8.

[69] Cass., 10.1.2007, n. 5640, Schimmenti; Cass., sez. VI, 4 giugno (26 settembre) 2014, n. 39911; Cass., Sez. 6, 24/01/2014, S.D. Costruzioni S.r.l., n. 676624, Rv. 259073; Cass. Sez. 6, 24.10.2013, Guerrera e altro, n. 47080, CED 257709; see PICCIRILLO, *op. cit*., 692 ss.

[70] Cass., Sez. III 12.11.1990, Licastro, in *Cass. pen.* 1992, p. 1307; ex pluris Cass., sez. I, 4.12.2008, n. 2453 ; Cass., sez. III, 3.3.2005, n. 10916. Constitutional Court, ordenance n. 187/1998.

[71] Cass., sez. III, 17 novembre 2008, n. 42741, Salvioli ; Cass., sez. III, 29 aprile 2009, n. 17865; Cass., sez. III, 20 maggio 2009, n. 21188; Cass., sez. III, 8 ottobre 2009, n. 39078.

After Varvara judgement, the Italian jurisprudence (with the support of the Constitutional Court [72]) carried on to apply urban confiscation after the prescription of the crime[73].

In the G.I.E.M. case the Grand Chamber of the ECHR (appeal n. 1828/06) has recognized the punitive nature of the urban confiscation, which demands the ascertainment of the guilty, but – accepting the arguments of the Italian government – the Court admits that the declaration of criminal liability can be contained within a sentence that declares the crime time barred.

13. Proposal of reforms in the light of the Directive n. 42/2019 and the proposal of a new Directive on asset recovery and confiscation. Mutual recognition.

The traditional model of confiscation pursuant art. 240 criminal code and also the special forms of mandatory confiscation - provided for in criminal code or in special laws - **fall within the confiscation model of art. 4, § 1 of the Directive 42/2014**; the same definition of confiscation of art. 4, § 1 is repeated in the art. 12 of the proposal for a new Directive 2022[74]**.**

These form of confiscation can certainly be the object of mutual recognition as they are included in the definition of art. 2 Regulation n. 1805/2018 ("confiscation order' means a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person**") and are applied in a "proceeding in criminal matters" (art. 1 REG), indeed criminal in the strict sense.** However, the application of the safeguards of criminal matters pursuant to recital n. 18 Reg demands the respect of the **principle of non-retroactivity,** as stressed above.

Further, some proposal to better adapting the model pursuant to art. 240 criminal code to the indications coming from the Directive, above all in terms of guarantees.

1) De iure condendo according to the Directive 42/2014 the Italian legislator has to provide for the mandatory nature of the confiscation of the proceeds and the products as established in art. 2 of Directive, and it is necessary to overcome the obsolete distinction between price and profit.

2) A general discipline of confiscation by equivalent has not been introduced within the ambit of art. 240 criminal code as a surrogate form of the direct confiscation of the profits (which presupposes the ascertainment of the profits and its amount) (Article 4, Dir. n. 42/2014 provides for the confiscation by equivalent). In recital n. 14[75] of the Directive it is specified that confiscation by equivalent can be considered as: subsidiary sanction to direct confiscation, and therefore applicable only where, despite having ascertained the existence of the profit and its amount, it is no longer possible to subtract it directly; or as an alternative measure, a sort of autonomous confiscation that can also allow to forfeit forms of profit that could not be subject to direct confiscation, such as, for example, immaterial profit or savings profit. In the first direction we can quoted the Italian jurisprudence which, also in relation to the confiscation pursuant to art. 19, Legislative Decree no. 231/2001, recognized the " surrogatory nature" of the confiscation for equivalent to the confiscation of property, being applicable only in the legal patrimonial sphere of the suspect where it has not been "found, for any reason whatsoever, the price or the profit of the crime for which we proceed, but whose existence is obviously certain"[76].

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[72] Constitutional Court, 14 gennaio 2015, n. 49.

[73] Cfr. Corte eur. dei dir. dell'uomo, *Varvara c. Italia*, cit., §§ 71 e 64 ss. Si veda *supra* § 4.

[74] Article 12 **Confiscation** 1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of instrumentalities and proceeds stemming from a criminal offence following a final conviction, which may also result from proceedings in absentia. 2. Member States shall take the necessary measures to enable the confiscation of property the value of which corresponds to instrumentalities or proceeds stemming from a criminal offence following a final conviction, which may also result from proceedings in absentia.

[75] „Member States are free to define the confiscation of property of equivalent value as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law".

[76] Cass. Pen. 6 luglio 2006, n. 30729, Carere.

The obligatory nature of the confiscation of the profit and the confiscation by equivalent are foreseen in all supranational legal sources on the subject (in particular, in art. 4, Directive n. 42/2014). For example, in the art. 3 of the Framework Decision 500/2001 and in the art. 2 of the Framework Decision 212/2005, which remain in force even after the entry into force of the Directive, provides for the mandatory nature of the confiscation – also by equivalent - of the instruments and proceeds of crimes punishable with a deprivation of liberty exceeding one year. The reform introduced by Legislative Decree no. 212/2016 provided for the mandatory nature of the confiscation of the proceeds and the products, also in the equivalent form, only in relation to the so-called *computer crimes*, expressly falling within the scope of the directive, causing the incomprehensible anomaly whereby a special form of confiscation of value is inserted in a provision which contains the general discipline of confiscation. In Italy the 2007 community law (L. n. 34/2008), a legislative decree which has not been implemented, already provided for the introduction of a series of directive principles to adapt the national discipline to the indications of art. 2 of Framework Decision 212/2005, both in relation to the confiscation of instruments and in relation to the confiscation of the proceeds (art. 31)[77]. In conclusion, it is considered necessary to introduce a general discipline of confiscation by equivalent within the criminal code.

3) In the context of the necessary reform of the Italian confiscation discipline, among other things, an attempt should be made to provide a definition of the notion of crime proceeds in the light of Dir. 42/2014, which in art. 2[78] and recital no. 11 accepts a particularly broad notion including both surrogates (subsequent reinvestments or transformation of direct income) and additional utilities, and in response to the need for legality (precision and foreseeability) which, for example, seem largely disregarded in the broad notion of profit-saving accepted by the more recent jurisprudence[79]. The notion of "proceeds" could include "any asset derived directly or indirectly from the crime, including the reuse and utilities causally connected to the crime", accepting the indications of the Miragliotta United Sections judgement which demands circumstantial proof of the causal derivation from the original profit[80].

4) A position should therefore be taken on the possibility of including savings in the notion of confiscable proceeds (the Gubert judgment includes it in the notion of directly confiscable profit, as examined above) [81]; the mandatory provision of this form of confiscation only in some specific hypotheses (e.g. for tax crimes) and the determination of the calculation criteria would be desirable, avoiding indiscriminately admitting its confiscation and leaving its assessment to the mere discretion of the judge in violation of the principle of legality/precision[82].

5) For the case of proceeds of crime that are intermingled with property acquired from legitimate sources, the Directive allows for confiscation only "up to the assessed value of the intermingled proceeds"; the adoption of this rule will be important in order to avoid the practice of the Italian Courts to use the preventive confiscation ex art. 24 antimafia cod. (and also the extended

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[77] A.M. Maugeri, *La lotta contro l'accumulazione di patrimoni illeciti da parte delle organizzazioni criminali: recenti orientamenti*, in *Riv. trim. di dir. pen. econ*. 2007, 489 ss.; Id., *La confisca per equivalente* - ex *art. 322* ter, in *Riv. it. dir. proc. pen*., 2011, 777.

[78] Recital n. 11: "There is a need to clarify the existing concept of proceeds of crime to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. Thus proceeds can include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled".

[79] For all, Cass., SS.UU., 30.1.2014, n. 10561, Gubert; Cass., SS.UU., 24.4.2014, n. 38343, Espenhahn e a. (Thyssenkrupp). See A.M. MAUGERI, *La Direttiva* 2014/42/UE *relativa alla confisca degli strumenti e dei proventi da reato nell'Unione europea tra garanzie ed efficienza: un "work in progress"*, in *Dir. pen. cont. Riv. Trim.* 2015, 326; Id., *La responsabilità da reato degli enti*, cit., 669 ss.; Id., *L'autoriciclaggio dei proventi dei delitti tributari*, in E. Mezzetti - D. Piva, *Punire l'autoriciclaggio*, Padova, 112 ss. and doctrine and jurisprudence cited therein.

[80] Cass. Pen., SS.UU., 6.3.2008, n. 10280, Miragliotta.

[81] Cass. Pen., SS.UU., 30.1.2014, n. 10561.

[82] For proper restrictive interpretations Cass. Pen., SS.UU., 2.7.2008, n. 26654, Fisia Italimpianti S.p.a.; Cass. Pen., Sez. VI, 28.5.2013, n. 35490, Ri.va. Fire S.p.a. ed altro.

confiscation ex art. 240-*bis* c.p.) as a general confiscation of property where the illegal proceeds have been invested in a company - because it would no longer be possible to distinguish lawful from illegal assets -, in violation of the legality and proportionality principles.

6) In relation to the confiscation of the instruments of the crime, it is necessary to limit the scope to those things that have been indispensable to the commission of the crime or to require an instrumental, essential and not merely occasional connection with the crime (as required by the best jurisprudence[83]), in order to safeguard the preventive-interdictory nature of this measure – whose application is discretionary -; otherwise this form of confiscation acquires a mere punitive character (as in the hypothesis of the building used to carry out the crime of corruption between private individuals) [84]. The confiscation of the value of the offense instrument should not be envisaged because it assumes a purely punitive nature (as recognized by the judgement of the Constitutional Court n. 212/2019 in relation to the confiscation by equivalent of the instruments of insider trading pursuant to art. 187-sexies, Legislative Decree n. 58 of 1998), even if provided for in EU Directive 42/2014 (which recognises its punitive nature, suggesting the respect of the principle of proportionality in the recital n. 17)[85].

7) In general, a rationalization would be necessary of all the special forms of confiscation of instruments, which assume a punitive nature. Confiscation must be kept within the limits of the principles indicated and not turn into a disproportionate punitive sanction (see Cost. Court n. 112/2019).

13.1. Further suggestions de iure condendo for a general discipline of the confiscation.

The Directive demands the compliance with the principle of proportionality in recitals nn. 17 and 18[86] and suggests the introduction of a clause to ensure this compliance ("confiscation should not be ordered" in exceptional circumstances, where confiscation would represent undue hardship for the affected person)[87], a "onerousness clause", which makes it possible not to apply confiscation if "it represents an excessive deprivation for the interested party, on the basis of the circumstances of the individual case, which should be decisive", as already provided for in various foreign legal systems[88].

This clause, as highlighted elsewhere, could represent an appropriate instrument of judicial discretion to avoid the so-called *strangulation effect* of the confiscation (recital n. 18: "Member States should make a very restricted use of this possibility, and should only be allowed to provide that confiscation is not to be ordered in cases where it would put the person concerned in a situation

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[83] Cass. Pen., 10.3.2008, n. 25793; Cass. Pen., Sez. VI, 5.3.2013, n. 13049; Cass. Pen., Sez. feriale, 22.9.2013, n. 35519.

[84] Cass. Pen., Sez. V, 6.7.2017, n. 33027, Società Archimede 96 S.r.l., in *Mass. Uff.*, n. 270337.

[85] Cass. Pen., Sez. V, 6.7.2017, n. 33027. See A.M. MAUGERI, *Art. 240 c.p.*, in *Commentario breve al Codice penale*, a cura di Forti - Zuccalà - Seminara, Padova, 2017, 804; Id., voce *Confisca*, cit., 193.

[86] Recital n. 17: „When implementing this Directive in respect of confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned. Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible".
Recital n. 18: "When implementing this Directive, Member States may provide that, in exceptional circumstances, confiscation should not be ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person, on the basis of the circumstances of the respective individual case which should be decisive. Member States should make a very restricted use of this possibility, and should only be allowed to provide that confiscation is not to be ordered in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive".

[87] Dir. 2014/42, para. 17. Para.18 goes on to specify that this exceptional circumstance should only be permitted 'in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive.'

[88] Before par. 73 c StGB *Härtevorschrift* (see BGH 5 StR 133/17 - Beschluss vom 11. Mai 2017 (LG Neuruppin); *Härtefallklausel* art. 71, c. 2, swStGB; art. 128 Spanish CP "principio de proporcionalidad en relación con los efectos e instrumentos".

in which it would be very difficult for him to survive"), especially where this measure is applied to enterprises which carry out an economic activity[89]. This in accordance with art. 49, paragraph 2, of the European Charter of Fundamental Rights, with the most recent case law of the Italian Constitutional Court on confiscation (e.g. n. 112/2019) and of the Supreme Court with particular reference to urban confiscation pursuant to art. 44, Presidential Decree no. 380/2001 (which proposes interesting evolutionary interpretations in terms of respect for the principle of proportionality, even if sometimes in contrast with the principle of legality)[90].

The introduction of a so-called "onerousness clause", which makes it possible not to apply the confiscation of instruments or to mitigate its effects if it is disproportionate, was provided for by art. 114, no. 3, of the criminal code reform project, drawn up by the Grosso Commission in 2000 and by the Ministerial Commission chaired by Professor Palazzo in 2013[91]. It is therefore proposed, de iure condendo, to introduce a clause whereby "it is possible to renounce confiscation, or apply it to a reduced extent, when it is disproportionate in consideration of the seriousness of the crime or the economic conditions of the recipient".

2) The safeguarding of the injured party's rights also deserves specific discipline, as established in the Grosso project, avoiding the violation of the ne bis in idem principle against the offender (with a double subtraction of profits by the State and by the injured parties), and at the same time avoiding the dependence of the confiscation implementation on the behavior of the injured party. It must be provided, on the one hand, that the latter can exercise the right to compensation also on the assets subject to confiscation, if the assets of the crime perpetrator are insufficient; on the other, that the non-application of the confiscation is subject to the effective exercise of the right to restitution by the injured party[92].

3) The removal of the profit from third parties (including legal persons) should be guaranteed, as established by the jurisprudence[93] and in the Grosso project (art. 114, n. 5), provided that, as stated in all supranational instruments and in the Pisapia Project, the protection of the third parties rights is imposed, also in the light of art. 6 of the Directive (recital n. 24) and in the same terms in the art. 13 of the proposal of new Directive[94].

4) The application of the principle of non-retroactivity to confiscation, regardless of the nature it assumes (even if applied within the limits of a mere economic compensatory measure), considering the incisiveness that this instrument takes on, the mandatory nature, and that it often falls within the notion of criminal matters on the basis of the autonomous definition of the European CourtHR case law and therefore in compliance with art. 7 of the ECHR and art. 117 of the Italian Constitution (which imposes the respect of the ECHR).

5) Finally, the general discipline of confiscation should be coordinated with the discipline of the legal persons referred to in Legislative Decree no. 231/2001. For example, the legislator has introduced a mandatory form of confiscation of the product, profit and instruments of the crime, pursuant to art. 452-undecies criminal code in the sector of crimes to protect the environment, which must not be applied where the defendant has effectively provided for the safety, recovery and restoration of the state of the places, all in an interesting remedial/reparatory logic in the matter

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[89] A.M. MAUGERI, *La Direttiva 2014/42/UE*, cit., 308.

[90] Cass. Pen., Sez. III, 22.4.2020, Iannelli, n. 12640, in *Lexambiente.it*, 7.5.2020; Cass. Pen., Sez. III, 1.2.2021, n. 3727.

[91] In *Dir. Pen. Cont.*, 2014, 10.2.2014.

[92] Cass. Pen., Sez. II, 21.2.2011, n. 6459, Morello e altro, in *Mass. Uff.*, n. 249403; cfr. Cass. Pen., Sez. II, 5.12.2011, n. 45054, Benzoni e altro, in *Mass. Uff.*, n. 251070; Cass. Pen., Sez. II, 9.10.2012, n. 39840.

[93] Corte cost. 29.1.1987 n. 2, Lucchetti e altri, in *Cass. pen.*, 1987, 867; Cass. Pen. 10.1.2013, n. 1256; Cass. Pen., Sez. V, 4 febbraio 2021, n. 6391 con riferimento a un ente.

[94] Article 13 Confiscation from a third party 1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person. The confiscation of these proceeds or other property shall be enabled where it has been established that those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

of environmental crimes; however, the application of this discipline has not been imposed to legal persons (enterprises) which are often the perpetrators of this type of crimes.

6) The Directive establishes that "it is … necessary to enable the determination of the precise extent of the property to be confiscated even after a final conviction for a criminal offence, in order to permit the full execution of confiscation orders when no property or insufficient property was initially identified and the confiscation order remains unexecuted"[95]. The European legislator would like to ensure the confiscation of the illicit proceeds notwithstanding the evasive manoeuvres of suspected or accused persons who conceal property with the hope of benefiting from it once they have served their sentences. This rule is interesting as it attempts to guarantee the efficiency of confiscation orders; for example, section 22 of the (UK) Proceeds of Crime Act 2002 permits the reconsideration of the available amount (even at the risk of creating problems, such as the risk of confiscating legal earnings with negative effects on the convict's re-education)[96].

[95] Dir. 2014/42, para. 30. Also see Dir. 2014/42, Art. 9.

[96] See, for example, *R v Padda (Gurpreet* Singh) [2013] EWCA Crim 2330. For discussion, see G.DOIG, '*Revisiting the available amount - Confiscation of post-acquired legitimate assets'* (2014) 78(2) *Journal of Criminal Law* 110.

PART II: **EXTENDED CONFISCATION IN THE ITALIAN LEGAL SYSTEM**.

Index: 1. The Extended Confiscation (art. 240 bis Criminal Code=c.p.): origins and requirements. - 2. The presumption of the illegal origin of the assets. - 3. The scope (Constitutional Court 33/2018). – 4. Ownership or Availability of the assets. – 5. Disproportionality. – 6. "Temporal reasonableness". – 7 The lack of justification of the origin of the assets; the reversal of the burden of the proof and the standard of the proof. – 8. The nature of the extended confiscation (art. 240 bis c.p.). – 9. Application after the prescription and without the conviction. – 10. The extended confiscation after the convicted's *death*. – 11. Extended confiscation against third parties. – 12. The confiscation by equivalent of the extended confiscation. – 13. Procedural aspects. The application by the enforcement judge: the extended confiscation becomes a Damocles' sword. - 14. Issues of constitutionality. - 15. Correspondence of the Italian extended confiscation to the model of Directive no. 42/2014 and needs to reform. – 16. tual recognition of the Italian extended confiscation order.

1. The Extended Confiscation (art. 240 bis Criminal Code=c.p.). Origins and requirements.

In the years 1992-1993 the Sicilian Mafia organization called "cosa nostra" ("our thing") strongly reacted to the sentences inflicted by the Court of appeal of Palermo and upheld by the Supreme Court of Cassation. In the Capaci massacre of 23 May 1992, judge Giovanni Falcone, his wife judge Francesca Morvillo and his bodyguards (police agents Vito Schifani, Rocco Dicillo and Antonio Montinaro) were killed. After only 57 days, on 19 July 1992, in the massacre of via D'Amelio in Palermo, judge Paolo Borsellino and his bodyguards (police agents Emanuela Loi, Vincenzo Li Muli, Walter Eddie Cosina and Claudio Traina) lost their lives; such grave massacres, which constituted an attack to the heart of the democratic institutions, pushed the Government to approve the legislative decree 8 June 1992 n. 306, converted into law of 7 August 1992, n. 356 (in G.U. 07/08/1992), Urgent reforms to the new criminal procedure code and measures to combat mafia crimes (Modifiche urgenti al nuovo codice di procedura penale e provvedimenti di contrasto alla criminalità mafiosa). These laws strengthened the repressive system of organised crime[97].

In particular. Art. 12-quinquies D.L. n. 306/1992 provided for two different criminal offenses: "Fraudulent transfer of valuables", punishable by imprisonment from two to six years (fully transfused in art. 512-bis of the Italian Criminal Code), and "Unjustified possession of valuables", sanctioned by an editorial framework not dissimilar (from two to four years of imprisonment). Following the intervention of the Costitutional Court, which declared uncostitutional art. 12-quinquies, co. 2, D.L. n. 306/1992 for contrast with articles 3, 24 and 27, co. 2, of the Constitution, with D.L. n. 399 of 20-06-1994, converted by Law no. 501 of 08-09-1994, art. 12-sexies was introduced in the D.L. n. 306/1992, entitled "Particular hypothesis of confiscation".

Art. 12 sexies d.l. 306/1992 was replaced by the art. 240 bis ("Confisca in casi particolari"), introduced into the Italian Penal Code by the Italian Legislative Decree 21/2018, which has also introduced the extended confiscation within the Consolidated Customs Act (Testo Unico Doganale, paragraph 5-bis of article 301) and within the Consolidated law on narcotic drugs (Testo unico in materia di stupefacenti, article 85-bis).

Art. 240 bis c.p. establishes that, for many specific offences indicated within the text of the provision, in cases of conviction (or plea bargain) it is always ordered to confiscate the money,

[97] The conversion law includes a number of provisions: the tightening of the prison regime with the prohibition of granting benefits to members of organized crime (article 15 D.L. 306/1992 converted to Law 356/1992), the introduction of new measures to protect those who collaborate with justice, the introduction of changes in the measures on financial prevention. Others changes were introduced by the legislative decree of 20 June 1994 n. 399 converted, with amendments, into the Law 8 August 1994 n. 501

assets, or other utilities whose origin are unable to be justified by the convicted person, and of which, even through a natural or legal person, he/she appears to be the owner or have the availability thereof in any capacity, for a value that is disproportionate to his/her income declared for tax purposes or his/her economic activity.

So, in the Italian system of law the extended confiscation has been introduced before the transposition of the Directive 2014/42/EU, as a tool to fight the Mafia (criminal organisations, also differently qualified) and acceptable, even if based on a presumption of illicit enrichment and the only element of the disproportionate value of the goods to confiscate (together with the conviction). The doctrine has strongly criticised this form of confiscation considered not consistent with the presumption of innocence, the right to property, the proportionality principle and the right to defence (see below).

Art. 5 of Italian Legislative Decree n. 202/2016, implementing Directive 2014/42/EU, introduces several amendments to the legal framework for this type of confiscation, as laid out by art. 12 sexies Decree Law 306/'92, to extend the scope to the crimes envisaged in articles: 453, 454, 455, 460, 461 and 648 ter.1 of the Criminal Code, 2635 civil code, for the crime of improper use of credit or payment cards by art, 55, § 9, Leg. Decree n. 231/2007, computer crimes (617 quinquies, 617 sexies, 635 bis, 635 ter, 635 quarter, 635 quinquies).

2.The objective and subjective requirements are:

the person must have engaged in - normally has been ***convicted*** for - one or more forms of criminal conduct expressly envisaged by law (this is constantly increasing);

after the reform introduced by Law. 161/2017, extended confiscation, after the final conviction, can also be applied **in the event of the *death* of the person concerned**, and can therefore remain in effect in relation to the person's heirs or assignees (art. 183 quarter Disp. Att. of the Criminal Procedure Code).

the asset must be in the ***ownership*** or in the ***availability*** of the convicted person (directly or indirectly);

there must be a ***disproportion*** between the person's declared income or economic activity and the value of the assets – with the reform introduced by l. 161/2017, a jurisprudential principle (consolidated only for the preventive confiscation) was introduced into positive law, according to which the defendant cannot justify the origins of the assets by indicating them as the reinvestment of income generated through tax evasion (without the possibility of demonstrating the proportionate value of the purchases through the proceeds of tax evasion, or – in some judgements - even through the taxable income subtracted from taxation);

the owner **doesn't demonstrate the proportionate value** of his assets (doesn't justify the legal origin); the onus of refuting the presumption lies on the convicted who can adduce evidence showing the lawful origin of the property in question [98].

3. The presumption of the illegal origin of the assets.

The case law about extended confiscation is rich in the Italian system of law; in the prosecution the most important positions of this jurisprudence will be analysed.

The Constitutional Court and the Supreme Court have established that the **presumption *iuris tantum*** about the illegal origin of the assets is reasonable because it is based on the conviction for serious organized crime offenses, - such as mafia-type association, major drug-trafficking, money laundering, kidnapping for purposes of extortion, trafficking in persons and a few others-,

98 FIANDACA-VISCONTI, *Scenari di mafia,* Torino. 2010, 79 ss.; MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, cit., 317 ss.

perpetrated to pursue the acquisition of undue benefits; this criminal activity is able to accumulate illegal proceeds that can be reinvested to commit other crimes [99].

The confiscation pursuant to 12 sexies is based on "a fundamental choice of criminal policy of the legislator, made with the identification of particularly alarming crimes, suitable for creating an economic accumulation, in turn a possible instrument for further crimes, and therefore by drawing from it a presumption, iuris tantum, of illicit origin of the "disproportionate" patrimony available to the offender for such crimes ».

The Constitutional Court (33/2018) has established that "the institute is based on the presumption that the disproportionate and unjustified economic resources found in the convicted person derive from the accumulation of illicit wealth that certain categories of crimes are ordinarily capable of producing" and that this presumption is has already been held by the Constitutional Court as not unreasonable and consistent with the principle of equality and the right of defence, also with reference to art. 42 of the Constitution (the protection of the right to property) (C. cost., Ord. n. 18/1996; see C. cost., n. 88/2000). The reasonableness of the presumption under discussion would remain linked to the circumstance that is based on the conviction for crimes usually perpetrated "in an almost professional form" and which arise as an ordinary source of an unlawful accumulation of wealth (C, VI, n. 1600/1996, Berti)[100].

4. The scope (Constitutional Court 33/2018).

The scope of application of this form of extended confiscation, originally introduced as an instrument to combat the infiltration of organized crime into the economy, has increasingly extended in a manner inconsistent with the original intentions of the legislator, as recently highlighted by the Constitutional Court with the judgement n. 33 of 2018; for example, also in relation to the crimes of public officials against the public administration[101].

The Court (33/2018), while rejecting the question of constitutionality, acknowledges that "although the objective of the" extended "confiscation was expressly identified in the **contrast to the accumulation of the assets of organized crime, and mafia** in particular, and their massive infiltration into the economic circuit, the choice of "matrix offenses" was not rigorously consistent

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99 Cass. Sez. un., 17 December 2003, Montella, n. 920, 1182; Cass., 26 April 2007, n. 21250, in *Juris data online*, 4, § 4; Cass., 28 November 2006, n. 92, *ivi*, 4, § 2; Constitutional Court n. 18/'96 and 33/2018; A.M.MAUGERI, *La lotta contro l'accumulazione di patrimoni illeciti*, cit., 529; Cass., sez. II, 9.1.2018, n. 5378. See S.MILONE, *La confisca allargata al banco di prova della ragionevolezza e della presunzione di innocenza*, in *LP*, 2018. p. 15 ss.; S.FINOCCHIARO, *La Corte Costituzionale sulla ragionevolezza della confisca allargata. verso una rivalutazione del concetto di sproporzione*?, in *DPC* 2, 2018, p. 135 ss.; M.PICCARDI, *Legittima la confisca* allargata nel caso di "condanna" per ricettazione, in CP, n. 9, 2018, p. 2834.

100 Constitutional Court n. 33/2018; n. 24/2019, about this judgement A.M.MAUGERI- P.PINTO DE ALBUQUERQUE, *La confisca di prevenzione nella tutela costituzionale multilivello*, in *Dir. Pen. Cont. Riv. Trim.* 2019, 107 ss.; F.BASILE-E.MARIANI, *La dichiarazione di incostituzionalità della fattispecie preventiva*, in *GP* 2019, 151 – 160; G.AMARELLI, *Misure di prevenzione e principio di determinatezza*, in *Treccani - Libro dell'anno*, 2019, 104 – 108; M.CERFEDA, *La prevedibilità ai confini della materia penale: la sentenza n. 24/2019 della Corte costituzionale e la sorte delle "misure di polizia",* in *AP* 2019; S.FINOCCHIARO, *Due pronunce della corte costituzionale in tema di principio di legalità e misure di prevenzione a seguito della sentenza de Tommaso della Corte Edu*, in *DPC* 2019; F.MAZZACUVA, *L'uno-due dalla Consulta alla disciplina delle misure di prevenzione: punto di arrivo o principio di un ricollocamento sui binari costituzionali*?, in *RIDPP* 2019, 987 – 993; M.PICCHI, *Principio di legalità e misure di prevenzione nella ricostruzione dialogica fra Corte EDU, Corte costituzionale e Corte di cassazione. Gli sforzi "tassativizzanti" della giurisprudenza di legittimità possono sopperire alla cattiva qualità della legge*, in *Osservatorio sulle fonti*, n. 1/2019, http://www.osservatoriosullefonti.it; F.PALAZZO, *Per un ripensamento radicale del sistema di prevenzione*, in *Criminalia* e in *disCrimen* dal 12.09.2018, 9; E.APRILE, *La Corte Costituzionale "riscrive" la disciplina delle misure di prevenzione "generiche" per garantirne maggiore determinatezza nei loro presupposti applicativi e negli effetti penalistici della violazione delle relative prescrizioni - C. Cost., 27 febbraio 2019*, n. 24, in *CP* 2019, 1864 ss.; V.MAIELLO, *La prevenzione ante delictum da pericolosità generica al bivio tra legalità costituzionale e interpretazione tassativizzante (Osservazione a Corte cost., 27 febbraio 2019 n. 24)*, in *GCost* 2019, 322 – 344; A.MANNA, *Misure di prevenzione e diritto penale: una relazione difficile,* Pisa, Pisa University Press, 2019, 182 ss

101 R.CANTONE, *La confisca per sproporzione*, in *La legislazione penale in materia di criminalità organizzata, misure di prevenzione ed armi*, a cura di V.MAIELLO, Torino, 2015, 125; F.SGUBBI, *L'art. 12* quinquies *della legge n. 356 del 1992*, in *Atti del IV Convegno nazionale*, in *Dirittto penale*, Torino, 1996, 26. See A.M.MAUGERI, *La confisca "allargata"*, in Centro Nazionale Prevenzione e Difesa Sociale (a cura di), *Misure patrimoniali nel sistema penale: effettività e garanzie*, Milano, 2016, 65 ss.

from the beginning with this declaration of intent. Alongside criminal figures, they postulate an organization and structured, aimed at the achievement of illicit profits, in fact, such as the association of type mafioso or the association aimed at illicit drug trafficking, the censored rule recalled, in fact, from the outset, a series of other crimes - such as extortion, kidnapping for the purpose of extortion, usury, laundering, reuse, fictitious registration of assets, illicit drug trafficking, aggravated smuggling (over, 648 c. 2 of the Criminal Code) - which, although considered typical of organized crime (and mafia in particular), can in fact be perpetrated in contexts completely free of this and without implying, in an absolute and indefectible way, the quality of "habitual offender" of their author.

Not only that, but above all, the Court points out that "**in the course of time, moreover, the catalog of predicate offenses has been enriched, in progressive and "alluvial" way, from a series of novelistic interventions**» and "this process of implementation" «has been inspired, in more than one case, **by logics clearly extraneous to the primitive one of the institute**», as in relation to the "wide range of crimes against the public administration" established by art. 1, c. 220, the no. 296/2006 (which «is completely devoid of direct connection with organized crime, and which does not even denote, in the perpetrator of the single fact, a necessary "professionalism" or dedication to the offense»).

In order to limit the scope of the extended confiscation, the Constitutional Court considers that "from the point of view of valorizing the ratio legis, it can be considered, moreover, that - when discussing crimes which, by their nature, do not involve an extended criminal program over time (as the crime of receiving stolen goods) and which are not also committed, however it may be, in an organized crime area - the judge retains the possibility of verifying whether, in relation to the circumstances of the specific case and the personality of his perpetrator - which serve, in particular, to connote the criminal affair as completely episodic and occasional and productive of modest enrichment - the fact for which the sentence has intervened clearly goes beyond the "model" which is valid as basis for the presumption of illicit accumulation of wealth by the convicted person". In the opinion of some authors the Constitutional Court allows the discretional application of the extended confiscation, but this interpretation is not consistent with the principle of legality.

In any case the Constitutional Court demands, in a de iure condendo perspective, that «the selection of the "matrix crimes" by the legislator takes place, as long as the institution retains its current physiognomy, according to criteria strictly cohesive with it and, therefore, reasonably restrictive. In fact, in order to avoid obvious tensions in terms of guarantees which must assist such invasive measures for the assets, one cannot fail to underline the need for the choice of the predicate offenses to be based on types and modalities of facts in themselves symptomatic of an illicit enrichment of their author, which transcends the individual judicially ascertained affair, so as to truly be able to annex the "disproportionate" and "unjustified" assets that the agent has to a further criminal activity that has remained "submerged"».

5. Ownership or Availability of the assets.

In order to have the asset **availability**, the main Italian jurisprudence deems it sufficient to prove the subject's ability to determine its allocation or use, or, in any case, that he/she is the actual dominus. For this objective type of investigation, the iuris tantum presumption hold true, almost as a general rule[102].

The authors demand, with a stricter interpretation, that the availability would be a mere surrogate for the right to property, so as to include in the patrimonial measure the assets that the defendant has obtained illegally and that he, in order to evade the confiscation "but without

[102] Cfr. F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit.

divesting himself of them in economic-substantial terms", has done result, even if only fictitiously, in the ownership of third parties through formal legal schemes [103].

For the purposes of confiscation, the goods that were fictitiously registered in the name of third parties or which have been possessed by intermediary natural or legal persons shall also be considered as being at the disposal of the convicted offender [104]; the burden of proving the existence of circumstances that reveal the divergence between the formal ownership and the actual availability of the asset lies with the prosecutor[105.]

6. Disproportionality.

Another important element of this form of confiscation is the disproportionality, in conformity with the Art. 5 of the Directive 42/2014, which demands that ***"the value of the property is disproportionate*** *to the lawful income of the convicted person"*; the recital n. 21 also suggests considering "**the fact that the property of the person is disproportionate to his lawful income**" "among those facts giving rise to a conclusion of the court that the property derives from criminal conduct". This element is requested by art. 240 bis c.p. and also for the confiscation preventive measure, and by the Art. 127 bis Spanish Código Penal (*L.O. 1/2015),* comiso ampliado, and in the German system of law by Art. 437 StPO (special rules for the independent recovery procedure) as gross disproportion (2017 reform).

In art. 240 bis c.p. the disproportionality is the only fact that founds the presumption of the assets' illicit origin together with the conviction for a specific crime, for the Directive it is only one fact among other facts "giving rise to a conclusion of the court that the property derives from criminal conduct"; so, as stressed by the Constitutional Court (n. 33/2018), the Italian model is more severe. Not only that, but authoritatively establishing that the disproportion is a founding element, together with the condemnation (which no longer has to be definitive), of the presumption "that the assets themselves derive from criminal activities that it was not possible to ascertain", the Constitutional Court clearly reiterates that **the assets are confiscated not because they are of disproportionate value but because they are of illicit origin, of which the disproportion is a symptom.**

The Supreme Court requires the prosecutor to demonstrate that the **value of each good is disproportionate to the lawful income of the convicted person at the moment of the acquisition** [106]; the generic proof of the disproportionate character of the estate isn't enough, but the prosecutor must show specific evidence about the disproportionate character of each acquisition. In this way the defendant is burdened only to prove the legal origin of the assets whose disproportionate character was established and limited to the moment of the acquisition.

7. "**Temporal reasonableness**".

The Directive recital n. 21 contains another important element to limit the application of the extended confiscation: "Member States could also determine a requirement for **a certain period of time** during which the property could be deemed to have originated from criminal conduct".

In this direction the Italian Supreme Court and the Constitutional Court expressly requests the "**temporal reasonableness**" underlining that the presumption of illicit origin of the goods could not in any case "operate in an unlimited and indiscriminate manner, but must necessarily be limited

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[103] Così A.AIELLO, *La tutela civilistica dei terzi nel sistema della prevenzione patrimoniale antimafia*, Milano 2005. 102-104, 116 ss..

104 Cass., sez. II, 23 March 2011, n. 17287, T., in *www.dejuregiuffrè.it*; Cass. 3 May 2011, n. 22860, P., ivi; Cass., 3 December 2008, n. 4479, L.B., ivi.; Cass. 26 November 2008, n. 1178, ivi.

105 Cass., 24 October 2012, n. 44534, Ced n. 254699.

106 Cass., Sect. Un., 17 December 2003, Montella, n. 920, 1187; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass. 30 October 2008, n. 44940; Cass. 13 May 2008, n. 21357, E., in *www.dejure.giuffrè.it.*

to a temporal reasonable area that allows a connection to be made between the assets and the criminal act "(C. I, n. 41100/2014); this means that the Tribunal can confiscate only the things obtained by the convicted in a period of time reasonably connected with the crime's time"[107]. The Constitutional Court (n. 33/2018) has affirmed: "'The moment of acquisition of the assets should not be, that is, so far from the time of the "spy crime" as to make ictu oculi unreasonable the presumption of derivation of the assets itself from an illegal activity, even if different and complementary to that for which there was a conviction".

In any case money, commodities or other assets, acquired or matured earlier than the criminal activity of the convicted offender began, should not have been confiscated unless the judge had factual evidence justifying a reasonable connection with the same criminal activity, or factual evidence of illegal origin. Not only, as the Crostella judgement of the Joint Sections of the Supreme Court in 2021 clarified[108], if as a rule the judge, of cognition or execution, can order the extended confiscation of assets acquired by the convict up to the date of the sentence of first instance, or of appeal in case reform of the previous acquittal, it is however possible that the judge himself, by applying the canon of "temporal reasonableness", deems to identify an earlier limit with respect to the conviction, in particular when the latter occurs a long time after the commission of the crime. In an apparently derogatory sense with respect to these limits, moreover, the confiscation is admitted of property received even after the conviction sentence or after what can be inferred by virtue of the requirement of "temporal reasonableness": this when there are adequate probative evidence that the assets are the result of the reuse of financial resources acquired at a time prior to the conviction itself, or that the money or other movable investment instruments exist before the sentence and were only subsequently discovered or found, i.e. assets that could have been confiscate in cognition trial.

The Constitutional Court (n. 24/2019) has specified that the "aforementioned thesis of" temporal reasonableness "responds, in effect, to the need to avoid an abnormal expansion of the scope of the "Extended" confiscation, which would otherwise legitimize - even in the face of a conviction for a single offense included in the list - an asset monitoring extended to the entire life of the offender. A result that would risk making the fulfillment of the burden of the interested party to justify the origin of the assets particularly problematic (even if understood as a simple allegation), burden which becomes more complicated the more the purchase of the property to be confiscated is backdated"[109]. This is a corresponding temporal delimitation, mutatis mutandis, to that which the same S.U. (Spinelli 2014) considered effective with reference to the similar measure of the preventive confiscation, art. 24 legislative decree 159/2011.

This requirement makes the form of confiscation in question more compatible with the **presumption of innocence** and **the right of defense**, since its ascertainment makes the burden of proof of the prosecutor more pregnant and the counter-proof of the lawful origin of his assets is less onerous for the owner, avoiding a sort of diabolical probatio on him about the lawful origin of all assets at any time acquired[110]: "the identification of a precise chronological context, within

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[107] Corte cost., sent. 21.2.2018, n. 33, Pres. Grossi, Est. Modugno, annotata su *Dir. Pen. cont*.; Cass., Sez. un., sent. 25.2.2021 (dep. 15.7.2021), n. 27421, Crostella e al.; Cass., sez. VI, 17 January 2023, n. 10684, Del Gaudio; Cass., sez. I, 12.4.2019, n. 22820; Cass., sez. I, 17.5.2019, n. 35856; Cass., sez. I, 6.6.2018, n. 36499; Cass., Sez. VI, n. 54447/2018; Cass., Sez. I, n. 41100/2014; Cass., Sez. VI, n. 246083/2010, Fidelbo; Cass., I, n. 34136/2014; Cass., VI, n. 5452/2010; Cass., I, n. 2634/2012; C. IV, n. 35707/2013; C. I, n. 41100/2014; C. I, n. 34136/2014; C. I, n. 12047/2015; C. I, n. 9984/2018; C. II, n. 52626/2018; contra C. II, n. 18951/2017; C. I, n. 2634/2012; C. I, n. 12047/2015; C. I, n. 53625/2017; C. I, n. 9984/2018; C. V, n. 21711/2018; C. I, n. 19470/2018; C. I, n. 41100/2014.

[108] Cass., Sez. un., 25.2.2021 (dep. 15.7.2021), n. 27421, Crostella e al.

[109] See Cass. Pen., SS.UU., 25.1.2021, n. 2742; Cass. Pen., Sez. I, n. 19470/2018; Cass. Pen., Sez. I, n. 41100/2014; L.CAPRIELLO, *La confisca allargata e il limite temporale di operatività della misura in executivis*, in *Arch. pen*. 2020, 20.12..

[110] Così A.M.MAUGERI, *Una parola definitiva sulla natura della confisca di prevenzione? Dalle Sezioni Unite Spinelli alla sentenza Gogitidze della Corte EDU sul civil forfeiture*", in *Riv. it. dir. proc. pen.* 2015, 956.

which the power of ablation can be exercised, makes the exercise of the right of defense much easier, …"[111]..

This requirement, then, makes the form of confiscation in question more compliant also with the principle of proportionality, delimiting the scope of application.

8. The lack of justification of the origin of the assets; the reversal of the burden of the proof and the standard of the proof.

It is argued, at any rate, if the burden of the proof about the illicit origin is **on the owner**, as the law requires that the **owner was unable to demonstrate legal origin**.

Part of the doctrine denounces an unacceptable reversal of the burden of proof, under which it is for the individual concerned to prove the legitimate origin of property affected by the extended confiscation. In Supreme Court's opinion (also for the preventive confiscation), the burden of proving the illicit origin of property rests primarily on the prosecution, while the person concerned has the burden of "allegation" finalized to counter the evidentiary situation against him[112].

Authoritative doctrine said that "the burden of allegation of the person concerned does not differ greatly from the rules of a normal procedural dialectics, being perfectly natural that the defence should strive to counter the evidences given by the prosecution"[113].

The Supreme Court has repeated that this form of confiscation complies with the presumption of innocence because art. 12 *sexies* (now art. 240 bis c.p.) doesn't "presume" the guilt of the accused but only the unlawful source of the assets [114]; the right to silence regards only the demonstration of the responsibility of the accused, and after the conviction it isn't relevant [115].

The Court admits the mitigation of the constitutional safeguards in respect of property right, but it stresses that the presumption of innocence only concerns the protection of the personal freedom. The right to defence is respected because the owner can demonstrate the lawful source of his assets [116.]

However, as supra explained, the Court imposes on the prosecutor to demonstrate that the value of each good is disproportionate to the lawful income of the convicted person at the moment of the acquisition [117]; the generic proof of the disproportionate character of the estate isn't enough, but the prosecutor must show specific evidence about the disproportionate character of each acquisition. In this way the defendant is burdened only to prove the legal origin of the assets whose disproportionate character was established and limited to the moment of the acquisition.

The Supreme Court established that it is only a "burden of allegation", but it demands, in order to refute the presumption, that the owner has to fully demonstrate how he has economically accumulated the assets; it is a substantial burden: *explaining how the suspected has economically accumulated his wealth* (Supreme Court 2004 Montellla). The problem is, therefore, that the silence of the accused becomes evidence supporting the presumption of the illicit origin of the assets [118] ,in contrast with the right to silence also affirmed by the Directive 2016/242 (recital 24).

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111 Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880 for the preventive measure.

112 Cass. Sez. un., 17 December 2003, Montella, n. 920, 1187; Cass., sez. VI, 3 aprile 2003, Prudentino, rv. 226492; for preventive confiscation Court of Cassation 21 April 1987 n. 1486; 22 February 1993 n. 746; 5 May 1995 n. 2755

113 G.FIANDACA – S.COSTANTINO (a cura di), *La legge antimafia tre anni dopo*, Milano 1986.

114 Cass. Sez. un., 17 December 2003, Montella, n. 920, 1187; Cass. Sez. un., 30 May 2001, Derouach, in *Foro it.* 2001, II, 502 - 504.

115 Cass. Sez. un., 30 May 2001, Derouach, cit., 502.

116 In this direction L.FORNARI, *Criminalità del profitto e tecniche sanzionatorie. Confisca e sanzioni pecuniarie nel diritto penale moderno*, Padova 1997, 222; see also A.GIALANELLA, *Funzionalità e limiti garantisti dell'ordinamento penale alla difficile "prova" delle misure di prevenzione patrimoniale*, in *Crit. dir.* 1999, 548.

117 Cass., Sez. Un., 17 December 2003, Montella, n. 920, 1187; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass. 30 October 2008, n. 44940; Cass. 13 May 2008, n. 21357, E., in *www.dejure.giuffrè.it.*

118 Cass. Sez. un., 17 December 2003, Montella, n. 920, 1187; Cass., 26 April 2007, n. 21250, § 4; Cass., 2 June 1994, Malasisi, in *Cass. pen.* 1995, 907; Cfr. Cass., 30 October 2008, n. 44940; Cass., Sect. 1, 5 june 2008, n. 25728; Cc. - dep.

9. The nature of the extended confiscation (art. 240 bis c.p.).

The Directive allows the MS to choose the nature of the confiscation; this is established in the recital n. 13: "Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures"; and in the recital n. 10, "Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court".

It is not clear the legal nature of the extended confiscation. It could be assumed that the legislator, in defining this institution as "particular cases of confiscation", refers to the general institution of confiscation provided for by Italian legal system, namely the confiscation *security measure* contemplated by art. 240 c.p. and therefore it should be of a preventive nature. In the opinion of the Supreme Court and the Constitutional Court it is a security measure with preventive nature (C. cost., ord. n. 18/1996, Basco; Supreme Court, VI, n. 1600/1996); "atypical asset security measure, replicating the characteristics of the anti-mafia preventive measure ..and the same preventive purpose"[119]. Lastly, it is noted that the preventive function has undergone a significant enhancement by the l. 17 October 2017, n. 161, which, with art. 31, introduced multiple changes to the rules on "extended" confiscation "and, in particular, the application even in the event of prescription or amnesty" [120].

The doctrine criticize this judicial interpretation because the mandatory nature of the confiscation in question excludes, however, the possibility of subordinating the application of the measure to the assessment of the social dangerousness of the offender, which would be the prerequisite for the security measure, apart from the fact that the dangerousness of the recipients (and of the assets) has never figured among the requisites [121] of this form of confiscation and in a purely preventive approach it would not make sense to confiscate in confrontations of the heirs[122], as allowed with the recent reforms. Furthermore, as highlighted by the doctrine in relation to the confiscation-preventive anti-mafia measure, to pursue purely preventive purposes the requirement of the illicit origin of the assets (detected by the disproportionate character) would not be necessary, since the assets, however, are not in itself dangerous but becomes so in relation to a dangerous subject, who could in the future use it to commit crimes [123].

The authors who do not believe that the extended confiscation is a security measure, have qualified it as an ancillary patrimonial penalty with consequent retroactive inapplicability [124]; or,

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25 june 2008 - Rv. 240471; Cass., 5 June 2008, n. 25728, C.; Cass., 13 May 2008, n. 21357, E., in *www.dejure.giuffre.it*.; see also POTETTI, *Riflessioni in tema di confisca di cui alla legge 501/1994*, in *Cass. pen.* 1995, 1690; L.FERRAJOLI, *La normativa antiriciclaggio*, Milano 1994, 33; G.FIANDACA -E.MUSCO, *Diritto penale – Parte generale*, VI ed., Bologna 2010, 848; G.NANULA, *Le nuove norme sul possesso ingiustificato di valori*, in *Il Fisco* 1995, 10137.

119 Cass. S.U., n. 29022/2001, Derouach; Cass. S.U., n. 33451/2014; C. V, n. 1012/2017; Cass. I, n. 19470/2018; Cass. II, n. 5378/2018; Cass. VI, n. 54447/2018.

120 Cassation, V, no. 1012/2017.

121 See F.MAZZACUVA, *Le pene nascoste – Topografia delle sanzioni punitive e modulazione dello statuto garantistico,* Torino 2017, 177; cfr. R.BORGOGNO, *L'ablazione dei beni "marchiati di infamia*". *(Prime osservazioni su alcuni recenti interventi giurisprudenziali in tema di "confisca allargata" e di "confisca senza condanna")*, in *Arch. pen*. 2015,

30; L.FORNARI, *Criminalità del profitto e tecniche sanzionatorie. Confisca e sanzioni pecuniarie nel diritto penale*, Padova 1997, 67 which highlights that the measure applies to "goods" marked "by a characterization assumed in the past (the illegality of the acquisition), without requiring any prognostic judgment "and the crime" far from establishing ... a judgment of dangerousness ... discolouration in the law in question on the mere occasion ").

122 see A.M.MAUGERI, *La confisca allargata*, cit., 90 ff.; *La riforma della confisca (d.lgs. 202/2016),* cit*.,* 235 ss.

123 P.COMUCCI, *Il sequestro e la confisca nella legge "antimafia"*, in *Riv. it. dir. pro. pen*. 1985, 101 ff .; G.ILLUMINATI, *La presunzione d'innocenza*, Bologna, 1979, 202; F.BRICOLA, *Forme di tutela "ante-delictum" e profili costituzionali della prevenzione*, in *Le misure di prevenzione*, a cura di BRICOLA-PAVARINI-STORTONI *e* altri, Milano, 1975, 59 ff.

124 MAZZA, 33; FURFARO, 210; LUNGHINI-MUSSO, 43; L.FORNARI, *op. cit*., 66, criticizes the definition of accessory penalty because the latter is essentially intended to prohibit legitimate activities or prerogatives that the offender has

penalty of suspicion or sui generis penalty [125]; or in any case a sanction in the broad sense "released from a fact of crime" [126]. This measure constitutes a "patrimonial sanction of a purely punitive nature" [127], but whose real function is that of an instrument of wealth control aimed at the purposes of procedural efficiency: "The measure assumes a serving role with respect to the purposes of the process, or rather of the investigations,..", the aim would be "bringing out, at least in their patrimonial dimension, what by definition remains hidden: crimes intended to integrate the dark figure" [128]. Or, again, it is observed that the extended confiscation, despite being connected for repressive reasons to the definitive sentence for an exhaustive class of criminal offenses with economic connotation, represents an instrument of neutralization and recovery of wealth of presumed illicit origin on the basis of the assumption, for the past, of the derivation of assets from similar crimes not subject to procedural assessment, and, for the future, of their possible subsequent reuse both for financing further illegal activities, and for supporting legal economic activities with distorting effects on the market and competition [129].

The Constitutional Court, in a recent ruling (n. 24/2019), **denies any punitive nature** ("the relative presumption of illicit origin of goods, which justifies their ablation in favor of the community, does not necessarily lead - as sometimes it is argued - to recognize the substantially sanctioning-punitive nature of the measures in question "), but attributes **both the extended confiscation and the preventive confiscation** - to which the same ratio is recognized – a mere **compensatory - restorative function**. In the wake of what the Gogitdize judgment of the Edu Court affirmed: "from the point of view of the system, the ablation of these assets is not a sanction, but rather **the natural consequence of their illicit acquisition**, which determines - as well highlighted by the recent ruling, already mentioned, of the United Sections of the Court of Cassation – a genetic defect in the constitution of the same property right of those who have acquired the material availability, resulting "all too obvious that the social function of private property can only be fulfilled on the indeclinable condition that its purchase complies with the rules of the legal system. Therefore, the acquisition of assets contra legem cannot be considered compatible with that function, so that a purchase affected by illegal methods can never be opposed to the state system (Court of Cassation, section one, no. 4880 of 2015)". This is recently the opinion of some authors[130].

Contra some authors does not consider this position to be shared, although it fully recognizes this restorative-compensatory function to the direct confiscation of ascertained profits (as the offense is not a legitimate right to purchase goods and it would be a question of returning

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abused, while the confiscation in question tends to prevent a management activity inserted in an illegitimate system of reproduction of wealth.

125 D.FONDAROLI, *Le ipotesi speciali di confisca nel sistema penale*, Bologna 2007; FORNARI, *Criminalità del profitto e tecniche sanzionatorie*, Padova, 1997, 79

126 F.SGUBBI, *L'art. 12 quinquies della legge n. 356 del 1992 come ipotesi tipica di anticipazione: dalla Corte Costituizonale all'art. 12 sexies,* Torino 1996, 30; G.SQUILLACI, *La confisca "allargata" qule fronte avanzato di neutralizzazione dell'allarme criminalità*, in *Dir. Pen. Proc.* 2009, 1531, n. 38

127 L.FORNARI, *op. cit*., 68

128 L.FORNARI, *op. cit*., 81

129 F.MAZZACUVA, *op. cit*., 184; G.AMARELLI, *Confisca allargata e ricettazione: in attesa di una riforma legislativa la Corte fissa le condizioni di legittimità con una sentenza interpretativa di rigetto dai possibili riflessi su altri "reati-matrice"*, in *Giur. Cost*. 2018, 308

130 S.FINOCCHIARO, *La confisca "civile" dei proventi da reato. Misura di prevenzione e* civil forfeiture*: verso un nuovo modello di* non-conviction based confiscation, Milano, Criminal Justice Network, 2018 F.VIGANÒ, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione" nell'ordinamento italiano*, in PALIERO-VIGANÒ-BASILE-GATTA (a cura di), *La pena, ancora. Fra attualità e tradizione – Studi in onore di Emilio Dolcini*, II, Milano, Giuffrè, 2018, pp. 904 ss.; *contra* DELL'OSSO, *Sulla confisca di prevenzione come istituto di diritto privato: spunti critici*, in *Dir. Pen. Proc.* 2019, 995; TRINCHERA, *Confiscare senza punire? uno studio sullo statuto di garanzia della confisca della ricchezza illecita* , Torino 2020, believes that confiscation remains an instrument with which the legislator pursues purposes of criminal policy and therefore that it remains a measure firmly anchored to criminal law, with a function of "completion" of the sentence in terms of general and special prevention, an argument that then it also serves to justify a more meaningful request for safeguards (such as the principle of non-retroactivity, although not intended as an absolute right pursuant to Article 7 of the ECHR).

something that one has no right to hold); but there is compensation in the strict sense only in relation to the profit of which it is possible to ascertain the causal link with the crime and, therefore, the illicit nature. Confiscation pursuant to art. 240-bis, on the other hand, affects all the assets of the offender whose legitimate origin cannot be demonstrated, and, therefore, also the assets with respect to which the causal link with a specific crime has not been ascertained. Clearly the more binding will be the verification of the illicit origin of the assets to be confiscated by the prosecution, at least through proof of the disproportionate nature of the individual asset at the time of purchase, the more the confiscation in question will assume a compensatory and not a punitive nature [131]. Furthermore, it must not be forgotten that this form of confiscation also assumes **an undoubted *stigmatizing* character of a criminal nature**, where it is based on the presumption of illicit origin of assets of disproportionate value and therefore on the presumption that the recipient is responsible for other crimes, in addition to the one subject to conviction, from which he made a profit; the extended confiscation is based on and ends up attributing to the recipient of the measure an alleged criminal career, a criminal activity of a professional and habitual nature, source of the illegal accumulation of assets. In this form of confiscation, a punitive nature emerges, both for its **afflictivity**, being able to involve the subtraction of the entire patrimony, and for the aim pursued, which is above all general and not only special prevention, in particular the prevention of illicit use of wealth or economic incapacitation [132]. This form of confiscation pursues a general and special prevention purpose because "on the one hand it threatens the subtraction of the illicit profit that represents the purpose of the crime and, on the other, it subtracts that same profit by preventing the offender from enjoying the benefits of crime and, as the true preventive purpose emerges, from reinvesting the proceeds in crime or in any activity, even lawful, to the detriment of free competition and the laws of the market. This is a measure that was born from a macro-criminal point of view as an instrument of economic incapacitation of organized crime and of preventing its infiltration into the lawful economy, but which has taken on the aim of guaranteeing sine die the subtraction of profit ... and ... ends to also assume a punitive impact "[133].

In consideration of the intrusive nature of this form of confiscation, as also recognized by the Constitutional Court in ruling no. 33/2018, which can affect the entire patrimony and forces the holder to justify his lawful origin, stigmatizing him as a professional offender, should, then, be recognized as punitive, at least in the broad meaning accepted by the Edu Court in relation to the concept of criminal matter, in order to recognize the relative safeguards (from the principle of non-retroactivity, to the presumption of innocence up to ne bis in idem); what is at stake, in fact, is not the definition of the nature as an end in itself, but the determination of the system of guarantees (the "statute of guarantees") that is to be attributed to this model of confiscation - as highlighted by the Constitutional Court itself in judgement no. 24/2019 [134].

10. Application after the prescription and without the conviction.

Normally the application of confiscation ex art. 240 bis c.p. demands a conviction and the proof of guilt, even if this form of confiscation can be applied also if the crime is **statute barred** or amnestied, ex art. 578 bis c.p.p., introduced by l. 161/2017 and amended by l. n. 3/2019[135]; this rule states that when confiscation has been ordered in special cases pursuant to Article 240 bis c.p.

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131 A.M.MAUGERI, *Le moderne sanzioni*, 517 ff.

132 G.FORNASARI, *L'ultima forma di manifestazione della "cultura del sospetto": il nuovo art. 12-sexies della l. 356 del 1992*, CD 1994, 16; L.FORNARI, *op. cit.*, 68; A.M.MAUGERI, *La confisca allargata*, cit., 90 ff .; T.EPIDENDIO, *La confisca nel diritto penale e nel sistema delle responsabilità degli enti*, Padova, 2011, 98 ff.

133 A.M.MAUGERI, *Una parola definitiva*, cit., 955

134 In the matter of MASERA, *La nozione costituzionale di materia penale* Torino 2018, in particular 235.

135 "When the confiscation in particular cases provided for in the first paragraph of article 240 bis of the criminal code …has been ordered, the appellate judge or the court of cassation, in declaring the crime extinguished by prescription or amnesty, they decide on the appeal solely for the purposes of confiscation, after ascertaining the accused's responsibility".

and other legal provisions or pursuant to art. 322 ter c.p., the appeal judge or the Court of Cassation, in declaring the offence expired by a cause of extinguishment of the offence or by amnesty, shall deliberate on the appeal only with regard to the effects of the confiscation, after determining the liability of accused. It follows that, in order to apply the provision in question, the judge must have already ordered the confiscation before the crime is extinguished; in the end, if the confiscation has not already been ordered, it will still be possible to initiate the preventive proceedings for the purposes of applying confiscation as a patrimonial preventive measure[136].

The European Court of Human Rights has supported this approach, the possibility to apply the confiscation – even if punitive – after the prescription, in the G.i.e.m. case (against Varvara case), in relation to the so called "urban confiscation" which, in case of unlawful site development (art. 44 d.P.R. n. 380/2001), as examined, allows the confiscation of the land and all structures built on it; this form of confiscation has been considered punitive by the ECourtHR in the Sud Fondi judgement and included in the criminal matters. The ECourtHR has affirmed that art. 7 ECHR excludes the possibility of imposing a criminal sanction against a person without the verification and prior declaration (even incidental) of his/her criminal liability, which can be contained within a sentence that, nevertheless, declares the crime to be extinct by statute of limitations[137]..

The doctrine criticized the possibility to apply a form of extended confiscation without the final conviction, demanded by the law (art. 240 bis c.p.), in violation of the principle of legality and the possibility to carry on the proceeding after the prescription only to apply the confiscation is considered a violation of the substantial nature of the prescription, affirmed by the Constitutional Court (n. 24 del 2017) to guarantee the right to "be forgotten" and the presumption of innocence (the application of a punitive sanction "in the course of a criminal trial, in the absence of the measure that 'institutionally' crystallizes the ascertainment of criminal responsibility, infringes, in defiance of art. 6, paragraph 2, of the ECHR, the right of the accused acquitted not to be 'stained', socially stigmatized, by an afflictive sanction, however qualified "[138]). In his dissenting opinion in the G.I.E.M. case the judge Albuquerque has stressed the violation of the principle of legality and of the presumption of innocence; "the content of the principle of legality includes the principle nulla poena sine culpa, which must be established (both the culpa and the poena) within the timeframe set by the relevant statute of limitations. In a State governed by the rule of law and the principle of legality, the power of the State to prosecute and punish offences, even complex offences, is limited by time constraints, or to use the elegant formulation of the Constitutional Court, "with the passage of time after the commission of the fact, the need for punishment is attenuated and a right to be forgotten matures for its author" Otherwise the values of legal certainty and predictability inherent in the principle of legality, and therefore the principle itself, would be sacrificed on the altar of the efficiency of the justice system" (§ 23).

In any case, the situation is changed after the recent reform of the criminal trial (law n. 3/2019 and n. 134/2020) which has modified the rules regarding statute limitation period, which is now definitely interrupted after the verdict of first instance (l. 3/2019), and the introduction of the "unproceedability" as supra examined (the expiration of the statute limitation period during the appeal judgement will be no longer possible, but there will be a bar to prosecution after a certain period - from 2 to 3 years for the second instance judgment -). There were two possible solutions: the same mechanisms of art. 578 bis c.p.p. could have been adopted and even after the expiry of the bar prosecution period, the Court would have the power to order confiscation after assessing the defendant's criminal liability (confirmed by new art. 115 bis c.p.p.); transferring the decision regarding confiscation after bar prosecution period in the proceeding of prevention, as it is now

136 A.M.MAUGERI, *La riforma della confisca*, cit., 31.

137 ECtHR, 28 June 2018, *G.I.E.M. S.R.L. and others v. Italy, nos. 1828/06*.

138 V.MONGILLO, *La confisca senza condanna nella travagliata dialettica tra Corte costituzionale e Corte europea dei diritti dell'uomo. Lo "stigma penale" e la presunzione di innocenza*, in *Giur. cost.*, 2015, n. 2, 431; on this topic V.MANES, *Confisca urbanistica e prescrizione del reato*, in *Cass. Pen.*, 2015, 2195.

already foreseen for the decision on civil compensation after the quashing of the acquittal verdict by the Court of cassation for civil liability (art. 622 c.p.p.).

This second solution has been adopted with the introduction of the art. 578 ter c.p.p., § 2 by the Legislative Decree 10 October 2022, n. 150 (so called Cartabia Reform) "2. Except for the cases referred to in paragraph 1, if there are assets in seizure for which confiscation has been ordered, the judge of appeal or the Court of Cassation, in declaring the criminal action inadmissible pursuant to article 344-bis, order the transmission of the documents to the public prosecutor at the court of the district capital or to the national anti-mafia and anti-terrorism prosecutor competent to propose the patrimonial measures referred to in title II of Book I of legislative decree 6 September 2011, n. 159".

11. The extended confiscation after the convict's *death*

After the reform introduced by Law. 161/2017, extended confiscation, after the final conviction, can also be applied **in the event of the *death* of the person concerned**, and can therefore remain in effect in relation to the person's heirs or assignees (art. 183 quarter Disp. Att. of the Criminal Procedure Code). Accepting the most recent jurisprudential orientation in this direction[139], the application of the confiscation against the successors in the case of death of the offender is allowed, where it would no longer be possible to apply the confiscation belatedly, through the "execution incident" (art. 666 c.p.p.)[140] for the supervening death of the convict. While the possibility of proceeding against the heirs with the prevention procedure aimed at applying the confiscation pursuant to art. 24 legislative decree n. 159/2011, is possible only within five years of the death, in this case there is no deadline.

The problematic nature of this provision is given by the fact that it is not only possible to apply the extended confiscation, already deliberated in the context of the criminal trial, even when the death occurs following the definitive conviction, but also when the confiscation has not been deliberated and, following the definitive sentence and the death of the offender, an "execution incident" starts against the successors; this is possible in a similar manner to what is permitted in relation to preventive confiscation (art. 18 of Legislative Decree no. 159/2011). The extended confiscation in question, however, should presuppose a full adversarial procedure as it imposes a burden of allegation on the part of the convicted person to demonstrate the lawful origin of his assets, a burden difficult to acquit by successors.

A similar issue was addressed by the Constitutional Court in sentence n. 21 and 216 of 2012, on the subject of preventive confiscation, and it was resolved by declaring inadmissible the question of constitutional legitimacy of Law no. 575/'65, art. 2-ter, c. 11 (now art. 24 Leg. Decree n. 159/2011), raised in relation to the articles 24 and 111 of the Constitution, and highlighting the peculiarity of both the preventive procedure and the procedure aimed at applying a security measure, which cannot be superimposed on the criminal one: «the preventive procedure, the criminal trial and the procedure for the application of the security measures have their own peculiarities, both in the procedural field and in the substantive assumptions"; "the forms of exercise of the right of defense [may] be differently modulated in relation to the characteristics of each proceeding, when the purpose and function of this right are in any case ensured" (judgment no. 321 of 2004).

Despite these affirmations of the Constitutional Court, the problem remains that for the successors, third parties by definition, "the right to defend themselves by trying is only guaranteed

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[139] Cass., sez. VI, 4 luglio 2008, Ciancimino, n. 27343, in Mass. Uff. n. 240585.

[140] The so called „execution incident" is a procedural scheme that is used in issues that arise in the execution phase of judicial measures. The interested parties or the Public Prosecutor, in the executive phase, can apply to the Execution Judge to obtain specific decisions relating to penal decrees, ordinances and sentences that have become irrevocable (for example: requests for pardons, amnesties, recognition of crimes continued, unification of concurrent penalties, non-existence or non-executive of the presumed enforceable title, etc.).

on paper but not in substance, with all the consequences in terms of the effectiveness of the hearing and due process" [141].

12. Extended confiscation against third parties.

We have analysed that Article 240-bis of the Italian Penal Code also concerns the assets owned by or available to the convicted party in any capacity, even through a natural or legal entity (see supra § 3, **3. Ownership or Availability of the assets)** and that the extended confiscation can also be applied in the event of the death of the person concerned, and can therefore remain in effect in relation to the person's heirs or assignees (Article 183-quarter Disp. Att. of the Italian Code of Criminal Procedure; **see § 9**).

The system for the protection of third parties, provided for by the Legislative Decree no. 159 of 2011 for the preventive confiscation (art. 24 d.lgs. 159/2011, without conviction), **has been extended to confiscation ex Article 240-bis of the Italian Penal Code** and to any form of seizure or confiscation in regard to crimes mentioned by Article 51 (3-bis) of the Italian Code of Criminal Procedure (Article 104- bis (1-quater) Disp. Att. of the Italian Code of Criminal Procedure). In particular, Article 104-bis (1-quinquies) Disp. Att. of the Italian Code of Criminal Procedure, introduced by Italian Legislative Decree no. 21 of 2018, states that "third parties vested with property interests or personal rights of enjoyment on seized assets, available to the accused in any capacity, must be summoned".

The same Article 104-bis (1-sexies) (Disp. Att. of the Italian Code of Criminal Procedure) is also applicable in the event that, in declaring the offence extinguished, the appeal judge or the Court of Cassation deliberate on the appeal only with regard to the effects of the extended confiscation, after determining the liability of the accused (article 578-bis of the Italian Code of Criminal Procedure).

13. The confiscation by equivalent of the extended confiscation

The confiscation by equivalent of the extended confiscation was introduced by art. 10, D.L. n. 92/2008 in paragraph 2-ter of art. 12-sexies, D.L. n. 92/2008 and then immediately reformed; now it is in § 2 of the art. 240 bis c.p. It is a form of confiscation by equivalent of the goods that are the object of the extended confiscation, that is, of assets of disproportionate value that can no longer be directly confiscated (because they are dispersed, hidden, alienated, ...). This form of confiscation of value has a particularly pronounced punitive ratio, because it distorts the original criminal political function of the confiscation of value. The confiscation by equivalent arises as a tool to combat the attempts of the offender to frustrate the application of the direct confiscation of specific assets, assuming that it has been ascertained that a specific profit or well-identified product has derived from the crime, connected by a link of causality to the crime, and it is not possible to confiscate it because it is dispersed, alienated, hidden. Confiscation by equivalent is the first fundamental tool to overcome the limit of traditional forms of profit confiscation which require the ascertainment of the causal link between the crime and the profit or product, the same limit which, as highlighted by the Constitutional Court no. 33/2018, raised the need to introduce forms of extended confiscation. On the other hand, in relation to the forms of extended confiscation which do not require the establishment of the causal link in question, but extend to all profits of disproportionate value (or of suspected origin) on the basis of the presumption that the disproportion is an indication of illicit origin, the application also of confiscation by equivalent pursues a punitive efficiency aim with an omnivorous and draconian character, represents a

[141] MANGIONE, *La 'situazione spirituale' della confisca di prevenzione*, in *Riv. it. dir. proc. pen*. 2017, 625. See in relation to preventive confiscation Cass., sez. VI, 26.6.2017, De Marco, n. 31504, in Mass. Uff. n. 270854. See MENDITTO, *Verso la riforma del d.lgs. n. 159/2011*, cit., 71, who quoted *Silickienė c. Lituania*, 10 Aprile 2012, n. 20496/02.

degeneration of the nature of confiscation by equivalent and a punitive abuse without a clear criminal political purpose.

14. Procedural aspects. The application by the enforcement judge: the extended confiscation becomes a Damocles' sword.

In the case of seizure for the purposes of confiscation by equivalent or **extended confiscation** (art. 240 bis c.p.), in which there is no link between the assets to be seized and the crime itself, the prerequisite for applying the measure is the presence of serious clues as to the existence of the conditions required for the application of confiscation[142], in addition to the abstract possibility that a crime has been committed in relation to which the measure is permitted.

The extended confiscation must be ordered by the trial judge who pronounces the sentence of conviction, or by the enforcement judge. Since confiscation is applied following a conviction, the accused will have enjoyed the right to cross-examination during the trial, as well as every other guarantee offered by the criminal trial, and, in particular, the possibility of challenging the confiscation in his/her own legitimate interests (the appeal in front of the Court of Appeal and the Supreme Court).

The criminal trial characteristics of orality, immediacy, and brevity are not very conducive to the documentary checks required for confiscation to be applied, and for this reason the practice of postponing the confiscation until the enforcement phase has been adopted. This solution was later embraced by the legislature, first with Law n. 161/2017 (art. 12 sexies, § 4 sexies) and later with Legislative Decree n. 21/2018, which transposed the contents of the criminal procedure code's implementing provisions (art. 183 quarter Disp. Att. Of the Procedural Criminal Code, titled "Execution of confiscation in special case"). This law states that, once the final ruling has been issued, the power to order extended confiscation lies with the enforcement judge. In this case, upon receiving the request for seizure and confiscation from the public prosecutor, the enforcement judge arranges for the same without formalities (art. 667, § 4, Criminal Procedure Code) and, above all, he can take the provision without hearing the parties and the contradictory (inaudita altera parte; the judge can decide de plano on the basis of the request and the elements proposed by the public prosecutor or ex officio). Opposition can be raised under penalty of forfeiture, within thirty days of the decree's announcement or notification, based on which a chamber hearing for cross examination may be scheduled (art. 666 c.p.c.) and the provision adopted can be appealed to the Court of Cassation[143]. This procedure, which allows the application of the extended confiscation without hearing the affected, violates the principle of legality because art. 240 bis c.p. demands that the convicted doesn't justify the proportionality and legitim origin of his assets, and this means that he has to have this possibility in a hearing; so, this procedure limits the right to defence, even because it excludes the appeal in Court of Appeal and it is possible only the recourse in Cassation[144]. The Constitutional Court has considered this limitation of appeal consistent with the right to defence, art. 24 Italian Constitution[145]. In the Paraponiaris v. Greece, the European Court even considered incompatible with the presumption of innocence the application of an ablative measure adopted in procedural stages that do not allow for an adequate exercise of the right of defence[146].

This possibility is confirmed also even when the Italian extended confiscation is applied in the enforcement procedure as previously envisaged in case law (Article 676 of the Code of Criminal Procedure, a practice recognized by the United Sections with the Deourach sentence and most

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142 Court of Cassation, JC, 17 December 2003, no. 920, Montella, in C.e.d., no. 226492

143 In English so F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 324.

144 See A.M.MAUGERI, *Art. 240 bis c.p.*, in *Codice penale*, a cura di T.PADOVANI, collana, *Le fonti del diritto italiano - i testi fondamentali commentati con la dottrina e annotati con la giurisprudenza,* coordinato da CAPUTO-DE FRANCESCO-FIDELBO-VALLINI, Giuffrè Francis Lefebvre, Tomo I, 2019, 1624 ss.

145 Corte cost., 9.6.2015, n. 106; cfr. Cass., Sez. VI, 4.6.2014, n. 39911; Cass., Sez. I, 10.6.2014, n. 52058.

146 ECtHR, I section, 25 September 2008, *Paraponiaris v. Greece*, ref. no. 42132/06.

recently by the Constitutional Court with sentence no. 33 /2018) and today by paragraph 1 of art. 183-quater of the decree Leg. 271/1989 ("Execution of confiscation in special cases") introduced by Legislative Decree no. 21/2018, because in any case it is a "procedure in criminal matters" based on the autonomous meaning adopted by the European Union and that is, as specified in recital no. 13, in the notion of "proceedings related to a crime".

15. Issues of constitutionality.

The modern types of extended confiscation intended to fight criminal organisations, also appear in themselves to be symptomatic of the change in paradigms that characterises more generally contemporary criminal law in the passage from a 'classic' model to a 'modern or 'post-modern' one [147]; in this perspective one can understand the difficulties in reconciling these modern sanctions with the principles of the liberal tradition of criminal law and the guaranteeing of the rights of citizens.

According to part of the doctrinal thought the type of "extended" confiscation included in art. 240 bis c.p. violates some constitutional principles [148].

These legislative forms of confiscation are criticised by academic writers at the national level, particularly as regards the compatibility of such forms of confiscation with the principle of no-retroactivity, with the presumption of innocence, with the principle of proportionality and with the protection of property rights.

As examined, the principle of no-retroactivity is not applied to the confiscation security measure (art. 200 c.p.), as – in the legislator's opinion – the extended confiscation pursuant to art. 240 bis c.p. In relation to the British confiscation - which is a form of extended confiscation after conviction - the decision adopted by the ECtHR in the Welch v. United Kingdom case has specified that confiscation, considered as a "penalty" in this judgement, does not violate art. 7 of the Convention, where it allows the confiscation of profits deriving from crimes committed before the entry into force of the Drug Trafficking Offenses Act of 1986 (which entered into force on 12 January 1987), provided that the confiscation order is pronounced in relation to a crime committed after the entry into force of the Act; if you do not want to violate the art. 7, the offender must have "his eyes open in relation to the possible consequences" that may derive from the perpetration of the crime, in this case also the confiscation of the profits deriving from previous crimes[149]. The prohibition of art. 7, specifies the European Court of Human Rights, "concerns only the retroactive application of the relevant legislation and is not in question in relation to the power of confiscation conferred on the courts as a weapon in the battle against the scourge of drug trafficking" [150].

The Italian Supreme Court has denied that an argument can be drawn from the Welch sentence to support the non-retroactivity of the extended confiscation pursuant to art. 12 sexies l. 356/'92 (now art. 240 bis c.p.) - which continues to be applied retroactively as security measure ex art. 200 criminal code -, highlighting the "absolute incompatibility of the institutions compared"[151]. In reality, the principle of law expressed by the Welch decision should apply to all forms of extended confiscation of profits, but the Supreme Court considered it more functional to its efficiency needs not to take into consideration the guarantee recognized by art. 7 of the Convention.

In a way more consistent with the safeguards, the German legislator has also subjected to the principle of non-retroactivity the Erweiterter Verfall (§ 73d StGB introduced in 1992, now – after the 2017 reform - § 73 a StGB Erweiterte Einziehung von Taterträgen bei Tätern und

147 C.VISCONTI-G.FIANDACA, *cit.*, 73; see also MAUGERI, *cit.*, 5 ss.; G.FIANDACA-E.MUSCO, *Perdita di legittimazione del diritto penale*, in *Riv. it. dir. proc. pen.* 1994, 24; LÜDERSSEN, *Züruck zum guten alten, liberalen, anständigen Kernstrafrecht?*, in *Fest. Jäger* 1993, 268 ss..

148 A.M.MAUGERI, *Le moderne sanzioni, cit.*, 668 ss., 736 ss., 754 ss., 831 ss.

149 European Court Human Rights (ECHR), *Welch*, cit., 1 ss.

150 ECourtHR, *Welch*, *cit.*.

151 Cass., 28.1.2003, Scuto e altri, in *Foro it.* 2003, II, 514.

Teilnehmern), a form of extended confiscation which affects profits of suspicious origin[152] and does not constitute a Strafe but a Maßnahme pursuant to §§ 11 paragraph 1, n. 8, and 61 StGB[153].

In Supreme Court's (fundamental the Montellla case 2004) and Constitutional Court's (18/1996; 33/2018; 24/2019, see § 2 and 6) opinion, as examined, this form of confiscation means a mitigation of the constitutional safeguards in respect of property right, but it is acceptable in consideration of the position of the property right in the scale of the constitutional values; the principle of no retroactivity is not violated because it concerns only the punishment; there is no reversal of the burden of the proof (only a "burden of allegation") and no violation of the presumption of innocence, which only concerns the protection of the personal freedom; the right to defence is respected because the owner can demonstrate the lawful source of his assets (see § 6.) [154].

Some scholars think that there is a price to pay in terms of citizens' guarantees for a more effective fight against organised crime, the strategic objective being to attack the economic base of organised crime through the property of the individual criminal and thus to restrict the further spread of such a serious social disease and to prevent the pollution of the legal economy as a result of the laundering of dirty money. The property of members of organised crime is 'dangerous' because it is liable to be used for unlawful purposes including the reinvestment of the relative capital in legitimate economic activities. If it is true that organised crime posts a serious threat to democratic principles, it is necessary to counter this threat by relying on new mechanisms while at the same time updating the classical notion of guaranteeing citizens' rights. Historically, the fundamental safeguards offered by a penal system take as their reference point punitive sanctions that impinge on the value of personal liberty - a value which is still of primary importance today; classic penal principles should be mitigated when the sanction exclusively affects property rights and then only with preventative objectives in mind. An affirmative argument assumes that in the current evolutionary stage of legal systems, property rights no longer occupy a primary position in constitutional values but certainly rank below the importance attributed to personal liberty [155].

This is true, but, as United States Supreme Court observed in *United States vs. James Daniel Good Real Property*, freedom finds a tangible expression in property, there is an indissoluble bond between right of freedom and property right [156]; if a government has an uncontrollable power on property rights of a citizen, all other rights became without value [157] (if a government can confiscate liberally the assets of citizens, there is no more freedom, because property is a guarantee for freedom). Art. 1 of the Protocol of the European Convention of Human Rights affirms: "property rights are a condition for personal and familiar independence". Property is also a tool to express the freedom of economic initiative [158].

Furthermore, if the proof of illicit source is lacking, confiscation is a penalty which must be proportionate to the gravity of the crime and to guilt; a sanction that can confiscate all the property without the evidence of the illicit origin violates the principle of proportionality and the principle of culpability, because this sanction is based on suspicions of the commission of other, unproven, crimes

The presumption of innocence is incompatible with this kind of sanctions, based on the reverse onus of proof, because according to this fundamental principle of a democratic State all the facts, on which the penalty is founded, have to be proved in criminal proceedings with the safeguards of

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152 BGH, 20.9.1995, 3 StR 267/95 (LG Krefeld), in *NJW* 1996, 136; *BGH,* 19.11.1993, 2 StR 468/93 (LG Köln), in *NStZ* 1994, 123; BGH, 27.4.2001, 3 StR 132101 (LG Itzehoe), in *NStZ* 2001, 419.

153 BVerfG, 14. 1. 2004 - 2 BvR 564/95, § 58 ss., cfr. § 70 – 72.

154 In this direction L.FORNARI, *Criminalità del profitto e tecniche sanzionatorie. Confisca e sanzioni pecuniarie nel diritto penale moderno*, Padova 1997, 222; see also A.GIALANELLA, *Funzionalità e limiti garantisti dell'ordinamento penale alla difficile "prova" delle misure di prevenzione patrimoniale*, in *Crit. dir.* 1999, 548.

155 G.FIANDACA – S.COSTANTINO, *op. cit.*, 81 – 82.

156 *United States v. James Daniel Good Real Property,* 114 Supreme Court 492 (1993).

157 *Lynch v. Household Finance Corp*., 405 U.S. 538, 552 (1972).

158 *United States v. James Daniel Good Real Property,* 114 Supreme Court 492 (1993); MAUGERI, *cit.*, 670.

the criminal law, whereas in the confiscation proceeding the other crimes (if it is required the conviction) or the crimes (in the *actio in rem*) from which the unlawful assets derive aren't demonstrated; in these procedures the estate is confiscated only on the assumption that it comes from offences but without the proofs of this unlawful origin. The safeguards of the criminal procedure are not respected, first of all the right to silence, because the presumptions of the illegal origin can become proof if the owner fails to refute the assumption, this means that the silence acquires a probative value. The presumption of innocence, then, requires that the burden to establish the unlawful origin of assets is on the prosecution, that the evidence must be enough to overcome the presumption of innocence and that the method used to obtain the evidence respects the guarantees of the defendant -in particular the right to defence and the connected right to silence -(as far as to respect the presumption of innocence as rule for the dignity of the proof)[159].

In conclusion, in order to find a good balance between the exigencies of the efficiency in the fight against criminal organisations and the protection of the citizens' safeguards, it would be better if the prosecutor had at least the burden to demonstrate the unlawful source of the assets by circumstantial evidence; this doesn't mean that the prosecutor must prove the relationship between goods and specific crimes, but only the illicit origin of the assets. Moreover, in the implementation of kinds of confiscation extended in such a way as to affect the whole estate, the civil standard of proof is not acceptable in order to respect the fundamental guarantees of the presumption of innocence, the right to silence, the property right and the proportionality principle. U.S. authors also criticise the discipline of the civil forfeiture and urge the adoption of a higher standard of the proof: "*Increasing the evidentiary burden would prevent the government from seizing property based on flimsy evidence, such as the commonly used theory that possession of a large sum of cash itself indicates criminal activity*" [160].

To conclude, it is important to stress, as analysed, that the Supreme Court and the Constitutional Court demand the proof of the **disproportionate character in relation to each asset at the moment of the purchase** and the "**temporal reasonableness**"; not only, as the Constitutional Court has highlighted, it would be important that the proof of the disproportionate character is interpreted as a evidence of the criminal origin because the asset are confiscated because they derive from crime and not because the value is disproportionate.

In other legal system the proof of the disproportionality is only an important typology of evidence among others; and in perspective of reform this can be a suggestion, but, in any case, this kind of proof in relation to **each good at the moment of the purchase, is very demanding for the prosecutor.**

In perspective of reform, when the extended confiscation is issued in the enforcement proceeding, it would be important to guarantee to the defence the right to contradictory in a hearing, before the confiscation is pronounced.

16. Correspondence of the Italian extended confiscation to the model of Directive no. 42/2014 and needs to reform.

The extended confiscation pursuant to art. 240-bis represents in the Italian legal system the instrument for implementing the extended confiscation model provided for by art. 5 of Directive no. 42/2014 [161].

In implementation of the Directive in the Italian legal system, art. 5 of Legislative Decree 202/2016 extended the scope of application of extended confiscation (art. 12 sexies of Legislative Decree 306/92, now art. 240 bis) to the case of criminal conspiracy aimed at committing crimes of

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159 A.M.MAUGERI, *Le moderne sanzioni patrimoniali*, *cit.*, 775 ss. – 831 ss.

160 Cfr. E.MOORES, Reforming the Civil Asset Forfeiture Reform Act Civil, in *Arizona Law Review,* 777 ss.; United States v. $124,700, 458 F.3d 822, 826 (8th Cir. 2006); *contra* RUI, cit., 157.

161 Extensively A.M.MAUGERI, *La Direttiva 2014/42/UE come strumento di armonizzazione della disciplina della confisca nel diritto comparato*, in *Leg. Pen.* 2021, 25 ss.

forgery, all self-laundering, corruption between private individuals, as well as terrorist crimes, including international ones, and computer crimes.

For the rest, as examined, the extended confiscation pursuant to art. 240 bis of the criminal code can certainly fall within the model of the art. 5 even if it contemplates a less guaranteeing discipline providing for broader powers, first of all when its scope of application also extends to certain crimes against the public administration not covered by the directive (such as embezzlement, disclosure of official secrets); the same Constitutional Court - n. 33/2018 - highlighted that it is an alluvial extension of the extended confiscation outside its original ratio, recalling the legislator to greater caution in the selection of spy crimes.

Furthemore, the directive requires, in accordance with art. 6 of the ECHR, that this form of confiscation be pronounced by the judicial authority, as specified in recitals no. 10 and 14, claiming the jurisdiction of the proceedings, even if not criminal, aimed at the application of this form of confiscation. In the Italian system of law this form of confiscation is applied by a judge, as examined.

In relation to the fundamental profile of the burden and the standard of proof, art. 5 and the recital n. 21 adopt a questionable burden of civil proof (more probable that the goods are of illicit origin), even if reinforced (« much more probable »). In the English version art. 5 requires, in fact, only that the judge is satisfied (" "a court, on the basis of the circumstances of the case, including the specific facts and available evidence, …is satisfied that the property in question is derived from criminal conduct."[162]) rather than « fully convinced », as required in art. 3 of the framework decision n. 212/2005; the latter expression, recalling full conviction, imposed the criminal law standard of civil law systems comparable to the criminal law standard of common law systems, "above any reasonable doubt"[163].

This statutory standard can be defined as reinforced in terms of guarantees because the Directive recital no. 21 requires "it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it *is substantially more probable,* that the property in question has been obtained from criminal conduct than from other activities"[164]; the expression "substantially more probable", ("nettement plus probable") should express the request for a higher standard than the 51% required by the mere civil law standard (more probable than not), which suggests the standard of proof known in common law systems, "clear and evident proof": the probability in favor of illicit origin must decisively prevail over the contrary probabilities, one could say in a "clear and evident manner"[165]. In conclusion, Article 5 could be interpreted like the "clear and convincing evidence" standard, a reinforced civil standard which ensures that the unlawful origin of the proceeds *is certainly more probable than not*. The directive in the recital n. 21 allows also the use of presumptions to apply the extended confiscation.

In this direction in the Italian legal system, this form of confiscation appears to comply with the Directive where it places a weakened burden of proof on the prosecution (it must only prove availability/ownership and disproportionality) and places the burden of allegation on the defense of the lawful origin of his assets.

In any case, it should be considered that where the form of extended confiscation is applied against a subject convicted of participation in a criminal organization or for crimes carried out professionally and as a source of illicit enrichment, the lowest standard of proof – reinforced civil standard – in relation to the illicit origin of enrichment is more justified[166]; the problems arise when the extended confiscation is applied following the conviction for a single crime, not inserted in a context of organized or professional crime, as occurs for example in relation to the confiscation

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[162] Dir. 2014/42, Art. 5.

[163] See A.M.MAUGERI, MAUGERI, *La lotta contro l'accumulazione di patrimoni illeciti*, cit., 574 ss.; in case law see Cass., sez. I, n. 25834/2013

[164] Dir. 2014/42, para. 21.

[165] A.M.MAUGERI, *La Direttiva 2014/42/UE*, cit., 187; see BOUCHT, 137

[166] See BOUCHT, *Extended confiscation: Criminal Assets or Criminal Owners*, in LIGETI-SIMONATO 2017, 148

pursuant to art. 240-bis which can also be applied on the basis of the conviction for embezzlement by profiting from the error of others (art. 316 of the criminal code) or the use of inventions or discoveries known for official reasons (art. 325 of the criminal code).

The final version of the Directive accepted the LIBE Commission's amendment proposal regarding the need to include the requirement of the ***disproportionate*** character of the value of an asset with respect to the legitimate income of the convicted person as an example of a "specific fact", on which to base the conviction by the judge of the criminal origin of the assets to be confiscated ("the fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct"[167]). This element is relied on by Article 12 *sexies* of Law Decree 306/1992, now art. 240 bis of the Italian system[168], even if, as the Constitutional Court stressed (n. 33/2018), the Italian legislation is more severe where it is satisfied with this element of disproportion to establish the illict origin of the assets to be confiscated, while in the Directive the disproportionate value of the assets constitutes only a circumstantial element among other „circumstances of the case, including the specific facts and available evidence".

The directive indicates the opportunity to request the insertion of an element of temporal delimitation of the presumption of illicit origin of the assets to be confiscated (recital n. 21). This element, as examined, is required - through interpretation - by the most recent Italian jurisprudence, according to a consolidated orientation.

Another important limit to the extension of this model of confiscation derives from the definition of the concept of 'proceeds' in the Directive, recital 11: "… proceeds can include any property … which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds". This specification – "up to the assessed value of the intermingled proceeds" – is very important, as discussed above, against the temptation to apply the extended confiscation (art. 240 bis c.p.) (or the preventive measure[169]) - to entire companies when the illicit proceeds were invested in the business, because it would be impossible to separate licit from illicit property. In this way, the extended confiscation becomes a kind of general confiscation, a disproportionate punishment in violation of the legality principle and of the constitutional protection of private property, as well as of the principle of proportionality[170].

Basically, then, the confiscation pursuant to art. 240-bis complies with the Directive, even if, as underlined by the Constitutional Court (n. 33/2018), the latter claims the conviction of the judge, even if on the basis of the reinforced civil law standard, of the illicit origin of the assets to be confiscate and not only of disproportionality, which represents a mere circumstantial element on which to base the conviction of the judge. However, the directive does not exclude the possibility that the Member States may introduce more extensive powers, probably with fewer guarantees, as confirmed in recital no. 22 and, in any case, also in the Italian model the Supreme Court, as examined, demand the ascertainment of the disproportionate value for each asset in the moment of the acquisition and the disproportionality is considered as proof of the illegal origin, because the assets are confiscated for the illegal origin and not for the disproportionate value (Const. Court n. 33/2018).

In the 2022 draft directive this model of confiscation remains the same in art. 14[171], which includes in two paragraphs what is written in one paragraph in art. 5 of the current directive.

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[167] Dir. 2014/42, para.21.

[168] See Corte Costituzionale (1996) n. 18, Basco, in Cassazione Penale (1996), 1385.

[169] Art. 2 *ter* l. 575/65 – Art. 24 preventive measures code.

[170] A.M.MAUGERI, *'Dalla riforma delle misure di prevenzione patrimoniali alla confisca generale dei beni contro il terrorismo'*, in O.Mazza-F.Viganò (eds), *Il "Pacchetto sicurezza" 2009* (Giappichelli 2009), 425; ID., 'Dall' actio in rem alla responsabilità da reato delle persone giuridiche', in C.Visconti – G.Fiandaca (eds), *Scenari attuali di mafia* (Giappichelli 2010), 297 ss.; ID., *La Suprema Corte*, 337 and quoted case law; among others, Cass., sez.V, n. 12493/2014

[171] **Extended confiscation**

To conclude, as analysed, some aspects should be reformed to make this form of confiscation more compliant with the principles of criminal matter: according to the judgment of the Constitutional Court. no. 33/2018, the limitation of the scope and a better weighting by the legislator in the choice of „spy crimes"; considering the proof of the disproportionality only an important typology of evidence among others (including the possibility of justifying the legitimate origin of property through the asset subtracted from taxation); express provision of the requirement of temporal reasonableness (according to recital n. 21 Directive 42/2014, previously art. 3 of the framework decision 212/2005); when the extended confiscation is issued in the enforcement proceeding, it would be important to guarantee to the defence the right to contradictory in a hearing, before the confiscation is pronounced; to enforce compliance with the principle of non-retroactivity; guarantying the application of a clause of proportionality.

17. tual recognition of the Italian extended confiscation order.

Confiscation pursuant to art. 240 bis of the criminal code it should fall within the scope of application of the Regulation considering that it is included in the model of extended confiscation of art. 5 Directive 4/2014 and that this kind of confiscation is normally applied in a criminal trial by the judge of the cognition.

This possibility is confirmed also even when the Italian extended confiscation is applied in the enforcement procedure (Article 676 Code of Criminal Procedure) pursuant to art. 183-quater Leg. Decree 271/1989, § 1 (introduced by Legislative Decree no. 21/2018), because in any case it is a "proceeding in criminal matters" based on the autonomous meaning adopted by the European Union and that is, as specified in recital no. 13, a "proceedings in relation to a criminal offence".

In clarifying the scope of the Regulation the recital 13 specified that proceedings in criminal matters' is an autonomous concept of Union law and it is clarified that "The term therefore covers all types of freezing orders and confiscation orders issued following proceedings **in relation to** a criminal offence"; this expression is repeated in art. 2 in the definition of confiscation: "a final deprivation of property ordered by a court *in relation to a criminal offence*" (in the original proposal "proceeding for a crime"). So, it is enough that the proceeding in front of a judicial authority regards the proceeds and/or instruments of the crime. Also the Directive 2011/99/EU extends the concept of "European protection order" to any measure aimed at protecting an individual from acts of others with criminal relevance, even where such measures are adopted outside of stricto sensu criminal proceedings[172].

This despite the doubts about the compliance of this hybrid procedure with the guarantees of criminal matters where the powers of the execution judge are residual powers and it is allowed to pronounce the confiscation inaudita altera parte (the Chamber hearing can only take place following an objection). In any case the affected can challenge the application of mutual recognition by proving that the fundamental guarantees of criminal matters have been violated in the concrete case and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) ("the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence") and 19, h) („in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence,

1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of property belonging to a person convicted of a criminal offence where this offence is liable to give rise, directly or indirectly, to economic benefit, and where the national court is satisfied that the property is derived from criminal conduct.
2. In determining whether the property in question is derived from criminal conduct, account shall be taken of all the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person.

[172] Direttiva 2011/99/UE del Parlamento europeo e del Consiglio del 13 dicembre 2011 sull'ordine di protezione europeo, considerando n. 9 e 10. Sul punto v. S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders*, p. 205.

that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence")[173].

Furthermore, it is true that, as stressed in the Explanatory Memorandum of the proposed regulation, the ECtHR has repeatedly considered compliant with art. 6 of the ECHR and the property right pursuant to art. 1 of the Additional Protocol of the ECHR, forms of confiscation, even without conviction, based on presumptions, provided that they are refutable and "if effective procedural safeguards are respected", in line with directive 2016/343 on the presumption of innocence (which in recital n. 22 admits the use of presumptions); however, the same Directive 2016/343 demands respect for the right to silence, as an important aspect of the presumption of innocence (recital no. 24). And, then, it is not possible to base the proof of the illicit origin of the assets on the silence of the defendant or proposed or to attribute probative dignity to it, as instead normally happens in the application of forms of extended confiscation, including confiscation pursuant to art. 240 bis of the criminal code, in relation to which the jurisprudence demands from the affected an exhaustive explanation of how the assets were formed economically (C.S.U., n. 920/2004, Montella; C., n. 2761/1994; C. II, n. 32563/ 2011).

In this way, in order to improve the mutual recognition of this form of extended confiscation, the application of the Regulation should represent an incentive for the adoption of a model of trial against assets compliant with criminal law guarantees, starting from the standard of criminal law proof of the illicit origin of assets.

[173] S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: A headlong rush into Europe-wide harmonisation*?, in *NJECL* 2022, 206 s.: „The European legislator's efforts to tighten up the terms of the grounds for refusal and prevent an 'excess of guarantees' from hindering the machinery of mutual recognition has led to some truly disconcerting redundancies. The *exceptionality* of the situation and the *specificity* of the circumstances of the case are not enough; it is also necessary that the violation is *manifest*, that the right affected is of particular importance and that the conviction of the executing authority as to the likelihood of such an attack is based on *substantial* grounds and on *specific and objective* evidence".

PART III. THE NON-CONVICTION BASED CONFISCATION IN THE ITALIAN LEGAL SYSTEM: THE PREVENTIVE CONFISCATION

9. **Index:** 1. The preventive confiscation. - 2. The recipients and the principle of legality (De Tommaso judgement of the ECourtHR and Const. Court. n. 24/2019). - 3. The objective elements. - 4. The nature of the preventive confiscation. – 4.1. The nature of the preventive confiscation in the European Court Human Right's case law. - 4.2. The critics by the doctrine. – 5. The consistency of the preventive confiscation with the principle of criminal matter: the ECourtHR and Court Constitutional case law. - 5.1. The principle of legality. – 5.2. The property right. – 5.3. The presumption of innocence and fair trial principles. – 5.4. Ne bis in idem principle. - 6. The confiscation ex art. 34 Antimafia code. – 7. Procedural aspects. - 7.1. Chamber Hearing in the prevention proceedings. – 7.2. Others procedural guarantees. - 7.3. The appeal. - 7.4. Revocation. – 8. The protection of third parties in the preventive proceeding. – 9. Seizure „for prevention" envisaged by the „Anti-Mafia Code". - 10. Correspondence of the Italian non-conviction based confiscation to the models of Directive no. 42/2014 and of the proposal of new Directive (art. 15 and 16). – 11. The application of the Regulation n. 1805/2018.

1. The preventive confiscation.

The law 13 September 1982 n. 646 regulating "Mafia-type criminal association and provisions on preventive measures concerning property" (known as the "Rognoni-La Torre Act" from the names of the parliamentarians that proposed it) marks a turning point in the fight against organised crime. The article 416 bis, governing the crime of mafia-type criminal association, was introduced into the criminal code[174].

In order to counter the economic interests of the mafia, the "Rognoni-La Torre Act" introduced the anti-mafia seizure and confiscation (articles 2 bis, 2 ter and 2 quater). These additions radically change the contrast strategy against Mafia, which now hinges on the fight against the illicit assets. The innovations can be summarised as follows: it is established a link between preventive measures against persons and preventive measures related to property[175].

After some reforms[176], in 2011 Legislative Decree no. 159/2011 introduced the 'Code of antimafia laws, relevant preventive measures and new antimafia provisions' (hereafter Antimafia

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174 This is a special form of criminal association whose main characteristics are: - its members use the intimidating power of the organization and the resulting code of silence and intimidation, regardless of the commission of acts of violence or threat. - Participants of the mafia-type association make use of such intimidating power in order to: 1. commit crimes; 2. acquire (directly or indirectly) the management, or other forms of control, of economic activities, licences, permits, public contracts or services or gain unfair advantages or profits for its members or other persons 3. prevent or hinder the free exercise of the right to vote, or secure votes for its members or other persons in elections

175 Accordingly, "the public prosecutor and the Chief of the police competent for requesting the application of preventive measures, shall, even with the assistance of the tax police ("Guardia di Finanza"), conduct investigations on the person's standard of living ("tenore di vita"), financial resources and assets, in order to determine their origin". Such investigations are extended to the family members of the person suspected of belonging to the mafia-type organization. But the major changes introduced by the "Rognoni-La Torre Act" of 1982 concern the criteria assessed in the prevention related to property: that of "sufficient evidence" and that of "evidence of legitimate origin of property". Article 2 ter of the "Rognoni-La Torre Act" also provides that the District Court orders ex officio the seizure of goods of which the person suspected of belonging to the mafia may directly or indirectly dispose of, on the basis of sufficient evidence (such as the considerable gap between the living standards and the level of incomes, apparent or declared), and therefore there is reason to believe to be the result of illegal activities or constitute its reuse. Subsequently, if the legitimate provenance of the seized assets is not demonstrated, the District Court orders the definitive measure of confiscation, D.CARDAMONE, CRIMINAL PREVENTION IN ITALY From the "Pica Act" to the "Anti-Mafia Code", in http://www.europeanrights.eu/public/commenti/bronzini1-Cardamone_Criminal_prevention_in_Italy_2.0.pdf; F.MENDITTO, *Le misure di prevenzione personali e patrimoniali*, Milano, 2019.

176 Inter alia, l. n. 125/2008 and l. n. 94/2009.

Code). The Antimafia Code combined all the previous legislation into a unique normative corpus and is currently the main reference point for preventive measures.

The legislation on preventive measures provides for different forms of extended confiscation which are characterised by their ability to be applied to specific categories of persons who have not been attributed criminal responsibility through sentencing (not convicted), but only suspected (on circumstantial evidence) of criminal activities, persons considered a danger to society because suspected to be involved in crimes. In preventive proceeding it is not necessary to establish criminal liability for events committed in the past and which may lead to a conviction, the *decision being based on "circumstantial evidence"*. The preventive procedure may develop independently of criminal procedure so much so that it has often been pointed out by some scholar that the very prosecutorial elements that in a criminal trial have not led to conviction for participation in mafia association, can warrant the application of preventive measures[177].

For this reason such ablative measures are differentiated from traditional confiscation and are not really considered preventive measures - ante delicti, applied in order to prevent the commission of crimes - but *praeter probationem delicti* measures[178].

In the past they are applied together with personal preventive measures (special surveillance by the police or the prohibition or obligation of residence in a specific location) to currently dangerous people, after the 2008/2009 reforms it is possible to apply the preventive confiscation without imposing personal preventive measures (which require the proof of current dangerousness) (the principle of disjoint application) and even in cases where the owner dies during the proceeding or has died in the five years before the beginning of the procedure (art. 18 Ant. Code[179]).

It is possible to distinguish two types of preventive confiscation:

the provision for the confiscation of assets which a subject has at his disposal, when the value of said assets is disproportionate to declared income or economic activity, or when *it transpires (results)* that they are derived from illicit activity or used for reinvestment, and, at any rate, are assets for which the defendant has not demonstrated a legitimate origin (art. 24 Leg. Decree 159/2011) [180];

the provision regarding assets used in the exercise of an economic activity which, based on sufficient grounds, are considered objectively useful for the activity of persons who are considered

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177 HEIN-VISCONTI, *Proventi illeciti e il loro contrasto in Italia, con le forme camerali. in Il crìmine organizzato come fenomeno transnazionale*, a cura di Militello-Paoli-Arnold, Milano 2000, 95.

178 For this expression A.M.MAUGERI, *Le moderne sanzioni, cit.*, 366 – 367; C.E.PALIERO – A.TRAVI, *La sanzione amministrativa. Profili sistematici*, Milano 1988, 33 – 34; S.HEIN-C.VISCONTI, *Combating Illegal Proceeds in Italy*, in MILITELLO – HUBER (eds.), *Towards a European Criminal Law against organised crime – Proposal and summaries of the joint European project to counter organised crime*, Freiburg im Br., 2001, 9294; about the confiscation - preventive measure A.M.MAUGERI, *Le moderne sanzioni, cit.*, 348 ss.; Art. 2 *ter* l. 575/'65, before the reform of 2008 e 2009, saied: "... the District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person against whom the proceedings have been instituted, when there is sufficient circumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment.
Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized in respect of which it has not been shown that they were lawfully acquired. Where the inquiries are complex, this measure may also be taken at a later date, but not more than one year after the date of the seizure.
The District Court shall revoke the seizure order when the application for preventive measures is dismissed or when it has been shown that the property in question was lawfully acquired."

179 Art.18, 2. Asset preventive measures can also be ordered in the event of the death of the subject proposed for their application. In this case **the proceeding continues against the heirs** or in any case the assignees.
3. The patrimonial preventive procedure **can also be initiated in the event of the death** of the subject against whom confiscation could be ordered; in this case, the request for the application of the preventive measure can be proposed with regard to the successors in a universal or particular capacity within the term **of five years** from the death.
The asset preventive procedure **can be initiated or continued even in the event of absence, residence or stay abroad** of the person to whom the preventive measure could apply, upon proposal by the subjects referred to in article 17 competent for the place of last abode of the interested party, in relation to goods that there are reasons to believe are the result of illegal activities or constitute their reuse.

180 Art. 2 *ter,* l. 575/1965, introduced by art. 14 l. 646/1982, and now art. 24 of the Antimafia Code.

for preventive measures or if the person is the subject of ongoing criminal proceedings for crimes linked to organised crime, whether *there is motive to believe* that these assets are the fruit of illicit activity or constitute the reinvestment of such assets, and the owner has not demonstrated a legitimate origin (art. 34 Leg. Decree 159/2011) [181].

2. **The recipients and the principle of legality (De Tommaso judgement of the ECourtHR and Const. Court. n. 24/2019)**

Also after the separation of the patrimonial (against the assets) and personal preventive measures with the 2008/2009 reforms, it is not a truly *actio in rem* [182], because in any case the law (art. 6 Antimafia code), the Constitutional Court and the Supreme Court demand the **"pericolosità sociale"** (danger to society), even if it **isn't current**, this means that he/she was in the past a danger to society on the basis of circumstantial evidence of criminal activity or some kind of involvement in criminal activities or proximity to organised crime (art. 6 Ant. Code) [183]; the Supreme Court (United Sections Spinelli 2014) established that the confiscation becomes a punitive and uncivil sanction without the ascertainment of the dangerousness of the affected person, even if in the past.

The recipients are, amongst others, person who: ("special dangerousness")

according to art. 16 Antimafia Code, are - based on objectively verifiable facts - suspected (under investigation) for affiliation with the Mafia, Camorra or other criminal groups, however they may be known locally, that act according to typical methods of mafia groups" (art. 1, l. 575/1965, as modified by the law 646/1982 and now art. 4 Antimafia Code),

or suspected ("under investigation") for commission of the crimes provided in art. 51, § 3 *bis* Criminal Procedure Code (crimes connected to criminal organisations, kidnapping for profit, racketeering, ..) or Article 12-*quinquies*, § 1, law n. 356/1992;

or who have committed acts preparatory to acts of terrorism or are - based on objectively verifiable facts- suspected (under investigation) for terrorism acts (also foreign fighters);

and - ordinary dangerousness (when it was established that the individual posed a danger to public safety.):

"(1) individuals who, on the basis of factual evidence, may be regarded as habitual offenders - (art. 19 l. 152/'75, now art. 4, 1, c) that recalls art. 1 Antimafia Code) (category declared unconstitutional by Constitutional Court, n. 24/2019 after ECourtHR De Tommaso judgement[184]);

(2) individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime; and

(3) individuals who, on the basis of factual evidence, may be regarded as having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public order." ("dangerous for public safety" art. 3, § 1, l. 1423/1956, now art. 4, 1, c) Antimafia Code, that recalls art. 1)

Since 2008/2009 the reforms have been characterized by the extension of the scope of application from the organized crime (also terrorist) sector to the economic crime sector. In fact, these measures were introduced in 1982 by the Rognoni–La Torre law, in the context of the fight against mafia-type associations, but their sphere of application has been extended to all hypotheses of so-called generic danger with two historic reforms introduced by law decree 92/2008 and by the law 94/2009, and in particular with the repeal of art. 14 of Law 55/1990 by the first reform; it

181 Art. 3 *quinquies,* l. 1423/1956, introduced by art. 24 d.l. 306/1992, now art. 34, § 7 of the Antimafia Code.

182 See Corte Cost. 9 February 2012, n. 21, in *Dir. pen. cont.*, www.penalecontemporaneo.it/.

183 Corte Cost. 9 February 2012, n. 21.

184 F.VIGANÒ, *La Corte di Strasburgo assesta un duro colpo alla disciplina italiana delle misure di prevenzione personali*, in *DPC*, 3 marzo 2017; A.M. MAUGERI, *Misure di prevenzione e fattispecie a pericolosità generica: la Corte Europea condanna l'Italia per la mancanza di qualità della "legge", ma una rondine non fa primavera*, *ibidem*, 6 marzo 2017; R.MAGI, *Per uno statuto unitario dell'apprezzamento della pericolosità sociale*, *ivi* 13 marzo 2017; M.FATTORE, *Così lontani così vicini: il diritto penale e le misure di prevenzione,* ivi 9 aprile 2017; F.MENDITTO, *La sentenza De Tommaso c. Italia: verso la piena modernizzazione e la compatibilità convenzionale del sistema della prevenzione*, in *Dir. Pen. Cont.*, 4, 2017, 129

follows that these measures are also applied to crimes that are not serious in terms of the risk of pollution of the lawful economy by assets of criminal origin, such as theft or embezzlement.

The presumption of illicit enrichment - on which the preventive confiscation is built- was based on the connection of the criminal activity with that invasive and very serious phenomenon represented by the mafia-type association, as a permanent crime aimed at enrichment; with the indiscriminate extension to the scope of these measures (to the so called generic danger), the presumption in question risks being deprived of a rational foundation, where it is applied to subjects suspected of any crime.

The ECourtHR has established in De Tommaso case that personal preventive measure violated art. 2 Prot. 4 ECHR which provides that any measure restricting the freedom of movement must be adopted in accordance with domestic law, for the lack of foreseeability of the relevant Act, thus resulting in excessive discretion in defining the category of generic dangerousness on the part of the judge. Notwithstanding judgments of the Constitutional Court clarifying the criteria by which to assess the need for preventive measures under the Act in question, the Act was found to be couched in vague and excessively broad terms. Neither the individuals to whom the measures were applicable (for example, those "who, on account of their behavior and lifestyle and on the basis of factual evidence may be regarded as habitually living, even in part, on the proceeds of crime") nor the content of certain measures (requiring, for example, one "to lead an honest and law-abiding life" and not to give "cause for suspicion") were defined by law with sufficient precision and clarity to comply with the foreseeability requirements of Article 2 of Protocol No. 4 to the Convention. "Notwithstanding the fact that the Constitutional Court has intervened on several occasions to clarify the criteria to be used for assessing whether preventive measures are necessary, the imposition of such measures remains linked to a prospective analysis by the domestic courts, seeing that neither the Act nor the Constitutional Court have clearly identified the "factual evidence" or the specific types of behavior which must be taken into consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures. The Court therefore considers that the Act in question did not contain sufficiently detailed provisions as to what types of behavior were to be regarded as posing a danger to society". The law in force "was therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures"[185].

Referring also to the case law of the ECtHR and in particular the De Tommaso case, the Constitutional Court (n. 24/2019) declared unconstitutional the provision allowing for the first type of personal and in rem preventive measures, art. 1 letter (a) legislative decree n. 159/2011; the Court has declared unconstitutional the art. 4, paragraph 1, letter (c), of Legislative Decree no. 159 of 2011, in the part in which it establishes that the measures envisaged by chapter II also apply to the subjects indicated in art. 1, letter (a), as well as art. 16 of Legislative Decree no. 159 of 2011, in the part in which it establishes that the preventive measures of seizure and confiscation, governed by articles 20 and 24, also apply to the subjects indicated in art. 1, paragraph 1, letter (a), and that is to «those who must be considered, on the basis of elements of fact, habitually engaged in unlawful

185 "118. The Court notes that in the present case the court responsible for imposing the preventive measure on the applicant based its decision on the existence of "active" criminal tendencies on his part, albeit without attributing any specific behaviour or criminal activity to him. Furthermore, the court mentioned as grounds for the preventive measure the fact that the applicant had no "fixed and lawful occupation" and that his life was characterised by regular association with prominent local criminals ("malavita") and the commission of offences (see paragraphs 15-16 above). In other words, the court based its reasoning on the assumption of "criminal tendencies", a criterion that the Constitutional Court had already considered insufficient – in its judgment no. 177 of 1980 – to define a category of individuals to whom preventive measures could be applied (see paragraph 55 above). Thus, the Court considers that the law in force at the relevant time (section 1 of the 1956 Act) did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts, and was therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures".

dealings » (letter (a) above). However, it declined to make a similar ruling to measures issued on the basis of letter (b) above. Whilst the legislation was sufficiently precise in relation to letter (b), the wording of letter (a) was inherently imprecise (in particular as regards the terms "unlawful dealings" and "habitually") in a manner that could not be rectified through judicial interpretation. "Therefore, even if considered in the light of the case law that has hitherto attempted to clarify its scope, the legislative description in question does not satisfy the requirements of precision laid down both by Article 13 of the Constitution and, with reference to Article 117(1) of the Constitution, by Article 2 of Protocol no. 4 of the ECHR as regards the personal preventive measures of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location; it also fails to satisfy the requirements imposed by Article 42 of the Constitution and, with reference to Article 117(1) of the Constitution, by Article 1 of the Additional Protocol to the ECHR as regards the in rem measures of seizure and confiscation".

In relation to art. 1 letter (b) Legislative decree n. 159/2011, in order to identify the "crime categories" that can be assumed as a precondition for the measure, the Constitutional Court demands "the **triple requirement** - to be proved on the basis of precise "factual elements", which the court will have to promptly account for in the **reasoning** of the judgment (Article 13, second paragraph, of the Constitution) - for which it must be a) **crimes habitually committed** (and therefore over a significant period of time) by the subject, b) which have **effectively generated profits** for the latter, c) which in turn constitute – or have constituted in a given period – the **only income** of the subject, or at least a **significant component** of this income" [186].

In any case, on the basis of a more recent jurisprudential orientation, the Supreme Court distinguishes the **cognitive** phase from the **prognostic** phase of the judgment of social danger and claims that the cognitive judgment is strictly based on the verification of **facts** «historically appreciable and constituting in turn "indicators" of the possibility of registering the proposed subject in one of the criminological categories provided for by the law (the ascertaining and therefore reconstructive part of the judgement)»[187].

The most recent jurisprudence[188], even prior to the De Tommaso sentence, in attributing to the proposed person the condition of "dangerous", does not make "a subjective and uncontrollable brand judgment", but "requires a complex operation preliminary 'framing' of the subject - by virtue of the appreciation of facts- in one of the 'typifying' criminological categories of legislative rank, and this both on the front of the so-called generic and of the qualified dangerousness". It is reiterated, as highlighted in the Scagliarini sentence, that "no preventive measure (whether personal or patrimonial) can therefore be applied where there is a lack of an adequate reconstruction of "facts" suitable for determining the classification (current or previous) of the subject proposed in one of the «specific categories» of danger expressly «typified» by the legislator in art. 1 and art. 4 of the current Legislative Decree no. 159 of 2021"; it is specified that "the judgment of prevention (...) is structured, above all, as a "cognitive" judgment, aimed at reconstructing, preliminarily, certain behaviours' put in place by the subject observed"[189].

As stated in the Bosco ruling, "in compliance with these principles, it was reiterated that [..] the description of the 'criminological category' referred to in articles 1 and 4 of Legislative Decree no. 159 of 2011 therefore has the same "value" that in the criminal system is assigned to the incriminating rule, i.e. it expresses the 'previous' selection and connotation, with primary source, of the *relevant factual parameters*, which can be represented by a specific conduct (the hypotheses of

[186] Cfr. Cass., Sez. II, 1.1.2018, n. 30974.

[187] Cass., Sez. I, 1 febbraio 2018, n. 24707, Oliveri; Cass., Sez. I, 15.6.2017 (dep. 9.1.2018), Bosco Mario. n. 349; Cass., Sez. I, 14.6.2017 (dep. 30.11.2017), n. 54119, Sottile; Cass., Sez. VI, 11.10.2017, n. 2385; Cass., sez. I, 1.4.2019, n. 27696, Immobiliare Peonia s.r.l.; Cass., sez. VI, 21.9.2017, n. 53003, D'Alessandro.

[188] Cass., Sez. I, 24.3.2015, n. 31209, *Scagliarini*; Sez. II, 4.6.2015, n. 26235, Friolo; Sez. I, 11.6.2015, *Pagone*, n. 43720*;* Sez. I, 2.2.2016, *Targia*, n. 16038; Cass., sez. I, 14.6.2017 (dep. 21/07/2017), n. 36258.

[189] Cass., Sez. I, 1.2.2018, n. 24707, Oliveri.

'indication of commission' of a particular crime, with qualified dangerousness) or by a 'group of conducts' (the hypotheses of generic dangerousness)"[190].

In these judgments, despite continuing to deny the sanctioning nature of the measures in question, the guarantee principles of criminal law are expressly applied to preventive measures, inasmuch as they do not limit themselves to claiming the legal provision of the measure - as expressly sanctioned by the art. 25, § 3 Constitution for security measures -, but in line with the same De Tommaso judgment, full application of the principle of precision, anchored to the principle of legality, is expected, as a guarantee of the predictability of the authority's intervention; in this manner, **the preventive measure fall substantially within the notion of criminal matter**, at least in the broad conventional sense (if one refers to the parameters of the Edu Court) or constitutional [191] (the two concepts do not necessarily coincide[192]), in which to recognize some of the safeguards which are specific of criminal law in a sort of "variable geometry of guarantees" [193].

In this way, for the generic dangerousness the most recent and guarantee jurisprudence is not satisfied with mere suspicions or even clues (circumstantial evidence), rather requiring criminal and judicial ***precedents (precedent judgements)*** (as the Supreme Court states in the Spinelli sentence). As underlined by the Constitutional Court itself, n. 24/2019, "a previous criminal **ascertainment** is required, which can derive from a conviction or from an acquittal sentence for prescription (limitation statute), amnesty or pardon which contains in the motivation an ascertainment of the existence of the fact and its commission by that subject (Court of Cassation, n. 11846 of 2018, n. 53003 of 2017 and n. 31209 of 2015)" (§ 11); the existence of an acquittal sentence on the merits for a given fact does not allow, also in the light of the provisions of art. 28, paragraph 1, lett. b), that it (the fact) can be taken as the basis of the measure, except for some exceptional hypotheses[194], above all where the "cognitive interference" between the two procedures (preventive and criminal) falls on an essential ingredient of the reconstructive part of the preventive judgment; the assessment of **habituality to the crime** cannot be drawn from acquittal judgements, nor from the pending of another criminal proceeding[195]. "Mere clues (circumstantial evidence) are not enough, because the term used should be considered deliberately different and more rigorous than that used by art. 4 of Legislative Decree no. 159 of 2011 for the identification of the categories of so-called qualified danger, where we speak of "*indiziati*""[196].

Also in relation to the hypotheses of qualified dangerousness, the most careful jurisprudence demands and proposes a mandatory judgment in the diagnostic-confirmation phase[197]. It is possible to include into the category of subjects of "qualified dangerousness" those who belong to the mafia association pursuant to art. 1 l. 575/'65 and today those who participate in the association pursuant to art. 4 Legislative Decree No. 159/2011. Vague forms of contiguity (even ideological,

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[190] Cass., Sez. I, 15.6.2017, Bosco Mario. n. 349; Cass., Sez. I, 14.6.2017 (dep. 30.11.2017), n. 54119, Sottile.

[191] Corte Cost. 43/2017; 68/2017.

[192] Cfr. MASERA, *op. cit.*, 21 ss.

[193] MAZZACUVA, (2017), p. 111.

[194] Cass., sez. I, 19.4.2018, n. 43826; Sez. II, 19.1.2018, n. 11846, Carnovale; Cass., Sez. I, 1.2.2018, n. 24707, Oliveri; Cass., sez. I, 1.4.2019, n.27696, Immobiliare Peonia s.r.l..

[195] Court of Cassation, section VI, 8 April 2020, n. 21045. Even if the same Constitutional Court reaffirms the autonomy of the preventive judgment with respect to the criminal one (Cass., section I, 15.6.2017, n. 349; n. 43826/2018; section 1, 24.3.2015, no. 31209; section VI, 29.5.2015, no. 23294; 29.5.2015, no. 2308; section II, 29.5.2015, no. 23041); "while starting from the assumption that "the judge of the preventive measure can reconstruct the historical episodes in question in a totally autonomous way - even in the absence of a related criminal proceeding - by virtue of the absence of prejudice and the possibility of autonomous preventive action" (Cass ., n. 43826 of 2018)" (§ 11); and the sufficiency of elements emerging from pending criminal proceedings, Court of Cassation, section VI, 13 July 2017, n. 36216; Court of Cassation, section VI, 25 June 2020, n. 21060; "The prevention judge is not bound by the existence of a penal judgment", Criminal cassation section II, 18/01/2022, n. 8166.

[196] Constitutional Court n. 24/2018, § which cites Cassation, Section VI, 21 September 2017, no. 53003, D'Alessandro; section I, 19 April 2018, n. 43826. Compliant with the latest Court of Cassation, section I, 1 April 2019, n.27696, Immobiliare Peonia s.r.l.

[197] MAUGERI, *La riforma delle misure di prevenzione patrimoniali ad opera della l. 161/2017 tra istanze efficientiste e tentativi incompiuti di giurisdizionalizzazione del procedimento di prevenzione",* in *Archivio penale, 1 (supplemento),* 337 ss.

commonality of mafia culture, recognized attendance with subjects involved in the association) - as a category with a broader semantic range – are not included[198], but only conduct attributable to the case of mafia-type association, from which they would differ only for the lower degree of proof necessary for the purposes of the judgment of social danger; therefore, it would be required "the evaluation of a situation of contiguity to the association itself that is functional to the interests of the criminal structure (in the sense that the subject must offer an "effective contribution" to the activity and development of the criminal association)"[199]. The notion of "belonging" evokes "being part or at least making a concrete contribution to the group"[200]; or it is requested to ascertain what "the synallagma underlying the attraction of this company in the area of influence of the association" consist of[201]. It is therefore admitted that "the concept of belonging, evoked by the preventive legislation, is broader than that of participation, with the consequent importance attributed in terms of preventive measures to conduct that does not integrate the presence of the stable bond between the proposed and the association, and rather reveal an activity of collaboration, even if not continuous", substantially including external complicity. "In order to base the judgment on current events, the circumstances of the concrete case must be valued, in the light of specific indicators, such as the historical nature of the criminal group, the type of participation offered by the proposed, the particular value of the individual contribution in the life of the group" [202]; the contribution "is substantiated in an action, even isolated, functional to the purposes of the association, with the exclusion of situations of mere contiguity or proximity to the criminal group" [203]. The Supreme Court underlines that this recent orientation "represents a significant interpretative progression compared to previous arrests (including Section 6 n. 9747 of 29.1.2014, rv 259074 and others)[204]; in this direction it is important the affirmation of the more guaranteeing orientation which claims the verification of the social dangerousness and its relevance, for the purposes of the application of personal measures, also for the suspects of belonging to a mafia association; avoiding the use of presumptions such as 'semel sodalis semper sodalis [205].

In any case, the reconstruction is required, "even incidentally (and through the incorporation of knowledge gathered in criminal proceedings and not contested by the outcome of this judgment) of conduct constituting a crime producing illicit income. Such conduct, moreover, must be considered perpetrated (since the illicit income is postulated as an effect deriving from the crime) and therefore assisted by adequate demonstrative support (C.VI, n. 53003/17; C. I, n. 31209/15)" [206].

The need for the judge to take account of the defensive arguments with particular caution in his motivation is also underlined, in particular when a perpetrator accuses of complicity in the crime[207].

Notwithstanding in some judgements it is allowed the application of the preventive measure after acquittal (*sentenza di proscioglimento*), pronounced in accordance with Article 530 § 2 of the Code

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198 Trib. Lecce, 4.11.1989, Riotti, in *Cass. pen.* 1990, 690, Cass., sez. VI, 29.1.2014, n. 9747, *Mass. Uff.* n. 259074; sez. II, 21.2.2012, n. 19943, *Mass. Uff.* n. 252841; sez. II, 16.2.2006, n. 7616, *Mass. Uff.* n. 234745), Cass., sez. un., 2.2.2015, Spinelli, n. 4880, *Mass. Uff.* n. 26260 in *Riv. it. dir. proc. pen.* 2015, 922). See MAUGERI, *La riforma delle misure di prevenzione patrimoniali ad opera della l. 161/2017*, cit., 341 ss.; Id., *I destinatari delle misure di prevenzione tra irrazionali scelte criminogene e il principio di proporzione*, in *Ind. pen.* 2017, 81 ss.

199 Cass., sez. VI, 29.1.2016, *Gagliano ed altri*, n. 3941, *Mass. Uff.* n. 266541; Cass., sez. VI, 8.1.2016, n. 8389.

200 Cass., sez. 1, 14.6 (dep. 30/11) 2017, Sottile, n. 54119.

201 Cass., sez. V, 23.3.2018, n. 20826; Cass., Sez. I, 7.4.2010, n. 16783; Cass., Sez. I, 17.5.2013, L.C., in CED, 256769), cfr. MAUGERI, *I destinatari delle misure di prevenzione*, 37 ss.

202 Cass., sez. V, 23.3.2018, n. 20826; Cass., n. 54119, 2017; Cass., Sez. I, 7 aprile 2010, n. 16783; Cass., Sez. I, 17 maggio 2013, L.C., in CED, 256769).

203 Cass., sez. un., 4.1.2018, n. 111.

204 Cass. 2017 n. 48441.

205 Cass., sez. un., 4 January 2018, Gattuso, n. 111; Cass., sez. I, 5.2.2019, n. 24658; Cass. n. 3309 /2020 ; Corte Costituzionale 2-6.12.2013 n. 291; see Cass., sez. I, 20/04/2022, n.17530

206 MAGI, *Il sequestro e la confisca di prevenzione*, in *Codice delle confische*, edited by T.Epidendio-G.Varraso, 1087.

207 Cass. n. 1831/2016, Mannina.

of Criminal Procedure for insufficient or contradictory evidence[208], and it is stressed the autonomy of the valuation of the judge in the preventive procedure from that one of the judge of the criminal trial[209], in any case it is important to empathise this tendency to improve a serious proceeding of ascertainment with the safeguards of the criminal matter.

3. The objective elements.

In order to apply a preventive confiscation, the prosecutor has to demonstrate that:

the asset must be ***available*** to the person (directly or indirectly);

there must be a ***disproportion*** between the person's declared income or economic activity and the value of the assets – with the reform introduced by l. 161/2017, a consolidated jurisprudential principle was introduced into positive law, according to which the defendant cannot justify the origins of the assets by indicating them as the reinvestment of income generated through tax evasion (without the possibility of demonstrating the proportionate value of the purchases through the proceeds of tax evasion, or even through the taxable income subtracted from taxation);

or the assets **result to be the fruit of unlawful activities or the reinvestment**

and the owner **doesn't demonstrate the proportionate value** of his assets and **doesn't justify the legal origin**; the onus of refuting the presumption lies on the affected who can adduce evidence showing the lawful origin of the property in question[210].

For the concept of **availability** of the assets, the same interpretation is affirmed, which has been examined for the extended confiscation. In particular, art. 26 of Antimafia code (rule introduced by decree law n. 92/2008) establishes that if it is ascertained that certain assets have been falsely registered or transferred to third parties, the judge declares the relative acts of disposal to be null with the decree ordering their confiscation; the following are assumed to be fictitious: a) transfers and assignments, even for payment, carried out during the two years prior to the proposal of the preventive measure, involving a parent, child, spouse, or permanent cohabitant, as well as relatives within the sixth degree, and in-laws within the fourth degree; b) transfers and assignments, either free of charge or fiduciary, carried out during the two years prior to the proposal of the preventive measure (art. 26 d.lgs. 159/2011). These assumptions are relative and allow for evidence to the contrary.

The illicit origin. After the 2008 reform, preventive confiscation ex art. 24 Antimafia code can be applied only when *it transpires (results)* that the proceeds are derived from illicit activity or used for reinvestment ("the goods which result to be the fruit of unlawful activities or the reinvestment"), and no longer when *there is reason to believe*; this means, in authors' opinion, that the prosecutor has **to *prove* the illicit origin** of the proceeds on the basis of the criminal standard of the proof, even by **circumstantial evidence** ("serious, precise and concordant", art. 192 of the

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208 Court of Cassation, Section I, 28 April 1995, *Lupo*.

209 Cass., sez. I, 15.6.2017, n. 349; n. 43826/2018; sez. 1, 24.3.2015, n. 31209; sez. VI, 29.5.2015, n. 23294; 29.5.2015, n. 2308; sez. II, 29.5.2015, n. 23041ì); Cass., n. 43826 del 2018; Cass., sez. VI, 13.7.2017, n. 36216; Cass., sez. VI, 25 giugno 2020, n. 21060; Cass., sez. V, 30/11/2020, n.182; Cassazione penale sez. II, 18/01/2022, n. 816; Cassazione penale sez. II, 11/01/2022, n.4191; Cass., sez. II, 25/06/2021, n.33533: "With regard to preventive measures, the judge, given the independence between the criminal proceedings and the prevention proceedings, can autonomously evaluate the facts ascertained in the criminal proceedings, in order to arrive at an affirmation of the generic dangerousness of the affected pursuant to art. 1, paragraph 1, lett. b), legislative decree 6 September 2011, no. 159, not only in the event of an intervening declaration of extinction of the crime or a pronouncement of not having to proceed, but also following an acquittal sentence pursuant to art. 530, paragraph 2, of the Code of Criminal Procedure, where those facts which, although deemed insufficient - on the merits or due to procedural preclusions - for a criminal conviction, can well be placed at the basis of a judgment of dangerousness are outlined with sufficient clarity and in their objectivity".

210 FIANDACA-VISCONTI, *Scenari di mafia,* Torino. 2010, 79 ss.; MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano 2001, 317 ss.

Italian criminal procedure code)[211], whereas he cannot base his decision on mere suspicions. This doesn't mean that the prosecutor must prove the nexus between each asset and specific crimes, but only that he has to demonstrate the unlawful origin of the forfeitable assets or the absence of an alternative justification of the collection of assets. This interpretation is adopted after the 2008 reform by the Tribunal of Palermo in Zummo case and by the Palermo Court of Appeal in the Sapienza case[212], but the Supreme Court has established that the standard of the proof (of the criminal origin of the profits to confiscate) isn't changed with the reform, it **is lower than the criminal standard** and it is possible to apply the confiscation on the basis of assumptions, but these have to be based on "serious, precise and concordant" circumstances" [213]. The Court doesn't want to higher the standard of the proof, but, in any case, it demands "serious, precise and concordant circumstances" at the basis of the assumptions: in the opinion of some authors this means a criminal standard, in the end[214]. Arguably, the enforcement of the confiscation provided by art. 34 is possible when "*there is reason to believe"* [215].

In relation to the **disproportionate** character of the property the Supreme Court requires the demonstration of this element for every acquisition at the moment of the purchase [216], in the same way analysed for the extended confiscation (art. 240 bis c.p.) and even an explanation of the temporal connection between the purchase and the dangerousness, that is the suspected criminal activity [217]; normally for the prosecutor it is easier to give evidence of the unlawful origin.

The Constitutional Court has stressed the importance of the **temporal connection** between the purchase and the dangerousness [218]. The Supreme Court (United Sections Spinelli[219]) recognized the importance of the temporal correlation between the moment of purchase of the assets and the

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211 A.M.MAUGERI, *La riforma delle sanzioni patrimoniali: verso un actio in rem ?*, in MAZZA-VIGANÒ, *Misure urgenti in materia di sicurezza pubblica (d.l. 23 maggio 2008, n. 92 conv. in legge 24 luglio 2008, n. 125)*, Torino 2008, 156 ss.; ID., *Dalla riforma delle misure di prevenzione patrimoniali alla confisca generale dei beni contro il terrorismo*, in MAZZA-VIGANO', *Il "Pacchetto sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. in legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* Torino 2009, 425 (see also Id., *cit.*, 377 ss.); GIALANELLA, *La confisca di prevenzione antimafia, lo sforzo sistemico della giurisprudenza di legittimità e la retroguardia del legislatore*, in (edited by) CASSANO, *Le misure di prevenzione patrimoniali dopo il "pacchetto sicurezza"*, cit., 133 ss.

212 Tribunal of Palermo, sez. Preventive Measures, 25 October 2010, Zummo, inedita. See also Cass., 23 June 2004, in *Cass. pen.*, 2005, 2704; Cass., 16 gennaio 2007, n. 5234, L.e altro, in *Guida al dir.* 2007, 1067.

213 Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880

214 A.M.MAUGERI, *La riforma delle sanzioni patrimoniali: verso un actio in rem ?*, cit., 156 ss.; Tribunal of Palermo, sez. Preventive Measures, 25 October 2010, Zummo, inedita. See also Cass., 23 June 2004, in *Cass. pen.*, 2005, 2704; Cass., 16.1.2007, n. 5234, L.e altro, in *Guida al dir.* 2007, 1067.

215 A.M.MAUGERI, *La riforma delle sanzioni patrimoniali*, cit.,, 156 ss.;

216 Così CONTRAFFATTO, *L'oggetto della confisca di prevenzione e lo standard della prova*, in BALSAMO-CONTRAFATTO-NICASTRO, in *Le misure patrimoniali contro la criminalità organizzata*, Giuffrè 2010, 110 ss.; Cass. pen., Sez. VI, 31 May 2011 (dep. 26 July 2011), n. 29926, TG e altri (see MENDITTO, *Sulla rilevanza dei redditi non dichiarati al fisco ai fini del sequestro e della confisca di cui all'art. 12-sexies del d.l. n. 306/92, conv. dalla l. n. 356/92*, in *www.penalecontemporaneo.it*); Cass., 15 April 1996, Berti, in *Cass. pen.* 1996, 3649.

217 Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880; Cass., 13 May 2008, n. 21357, E.; Cass., 4 July 2007, n. 33479; Cass., 16 April 2007, n. 21048; Cass., 23 March 2007, Cangialosi e altro, n. 18822, *Ced Rv.* 236920; Cass., 16 January 2007, n. 5234, L.e altro, in *Guida al dir.* 2007, 1067; Cass., 13 June 2006, Cosoleto e altri, n. 24778, *Ced rv.* 234733; Cass., 3 February 1998, Damiani, in *Arch. n. proc. pen*. 1998, p. 424 e *Ced rv* n. 210230.; Cass. 2 May (15 July) 1995, n. 2654, Genovese, *Ced Rv.* 202142; Cass., n. 5365 del 1998; *contra* Cass., 21 April 2011, n. 27228; Cass., 9 February 2011, n. 6977, B. e altro; Cass., 15 December 2009, n. 2269; Cass., sez. I, 4 June 2009, n. 35175; Cass., 29 May 2009, n. 35466; Cass., 8 April 2008, n. 21717, Failla e altro, in *C.e.d. Rv.*. 240501; Cass., sez. I, 11 December 2008, n. 47798, C., in *Cass. pen*. 2009, 10, 3977; Cass., 23 gennaio 2007, n. 5248, G., in *Cass. pen*. 2008, 1174; Cass., Sez. I, 5 October 2006, Gashi, n. 35481, *Ced Rv.* 234902. See MAUGERI, *Profili di legittimitá costituzionale delle sanzioni patrimoniali, cit.,* p. 69 ss.; ID., *Dalla riforma delle misure di prevenzione patrimoniali alla confisca generale dei beni contro il terrorismo*, in MAZZA-VIGANO', *Il "Pacchetto sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, n. 11 conv. in legge 23 aprile 2009, n. 38 e alla legge 15 luglio 2009, n. 94),* Torino 2009, p. 465; GIALANELLA, *Un problematico punto di vista sui presupposti applicativi del sequestro e della confisca di prevenzione*, cit., 368.

218 Supreme Court, U.S., Const. court. 33/2018 and 24/2019

219 Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880.

social dangerousness [220], underlining, first of all, that the lack of this element would end up emptying the presumption of illicit origin of content and transform the preventive confiscation into a mere penalty of suspicion in contrast with the constitutional and supranational safeguards of the right to property (art. 41 and 42 Constitution and art. 1 Prot. n.1, ECHR). As already stated by authors, this requirement makes the form of confiscation in question more consistent with the presumption of innocence and the right of defense, since its ascertainment makes the burden of proof of the accusation more pregnant and the counter-proof of the lawful origin of his assets is less onerous for the owner, avoiding a sort of diabolical probatio on him about the lawful origin of all assets at any time acquired: "the identification of a precise chronological context, within which the power of ablation can be exercised, makes the exercise of the right of defense much easier, …".

The Constitutional Court (n. 24/2019) in approving the request for the requirement in question "aimed at circumscribing the area of confiscable assets, limiting them to those acquired in a period of time reasonably correlated to that in which the subject appears to have been engaged in criminal activities" , underlines that this requirement "evidently derives from the need to maintain reasonableness in the presumption (relative) of the illicit purchase of the goods, on which the seizure and preventive confiscation are based. This presumption, in fact, makes sense from time to time, inasmuch as it can reasonably be assumed that the confiscated goods or money are the result of the criminal activities in which the subject was engaged at the time of their acquisition, even if it is not necessary to establish the precise causal derivation from a specific crime".

It is argued, at any rate, if the burden of the proof about the illicit origin is on the owner, as the law requires that the owner wasn't able to demonstrate the legal origin [221]. The Supreme Court established that it is only a "burden of allegation", as examined for the extended confiscation (art. 240 bis c.p.), but doubts remain about the respect of the "right to silence"; it is possible to consider this discipline consistent with this constitutional guarantee only where the "result" is interpreted as the imposition on the prosecutor of the charge to demonstrate the unlawful source of the assets to confiscate. It is important to consider that after the separation of the patrimonial preventive measures from the personal measures, the demonstration of the illicit origin is the only element that can justify confiscation.

4. The nature of the preventive confiscation.

The united sections of the Supreme Court of Cassation ruled on the legal nature of the preventive confiscation in an important judgment[222] and affirmed that it is not a criminal sanction nor a "preventive" measure. To the contrary, such confiscation falls within a third category ("tertium genus") and consists of an administrative penalty. As such, it is comparable - as to its content and effects - to the security measures provided for by article 240, paragraph 2 of the criminal code (which reads as follows: "...It is always ordered the confiscation of the things that are the price of an offence, of things whose production, use, possession or alienation constitute an offence even if no conviction has been pronounced ...."). This approach was confirmed by many judgments of the Court of cassation.

After the introduction of the principle of "disjoint application" of personal and against property measures in 2008, a new debate has developed about the legal nature of the preventive confiscation. According to a thesis, the choice of untangling confiscation from the requisite of dangerousness of the subject has demonstrated its afflictive nature[223]. According to another thesis, the preventive

220 Cass., sez. VI, 6.8.2021-7.12.2021, n. 36421; Cass., sez. V, 23.11.2020-14.1.2021, n. 1543; e Cass., sez. II, 13.3.2018-27.3.2018, n. 14165, con nota di B. Rossi, *Le condizioni per l'applicabilità della confisca dei beni degli appartenenti ad associazioni mafiose*, in *Cass. pen.*, 2018, n. 7-8, 2382 ss. and D.Albanese, *Confisca di prevenzione: smussato il requisito della 'correlazione temporale'*, in *Dir. pen. cont.*, n. 4/2018, 193 ss.; Cass., Sect. VI, n. 47567/2013; C. II, n. 43776/2013; C. VI, n. 13049/2013; C. V, n. 26041/2011; C. I, n. 21357/2008.

221 MAUGERI, *Le moderne sanzioni, cit.*, 377 ss. - 839 ss.

222 United sections, 3 of July 3 1996 n.18, in the case against Simonelli.

223 Cassation, 13 November 2012 n. 14044, in the case against Occhipinti.

confiscation is preventive in nature. The issue was therefore remitted to the united sections of the Court of Cassation that, on 26 June 2014, pronounced the judgment n. 4880 (in the case against Spinelli). The Court of Cassation affirms that, following the introduction of the principle of disjoint application, and despite the fact that confiscation can now be ordered regardless of the "current" dangerousness of the subject, the confiscation does not have the legal nature of a criminal sanction (and therefore can be applied retroactively). The Court of Cassation affirms that the connotation of dangerousness is inherent in the asset (the "res"), due to its unlawful acquisition, and it pertains to it "genetically", on a permanent basis and, potentially, indissoluble; - the fact that financial preventive measures shall be released from the requirement of the current dangerousness of the individual reflects the phenomenal reality, having regard to the ontological-naturalistic difference between personal and material reality[224]. The Supreme Court affirms the preventive **nature** of the confiscation stressing that the temporal connection between the purchase and the dangerousness, that is the suspected criminal activity, is fundamental to guarantee the preventive nature of the confiscation.

Only in the Occhipinti case the Supreme Court has affirmed the punitive nature after the reform of 2008 and the separation between the personal and the patrimonial preventive measures[225]. The Supreme Court affirms that confiscated assets and goods, "since they are the result of illicit acquisition, contain a negative connotation, which imposes their mandatory acquisition by the State". The Court affirms the "objectively sanctioning" nature of the preventive confiscation, consequently applying the principle of non-retroactivity; this interpretation is based on the EctHR interpretation of the notion of criminal matter, which requires the ascertainment of the sanction nature beyond the formal qualification. In the ruling in question, the Court observes that it is no longer possible to equate the preventive confiscation to a security measure where the common assumption, i.e. the judgment of current social danger, has failed; the confiscation of assets or goods of a person who is no longer dangerous, and even against her/his heirs and successors, does not affect a person who was part of the mafia in order to prevent him/her to commit other offences, but targets the person only because he/she was part of the mafia.

The Constitutional Court, as analysed for the extended confiscation, in a recent ruling (n. 24/2019) **denies any punitive nature** ("the relative presumption of illicit origin of goods, which justifies their ablation in favor of the community, does not necessarily lead - as sometimes it is argued - to recognize the substantially sanctioning-punitive nature of the measures in question "), but attributes **both to the extended confiscation and to the preventive confiscation** a mere **compensatory - restorative function** with the rules of the legal system, in the wake of what the Gogitdize judgment of the Edu Court affirmed: "from the point of view of the system, the ablation of these assets is not a sanction, but rather **the natural consequence of their illicit acquisition**, which determines - as well highlighted by the recent ruling, already mentioned, of the joint sections of the Court of Cassation – **a genetic defect in the constitution of the same property right of those who have acquired the material availability**, resulting "all too obvious that **the social function of private property can only be fulfilled on the indeclinable condition that its purchase complies with the rules of the legal system**. Therefore, the acquisition of assets contra legem cannot be considered compatible with that function, so that a purchase affected by illegal methods can never be opposed to the state system (Court of Cassation, section one, no. 4880 of 2015)".

Part of authors accept this position, as examined[226].

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[224] Therefore, the Court of Cassation clarifies that the social dangerousness of the person reverberates on goods purchased in a dynamic projection, based on the objective dangerousness of keeping things in the hands of those who are deemed to belong – or have belonged to a subjective category of dangerousness provided for by the law.

[225] Cassation, 13 November 2012 n. 14044, in the case against Occhipinti.

[226] See note n. 118; see F. MENDITTO, *Le misure di prevenzione personali e patrimoniali*, Milano, Giuffrè, 2019, 507 ss. who stresses the preventive nature.

Although the Constitutional Court denies the punitive nature of the preventive confiscation, it admits that seizure and confiscation preventive measures "remain measures that **heavily affect property rights and economic initiative, protected at the constitutional** (articles 41 and 42 of the Constitution) and **conventional** (Article 1 Prot. add. ECHR) **level** "and, **therefore, must be subject" to the combined provisions of the guarantees to which the Constitution and the ECHR itself subordinate the legitimacy of any restriction to the rights in question",** and that is: **the provision through a law** (articles 41 and 42 of the Constitution) so as to guaranteeing its **foreseeability** (art. 1 Prot. add. ECHR); compliance with the **principle of proportion** (art. 1 Prot. add. ECHR and art. 3 of the Constitution) and respect for the principle of **due process** (art. 111, first, second and sixth paragraphs, Constitution), provided for by art. 6 ECHR also in civil matters, as well as respect for the **right of defense** (Article 24 of the Constitution) of the person against whom the measure is required.

4.1. The nature of the preventive confiscation in the European Court Human Right's case law.

The Court E.C.H.R. has always denied, since the *Marandino* (in this case the Commission) and the *Raimondo* cases, the punitive nature of the confiscation under article 2-ter law n. 575/1965 and, subsequently, article 24 d.lgs n. 159/2011, on the basis, as affirmed in the Supreme Court case law[227], of the recognition of its preventive nature which is founded on the evaluation that the recipient represents a social danger.

The Court, already in the *Labita* case[228], has recognized the compatibility of preventive measures with ECHR only because they are based on an assessment of the recipient's social dangerousness. From the recognition of the preventive and non-punitive nature of the anti-mafia confiscation derive the consistency of this measure with the right to property (Article 1 of the 1st Additional Protocol to the ECHR) and the presumption of innocence (Article 6 § 2) and the principle of legality (Article 7) (retroactive application is permitted)[229].

The measure of prevention, in the opinion of the Court, cannot be compared to a criminal sanction according to the three criteria established in the Engel case. [230]

The Court, accepting the arguments of the Italian Government, recognizes that anti-mafia confiscation is a measure of prevention which has a distinct function and nature from that of criminal sanction. While the latter tends to repress the violation of a criminal law and hence its application is subordinate to the determination of an offense and the guilt of the defendant, the measure of prevention does not presuppose a crime and a conviction[231], but it seeks to prevent the commission from people who are considered dangerous. By accepting the case law of the Court of Cassation, the European Court denied that the respondent assumes the status of the accused and that confiscation constitutes substantially a criminal sanction, relevant to the purposes of the Convention, and stresses that the preventive proceeding is independent of the criminal proceedings and does not involve a finding of guilt (a conviction). The anti-mafia confiscation presupposes only

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[227] Italian Supreme Court, United Sections, 25 March 2010, n. 13426, Cagnazzo, in www.dejure.it; cfr. Corte cost., 11 (12) July 1996, n. 275.

[228] ECTHR, Grand Chamber, 1 March-6 April 2000, *Labita v. Italy*, in *www.coe.int*.

[229] Commission eur., 15 April 1991, *Marandino*, no. 12386/86, in *Decisions et Rapports (DR)* 70, 78; ECTHR, 22 February 1994, *Raimondo v. Italy*, in Série A vol. 281, 7; 15 June 1999, *Prisco v. Italy*, Decision as to the admissibility, n. 38662/97; 25 March 2003, *Madonia v. Italy*, n°. 55927/00; 20 June 2002, *Andersson v. Italy*, n°. 55504/00; 5 July 2001, *Arcuri and three others v. Italy*, n°. 52024/99; 4 September 2001, *Riela v. Italy*, n°. 52439/99; *Bocellari and Rizza v. Italy*, n°. 399/02; 5 January 2010, *Bongiorno*, n. 4514/07, § 45. See A.M.MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano 2001, 530 (449 ff.); Id., *The criminal sanctions against the illicit proceeds of criminal organisations*, in *NJECL* 2012, 288; F.MAZZACUVA, *La materia penale e il "doppio binario"*, cit., 1928.

[230] ECTHR, *Engel e Altri*, in *Pubblications de la Cour Européenne des Droits de l'Homme* 1977, Série A, vol. 22, 36.

[231] ECTHR, 25 March 2003, *Madonia v. Italy*, n. 55927/00, § 4; Id., 20 June 2002, *Andersson v. Italy*, n. 55504/00, § 4; Id., 5 July 2001, *Arcurie tre altri v. Italy*, n. 52024/99, § 5;Id., 4 September 2001, *Riela vv. Italy*, n. 52439/99, § 6; Id., *Bocellarie Rizza v. Italy*, n. 399/02, § 8.

a preliminary statement of social dangerousness, based on suspicion of belonging to a mafia-type association of the affected person and therefore does not have any repressive function, but preventive, aimed at preventing the illicit use of the goods. [232]

In the opinion of the Court, the severity of the measure is not a sufficient criterion for determining whether it is a criminal sanction, emphasizing that confiscation is not an exclusive measure of criminal law but is widely used, for example, in administrative law. The legal order of the Council of Europe Member States shows that very strict measures, but necessary and appropriate to protect the public interest, are also provided for outside criminal law. [233].

4.2. The critics by the doctrine.

The authors criticize this position because the preventive confiscation limits the property right or allows to forfeit the whole property; limits the freedom of economic activity and stigmatises the person affected, without a demonstration of guilt and a conviction. The preventive proceeding is intended to affirm the dangerousness, even if in the past, of a subject and therefore, even if on a circumstantial level, the commission or involvement in a criminal activity that represents the source in all or part of his financial situation. The same Constitutional Court in the judgement 24/2019 bases the rationale of the confiscation on the presumption of a criminal activity which is the source of the enrichment to be confiscated. Confiscation substantially presupposes a judgment of qualified delinquency (mafioso, participant in an association aimed at drug dealing, extortionist ..., etc. the crimes referred to in Article 51 bis of the Code of Criminal Procedure referred to in letter b) of Article 4 legislative decree n. 159/2011, or the others referred to by art. 16) or habitual (as a subject who lives in whole or in part with the proceeds of the crime), which involves the interdiction of the subject for the future from entrepreneurial activities. Doctrine speaks of a judgment of legal degradation of the proposed, with "impairment or mortification of the dignity and prestige of the person" » [234].

. Even if it were to be considered that the confiscation in the strict sense assumes a reparative character, the stigmatizing effect is linked to the imputation of crimes - disruptive for the personal and professional reputation -, connected to the submission of the subject to the preventive procedure, would entail the submission to a higher system of guarantees than the purely civil one proper to a mere remedial measure.

Not only, a breach of the criminal measures provided was punishable by a sentence of up to five years' imprisonment[235]. The highly repressive nature of the preventive measures was further compounded by the fact that the application of such measures was considered an aggravating factor in the context of sentencing for various criminal offences under the Criminal Code.

The same solution is reached by adopting the Engel criteria adopted by the Edu Court to include a measure in the autonomous notion of "criminal matter"[236]: the official formal qualification or the

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[232] *Ibidem*.

[233] ECTHR, *Prisco*, cit.; *Raimondo*, cit., 16-17; *Madonia*, cit., § 4; *Bocellari e Rizza*, cit., § 6; *Riela*, cit., §§ 4-5; *Arcuri*, cit., § 3; Commission Eur., *Marandino*, 78.

[234] M.PELISSERO, *I destinatari della prevenzione praeter delictum: la pericolosità da prevenire e la pericolosità da punire*, in *Riv. trim. dir. proc. pen*., 2017, 441. Cfr. PADOVANI, *Misure di sicurezza e misure di prevenzione*, Pisa, 2015, 234; FIORENTIN, *Le misure di prevenzione personali nel Codice antimafia, in materia di stupefacenti e nell'ambito delle manifestazioni sportive*, Milano, 2012, 25; BOLIS, *I recenti sviluppi del dialogo tra corte Edu e Corte di Cassazione sulla confisca di prevenzione per pericolosità generica*, in *Ind. Pen.*, n. 3, 2018, 752.

[235] Between 2005 and 2014, 16,461 persons were convicted of breaching the preventive measures applied to them, according to the statistical information in the file. Although asked, the Government did not provide information on how many of them were sentenced to jail.

[236] ECHR, 8.6.1976, *Engel e Altri*, cit., 36; Id., 26.3.1982, *Adolf c. Gov. Austria*, in *Riv. dir. internaz.*, 1984, 121, e in *Publications de la Cour Européenne des Droits de l'Homme* 1982, Série A, vol. 49, 15; Id., 10.2.1983, *Albert et le Compte*, *ivi*, vol. 58, 16; Id., 21.2.1984, *Öztürk v. Germany*, in Série A, n. 73, 18, § 50 e in *Riv. it. dir. proc. pen.*, 1985, p. 894; Id., 25.8.1987, *Lutz, Englert e Nölkenbockhoff v. Germany*, Série A, vol. 123, 22; Id., 22.5.1990, *Weber v. Switzerland*, *ivi*, vol. 177, 17-18; Id., 27.8.1991, *Demicoli c. Malte*, in *Pubblications de la Cour Européenne des Droits de l'Homme*, *ivi.* vol. 210, 1991, 25; Id., 25.2.1993,

determination of the legal system to which it belongs[237];; the "nature itself" of the infringement with particular reference to its forms of typification and the procedure adopted [238] ("the "very nature of the offense is a factor of greater import"»); the nature of the sanction [239] and the degree of severity of the sanction[240], considered as the sole criterion in the Engel case[241].

Beyond the official formal qualification which, although defined as the first criterion, constitutes only a starting point from the Engel case, a ratio cognoscendi ("the indications that derive from it have only a formal and relative value"[242]), examining the generally considered first criterion, the nature of the offence[243], it must be highlighted that preventive confiscation can be included in the notion of criminal matters because it presupposes crimes, an unlawful act [244] and the affirmation of the involvement of the recipient of the measure in an criminal activity or as a qualified dangerous offender or as a habitual offender; it does not presuppose facts qualifying as civil or administrative offences[245].

To establish the nature of the infringement, the nature of the proceeding assumes particular importance, which indeed can assume autonomous relevance as a criterion determining the nature of an offense [246]. In the present case, the proceeding essentially assumes the characteristics of an enforcement proceeding and takes place before a criminal court (even if today with the reform of the judicial system introduced by law no. 161/2017, the court should have interdisciplinary skills - civil, bankruptcy, criminal, etc..) . The same Italian legislator has considered the preventive procedure criminal where in art. 3, letter. d) of Legislative Decree 7 August 2015, n. 137 (Implementation of framework decision 2006/783/GAI) also includes confiscation pursuant to art. 24 and 34 of Legislative Decree no. 159/2011- and the proceeding for the adoption of the extended confiscation ex art. 240 bis c.p. - in the context of decisions taken in *criminal proceedings*: "d) confiscation order: a measure issued by a judicial authority in the context of criminal proceedings, which consists in definitively depriving a person of an asset, including confiscation orders pursuant to article 12-sexies of the decree-law of 8 June 1992, n. 306, converted, with

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Funke, *ivi*, vol. 256, 30; Id., 10.6.1996, *Benham c. Royaume-Uni*, in *Recueil de Arrêts et Dêcisions* 1996, III, n. 10, 756; Id., 8.12.1998, *Padin Gestoso c. Espagne*, *ivi* 1999, II, 361 ss.; Id., 3.5.2001, *J.B. v. Switzerland*, Application n. 31827/96, in *www.coe.int*, § 44; Id., 9.10.2003, *Ezeh and Connors* v. the United Kingdom, n. 39665/98 e 40086/98, *ivi*, § 91. Sulla nozione di materia penale cfr. M.DONINI-L.FOFFANI, *La "materia penale" tra diritto nazionale ed europeo*, Torino, Giappichelli, 2018. See about the application of these criterions to Italian preventive confiscation A.MANNA, *Misure di prevenzione e diritto penale: una relazione difficile,* Pisa, 2019, 197 ss.

[237] ECHR, *Engel e Altri*, cit., 36; see DE SALVIA, *Lineamenti di diritto europeo,* Padova, Cedam, 140-141.

[238] ECHR, 9.10.2003, *Ezeh and Connors*, cit., § 91; *Engel e Altri*, cit., 34-35, § 82.

[239] ECHR, 27.8.1991, *Demicoli c. Malte*, in *Pubblications de la Cour Européenne des Droits de l'Homme*, vol. 210, 25; Id., 22.5.1990, *Weber v. Switzerland*, *ivi*, vol. 177, 30; Id., 25.8.1987, *Lutz, Englert e Nölkenbockhoff v. Germany*, *ivi*, vol. 123, 22; Id., 28.6.1984, *Campbell c. Gov. Regno Unito Gran Bretagna e Irlanda del Nord*, in *Riv. dir. internaz.*, 1986, 502; Id., 2.2.1984, *Oztürk*, in *Riv. it. dir. proc. pen.*, 1985, 894; *Engel e Altri*, cit., 35.

[240] Così ECHR, 8.6.1976, *Engel e Altri*, cit., 36; Id., 10.6.1996, *Benham c. Royaume-Uni*, cit., 756; Id., 24.2.1994, *Bendenoun*, in *Pubblications de la Cour Européenne des Droits de l'Homme*, Série A vol. 284, 3; Id., 25.2.1993, *Funke*, *ivi*, vol. 256, 30; Id., 27.8.1991, *Demicoli c. Malte*, *ivi*, vol. 210, 16; Id., 22.5.1990, *Weber v. Switzerland*, *ivi*, vol. 177, 17-18; 10.2.1983, *Albert et le Compte*, *ivi*, vol. 58, 16.

[241] Così ECHR, *Engel e Altri*, cit., 36. Cfr. SHABAS (eds.), *Art. 1 Protection of Property*, in *The European convention non human rights: a commentary,* Oxford, Oxford University Press, 2015.

[242] ECHR, *Engel e Altri*, cit., 36; ECHR, 10.6.1996, *Benham c. Royaume-Uni*, cit., 756; Id., 22.5.1990, *Weber v. Switzerland*, in *Pubblications de la Cour Européenne des Droits de l'Homme* 1990, Série A, vol. 177, 17; Id., 9.10.2003, *Ezeh and Connors*, cit., § 91.

[243] To be determined also in consideration of two referents: the comparative projection and the structure of the precept, in particular by verifying whether it involves a duty of a general nature, addressed to the generality of the citizens, and if it pursues a preventive and repressive purpose ECHR, 25.9.1987, *Lutz, Englert e Nölkenbockhoff v. Germany*, in *Publications de la Cour Européenne des droits de l'Homme*, Série A, vol. 123, 22; Id., 21.2.1984, *Oztürk*, cit., 894; TEITGEN-COLLY, Garantien du procès équitable et répression admistrative, in M. Delmas-Marty (ed.), Quelle Politique Penale pour l'Europe?, Paris, 1993, 294.

[244] Cfr. MASERA, *La nozione costituzionale di materia penale*, Torino, Giappichelli, 2018, 214.

[245] MASERA, *op. cit.*, 217.

[246] ECHR, 10.6.1996, *Benham*, cit., 756.

modifications, by law 7 August 1992, n. 356, and those arranged pursuant to articles 24 and 34 of the code of anti-mafia laws and prevention measures, pursuant to legislative decree 6 September 2011, n. 159, and subsequent amendments"[247]

The second criterion, the nature of the sanction, must be specified with reference to the nature of the sanction and the aims pursued: a penal sanction must have a repressive (afflictive) nature and pursue general and special preventive purposes, according to a purely punitive model [248] («criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence» [249]). The preventive confiscation risks having a punitive nature to the extent that it can subtract lawfully acquired assets where there is no proof of the illicit origin of the assets, but it is based on a presumption contra reum, as well as certainly having a stigmatizing and limiting impact on the right to freedom of economic initiative; for the rest, as already highlighted in relation to the direct confiscation of profit, it pursues general and special preventive purposes, as well as - in macroeconomic terms - the purpose of protecting the economy and the lawful market from criminal infiltration, representing a incapacitation of organized or professional crime, dedicated to illicit enrichment[250].

If we look at the severity of the measure, - apart from the inconsistent use made by the ECtHR itself of this criterion which is sometimes considered irrelevant [251] -, it suffices to recall that in the Grand Stevens case the disqualification from two to four months from carrying out a managerial activity is considered as a particularly severe punishment ("was such as to compromise the integrity of the persons concerned" and "the temporary loss of their honor for the representatives of the companies involved"[252]); the confiscation of entire assets or, better, to stay only with the disqualification effect of the confiscation, the connected imposition of reporting obligations and the devastating effect on the reputation and economic and managerial reliability of a subject, are they not severe enough? Not only that, but following the disjunction of personal measures from the patrimonial ones, the confiscation can be applied sine die, regardless of the moment in which the social dangerousness has manifested itself, even where the alleged illicit activity dates back absolutely and the original illicit profits are now reinvested in entirely legitimate activities. The anti-mafia confiscation knows no prescription; this profile also accentuates the severity and afflictive impact of this measure.

Precisely in the light of this stigmatizing scope, it is deemed necessary to adopt a criminal law model in the matter of preventive measures, at least in the broad meaning accepted by the ECtHR, - even if not in the matter of preventive measures -, allowing for an increase in the safeguards and above all, as also stated by the foreign doctrine on civil forfeiture, the adoption of the criminal standard of proof of the illicit origin of the assetts[253]. When it comes to confiscating entire assets

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247 (15G00152) GU Serie Generale n. 203, 02-09-2015.

248 ECHR, 21.2.1984, *Oztürk*, cit., 894; Id., 3.5.2001, *J.B. v. Switzerland*, n. 31827/96, § 48; cfr. HEITZER, Punitive Sanktionen im Europäischen Gemeinschaftsrecht, Heidelberg, 1997, 38 ss.

249 ECHR, 9.10.2003, *Ezeh and Connors*, cit., § 102. Cfr. ECHR, 21.2.1984, *Öztürk*, cit., 20-21, § 53; Id., 24 febbraio 1994, *Bendenoun*, cit., 20, § 47; Id., 2 settembre 1998, *Lauko v. Slovakia*, n. 26138/95, in *Reports* 1998-VI, 2504-05, § 58.

250 Da ultimo cfr. PALAZZO, op. cit., 9; cfr. CERESA GASTALDO, *Misure di prevenzione e pericolosità sociale: l'incolmabile deficit di legalità della giurisdizione senza fatto*, in *Diritto penale contemporaneo*, 3 dicembre 205, 8; BORGOGNO, *L'ablazione dei beni "marchiati di infamia". (Prime osservazioni su alcuni recenti interventi giurisprudenziali in tema di "confisca allargata" e di "confisca senza condanna")*, in *Arch. pen*. 2015, 38 s.; MANNA, *Misure di prevenzione e diritto penale: una relazione difficile*, Pisa, 2019, 197 ss.; BOLIS, *op. cit*., 770 s. who, among other things, believes that the disciplinary nature of the preventive confiscation measure must be detected due to the presence of confiscation by equivalent and of the institution of revocation.

251 See ECHR, 25.8.1987, *Lutz, Englert e Nölkenbockhoff v. Germany*, in *Publications de la Cour Européenne des droits de l'Homme*, Série A, vol. 123, 23; Id., 28.6.1984, *Campbell*, cit., 502 e 35 ss.; Id., 21.2.1984, *Oztürk*, cit., 894, which consider this criterion unreliable or even useful only as a "subsidiary element of judgment" (PALIERO, "Materia penale" e illecito amministrativo secondo la Corte europea dei diritti dell'uomo: una questione "classica" a una svolta radicale, in *Riv. it. dir. proc. pen*., 1985, 919; ECHR, 10.6.1996, *Benham*, cit., 756-770.

252 *ECtHR*, *Grande Stevens v. Italy*, 7.7.2014, no. 18640/10, § 97.

253 KING, *Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture*, in *The International Journal of Evidence & Proof*, 2002, v. 16, 348; HENDRY-KING, *Expediency, Legitimacy, and the Rule of Law: A*

due to their origin in crime, one cannot be satisfied with a civil standard as if it were a mere matter between private individuals in which the State has no interest (as the North American doctrine correctly points out).

We should then reflect on the repercussions in terms of the protection of third parties of the position under examination of the Constitutional Court regarding the nature of preventive confiscation, not justifying any sacrifice of the interests of third parties where it is a mere civil measure, rather than a a public measure aimed at pursuing the needs of public order and protection of the economy[254]; for example, how is the sacrifice of the rights of third parties justified, for their credits are guaranteed only to the extent of 60% (which, in the opinion of the writer, should not be justified even if it were recognized that preventative confiscation falls within the notion of criminal matter)? A part of the doctrine has considered that this form of confiscation represents an original purchase in favor of the State[255] and, lastly, the Council of State also establishes that the asset, "as a result of the confiscation, acquires a rigidly publicistic imprint, which does not allow it to be diverted, even temporarily, from the constraint of destination and public purposes. This determines the assimilability of the legal regime of the confiscated assets to that of the assets forming part of the unavailable State patrimony (see Council of State, section III, 05/07/2016, n. 2993; Council of State, section III, 06/16/2016, no. 2682)"[256].

Both the Edu Court[257], and the EU Court of Justice, as well as the Constitutional Court [258] recognize, moreover, the possibility of modulating the safeguards within the broad concept of criminal matters, where it is not the so-called hard core of criminal law (usually involving imprisonment)[259]. In this perspective, it could be considered that extended and preventive confiscation falls within the broad concept of criminal matters, while acknowledging that the foundation that justifies confiscation must be identified not so much in an alleged punitive purpose tout court of criminal behaviors that cannot be ascertained, but with the aim of removing from crime - especially organized - the wealth of illicit origin, which represents a factor of pollution of the market and the lawful economy, as recognized by the Constitutional Court n. 24/2019. Neverthless, in consideration of the punitive impact that extended confiscation assumes and in particular the preventive one, by applying this point of view of variable safeguards of criminal matters, it should be demanded that in the absence of a conviction - and an assessment of the proportionality of the sanction to the commensuration parameters of the sentence, starting from guilt -, in rule of law the removal of profits can be justified only insofar as and to the extent that their criminal origin is ascertained, only in this way in the ambit of the stigmatizing criminal impact of this sanction, it will be possible to bring out the economic/compensatory rebalancing function referred to by the Constitutional Court**[260].**

Systems Perspective on Civil/Criminal Procedural Hybrids, in *Crim Law and Philos*, 2016; KING-WALKER, *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Routledge.

254 See B.PATERNÒ RADDUSA, *Intervento alla Scuola della Magistratura*, Scandicci, 5.7.2019.

255 Cass. sez. un., 28.4.1999, Baccherotti, in *Foro it.* 1999, II, c. 580, about confiscation pursuant to art. 644 c.p.

256 Sez. III, 4.3.2019, n. 1499.

257 ECHR, 23.11.2006, Jussila c. Finlandia, n. 73053/01.

258 Corte Cost., 97/2009 e 196/10; Corte 68/2017; 109/2017; 43/2017; 487/99; L.MASERA, *op. cit.,*1 ss.

259 See V.MANES, *Profili e confini dell'illecito parapenale*,in *Riv. it. dir. proc. pen*., pp. 988 – 1007, 2017, 989 ss.; F.VIGANÒ, *Il nullum crimen conteso: legalita 'costituzionale' vs. legalità'convenzionale'*?, in *Diritto penale contemporaneo*, 2017, 20; F.MAZZACUVA, *Le pene nascoste – Topografia delle sanzioni punitive e modulazione dello statuto garantistico*, Torino, Giappichelli, 2017, 56 – 73; L.MASERA, *op. cit.,* (2018) p. 226 ss.

260 A.M.MAUGERI, *Art. 240 bis c.p.*, in *Codice penale*, a cura di T. PADOVANI, I, VII ed., Milano, 2019, 1659 ss. In this direction J.HENDRY-C.KING, *Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids,* in *Crim Law and Philos*, 2016, 20: «Where the State is alleging that an individual has benefited from criminal activity, it is difficult for a lower burden of proof than the criminal standard of beyond reasonable doubt even to be countenanced Nevertheless, countenanced it is, and more: through Part 5 of POCA, efficiency is privileged over certainty and due process safeguards are abandoned in the service of the legislative intent to ensure that c*rime does not pay*. Indeed, the lowering of the standard of proof makes it significantly more straightforward to prove matters of both fact and law: '[e]ven a modest degree of civil content introduced into the strategy, the trading of the criminal standard for the civil standard of proof in the confiscation process, facilitates the task of realizing an attack on the financial

5. The consistency of the preventive confiscation with the principle of criminal matter: the ECourtHR and Court Constitutional case law.

5.1. The principle of legality

In the opinion of the ECHR the confiscation, as interference with the applicants' right to the peaceful enjoyment of their possession ex Article 1 of Protocol No. 1 to the Convention, must have a legal basis (must be established **by law)**, which must have the quality of the law in the Court's interpretation; this means that the law should be accessible and foreseeable.

However, in the De Tommaso case, as examined, the European Court has established that the application of preventive measures to the applicant was not sufficiently predictable and was not accompanied by adequate safeguards against possible abuses. This law was formulated in unclear and overly broad terms, *being insufficiently clear and precise with regard to persons to whom preventive measures were applicable* (article 1 of the law), and the content of some such measures (articles 3 and 5 of the law). "Thus, the Court considers that the law in force at the relevant time (section 1 of the 1956 Act) did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts, and was therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures".

So, the Italian legislation violates Article 2 of Protocol No. 4 to the Convention for the personal preventive measures; the same arguments are valid in relation to the violation of the art. 1 of Protocol No. 1 for the patrimonial preventive measures (see § 2).

After the De Tommaso case, the Constitutional Court – as analyzed - has declared the unconstitutional character of the category of recipient ex art. 1 lett. a legislative decree n. 159/2011.

In general the Constitutional Court, for its part, has evaluated the preventive system outlined by law n. 1423/1956 compatible with the principles of the Constitutional Charter, as it is placed to guarantee the orderly and peaceful development of relations between citizens" both with reference to articles 13, 16, 17 and 25, § 3 of the Constitution, both by virtue of the parallelism with the security measures, but has contributed to building a more guarantee statute by demanding the jurisdictional safeguards - as already anticipated in the very first sentences n. 2, 10 and 11 of 1956 -, and respect for the principle of legality, specifying that "these are two essential and intimately connected requirements, because the lack of one nullifies the other, making it merely illusory". The

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elements of crime' (Gallant 2005: 19). More troubling still is the way in which a person who has been subject to an unsuccessful criminal prosecution can nonetheless be subject to subsequent proceedings under Part 5 of POCA (*Taher* 2006),or how civil recovery proceedings can continue even after a criminal prosecution has been discontinued. This was the case in *Jia Jin He and Dan Dan Che* (2004: para. 67), where in spite of the decision not to prosecute—'no doubt because it was considered that [criminal proceedings] would not succeed'—civil recovery proceedings were still permitted. Part 5 proceedings have even been successful in circumstances where the criminal case was stayed as an abuse of process (*Hymans* 2011). This jurisprudence highlights the way in which civil recovery, where criminal prosecution is either impossible or has been unsuccessful, allows the State to take a second bite at the cherry. To be clear on this point: under such proceedings the parties are the same (i.e., the State against the individual), the allegations will often concern the same conduct, and the evidence can even be the same as that relied upon in the unsuccessful criminal prosecution—the *only* salient difference is the reduced standard of proof. These observations combine to indicate that civil recovery is an express mechanism for State circumvention of those enhanced procedural protections inherent to the criminal process. The most bewildering aspect of this state of affairs, however, has been the willingness of the courts to accept unchallenged the legislative label 'civil' for such proceedings, particularly in light of the repercussions for due process and individual rights. Indeed, considering that it is arguably the role of the courts to regulate the exercise of state power with a view to ensuring its compliance with the rule of law (O'Cinneide 2009), this raises the question: why, then, such an apparent reluctance to do so in terms of civil recovery? Moreover, is this likely to be the case for *all* such procedural hybrids?».

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Constitutional Court then specified that we cannot be satisfied with the very uncertain connotations on the type of author and we must go to the evaluation of some concrete manifestation of mafia activity.

In terms of respect for the principle of legality, the Constitutional Court's judgement no. 177/'80 which, as also recalled by the European Court in the De Tommaso case, declares the unconstitutionality of the category of criminals inclined to commit crimes (those "whose outward conduct gives good reason to believe that they have criminal tendencies") envisaged by law 1423/1956 due to its vagueness (the Court found it not to be defined in sufficient detail) and demands, at least, the definition of the behaviors on the basis of which to establish the dangerousness and the crimes with respect to which to evaluate the social dangerousness of the proposed. In this ruling, the Court authoritatively ruled that the reciprocal implication between the "principle of legality" and the "judicial guarantee" postulates as essential corollary the rejection of the "suspect" as a sufficient presupposition for the application of a preventive measure, with the consequence that the judgment of dangerousness must necessarily be based on "an objective evaluation of the facts", so as to "exclude purely subjective and uncontrollable assessments by those who promote or apply the preventive measures"[261].

The principle of no retroactivity ex art. 7 is not applied because the preventive confiscation is not considered by the European Court a punishment; this means that it is applicable according to the law in force at the adoption time.

In the opinion of the Supreme Court the preventive measures are equivalent to the security measures and, therefore, the art. 200 criminal code, § 2 is applied[262]; the issues of constitutional legitimacy were declared unfounded in relation to the violation of articles 24, 25 and 42 of the Constitution since the anti-mafia legislation refers to assets "of which the suspect directly or indirectly has (...), at the time of application of the measure in consideration of the current membership of the subject in mafia associations, of the methods of acquisition or of the reproducibility of wealth polluted at the origin, so that also the asset, due to the aforementioned conditions, ends up being a tool for the development of the mafia organization, of its members and therefore also dangerous" [263]. This is a logical consequence of the aim pursued, namely the ablation of illicit assets consolidated over time. This orientation was confirmed with the retroactive application of the reforms of 2008 and 2009, which substantially extended the scope of application of patrimonial measures, separating their application from that of personal ones; the Supreme Court has applied the principle of non-retroactivity only to the confiscation by equivalent of the preventive confiscation, considered punitive [264]

The doctrine disputes this orientation because, first of all and as examined, it considers the principle of non-retroactivity applicable to security measures by virtue of art. 7 of the ECHR and, therefore, to preventive measures. These last are not only considered punitive measures due the broad concept of criminal matter of the ECHR, but also because the distinction between preventive measures ante delictum and measures post delictum has lost its relevance when it is observed that the so-called preventive measures ante delictum are also applied following the commission of

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[261] As stressed by the European Court „In respect of all other categories of individuals to whom the preventive measures are applicable, the Constitutional Court has come to the conclusion that Act no. 1423/1956 contained a sufficiently detailed description of the types of conduct that were held to represent a danger to society. It has found that simply belonging to one of the categories of individuals referred to in section 1 of the Act was not a sufficient ground for imposing a preventive measure; on the contrary, it was necessary to establish the existence of specific conduct indicating that the individual concerned posed a real and not merely theoretical danger. Preventive measures could therefore not be adopted on the basis of mere suspicion, but had to be based on an objective assessment of the "factual evidence" revealing the individual's habitual behavior and standard of living, or specific outward signs of his or her criminal tendencies (see the Constitutional Court's case-law set out in paragraphs 45-55 above)".

[262] For all, Cass. 9.12.1986, Piccolo, in Giust. Pen. 1988, c. 8

[263] For all, Cass. 18.5.1992, Vincenti and others, in Cass. Pen. 1993, 2377.

[264] Cass., Sez. I, 28.2.2012, Barilari, n. 11768, in *Mass. Uff.*, n. 252297; cfr. Cass., 5.2.2016, Hadjovich, n. 4908, in *Mass. Uff.*, n. 266312; Cass., 10.2.2016, Bevilacqua, n. 5336, in *Mass. Uff.*, n 265957.

crimes, indeed they presuppose the offences commission, starting from the existence of the mafia-type association[265]. It seems hardly compatible with the principles of a democratic state to allow the legislator to introduce retroactively measures which are substantially restrictive of fundamental rights, such as the preventive measures.

5.2. The property right.

The Court has always repeated that Article 1 of Protocol No. 1 to the Convention, which guarantees in substance the right to property, comprises three distinct rules. The first one, which is expressed in the first sentence of the first paragraph, lays down the principle of peaceful enjoyment of property in general. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule[266]. The Court demands that the confiscation which constitutes an interference with the applicants' right to the peaceful enjoyment of their possessions, is provided for by law, pursues a legitimate aim and it is proportionate to the aim.

"The Court notes that in cases where the confiscation followed a conviction, and thus constituted a penalty, the Court found that such interference fell within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties. That provision had to be construed in the light of the general principle set out in the first sentence of the first paragraph which requires that there exists a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many examples, *Sofia*, cited above and *Phillips*, cited above, § 51). In other cases, where a confiscation measure had been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (within the meaning of Article 6 § 1 of the Convention) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, the Court has again held that such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 and in such cases, also, the measure had to be reasonably proportionate to the aim sought to be realised (see *Gogitidze and Others*, cited above, §§ 94 and 97)"[267].

In particular for the preventive confiscation the European Court "even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1, which gives the State the right to adopt "such laws as it deems necessary to control the use of property in accordance with the general interest"[268].

The Court notes at the outset that confiscation of the applicants' assets "was therefore an interference prescribed by law" (in that case it was ordered pursuant to section 2(3) of the 1965 Act); "next that the confiscation complained of sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. It therefore

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265 G.GRASSO, *Art. 200 c.p.*, in ROMANO-GRASSO-PADOVANI, op. cit., 391; A.M.MAUGERI, *Le moderne sanzioni patrimoniali*, cit., 532; in the same direction interpreting artt. 2 and 200 criminal code, PAGLIARO, *Principi di diritto penale – Parte generale*, Milano 1993, 124; ALESSANDRI, *voce Confisca*, cit., 44; VASSALLI, *Nullum crimen sine lege*, in *Noviss. Dig. It.*, vol. XI, Torino 1965, 503.

266 See, among many authorities, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 44, ECHR 1999-V

267 see, Arcuri, cit.; *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 44, ECHR 1999-V

268 Arcuri, cit.; see the Agosi v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, § 51 et seq., and the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, pp. 29 and 30, §§ 62-63.

considers that the aim of the resulting interference serves the general interest"[269]. "It remains to be determined, nevertheless, whether this interference was proportionate to the legitimate aim pursued. In this connection the Court points out that the impugned measure forms part of a crime-prevention policy; it considers that in implementing such a policy the legislature must have a wide margin of appreciation both with regard to the existence of a problem affecting the public interest which requires measures of control and the appropriate way to apply such measures. The Court further observes that in Italy the problem of organised crime has reached a very disturbing level".

In this way the Court didn't affirm the violation of the **right to property** provided by art. 1 of the First Protocol because also the purpose of this form of confiscation is proportionate to the instrument, i.e. the fight against organised crime like the Mafia [270], "an aim that was in the general interest…..The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this "organization" has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued, ..»[271].

The Court has confirmed this approach also in the *Todorov and others v. Bulgaria* case [272]: "In a series of cases against Italy the Court found that the forfeiture of assets of suspected Mafia members was proportionate to the legitimate aim pursued. It pointed out that in Italy the problem of organised crime had reached "a very disturbing level", which justified the impugned measures[273].

Even the Constitutional Court has denied the relevance of the issues of constitutional legitimacy of some provisions and, in particular, the contrast of patrimonial measures with the guarantee of the right to property. Even the limitation of the constitutional guarantee of property is considered functional to the fight against organized crime and the protection of the market and free competition, threatened by the massive infiltration of illicit capital (the right to property can be limited to allow it to carry out its social function) (Const. Court 464/'92; order n. 105 of 1989); the aim is to guarantee the genuineness of the economic traffic and the correct observance of the rules of the market (ord. n. 105 of 1989 and 675 of 1988), preventing "the eventual entry into the market of money obtained from the exercise of criminal activities or offences" (order no. 675 of 1988). This is the position of the Constitutional Court judgement n. 24/2019, as examined, which demands the respect of the principle of legality and proportionality.

5.3. The presumption of innocence and fair trial principles.

The European Court has more than once affirmed the compatibility of Italian procedure developed in the area of preventive measures regarding assets, with the safeguards for "fair trial" established by art 6.1. The Court didn't apply art. 6, § 2 (the presumption of innocence) because the confiscation is a preventive measure and isn't a penalty, "the presumption of innocence enunciated in Article 27 of the Constitution does not concern preventive measures, which are not

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[269] see the Raimondo, cit., 17, § 30.

[270] FIANDACA – S.COSTANTINO, *cit.*, 82.

[271] Arcuri, cit.. Cfr. A.M.MAUGERI, *Le moderne sanzioni patrimoniali*, *cit.*, 532 - 839.

[272] ECHR, 13.10.2021, *Todorov and others v. Bulgaria*, n. 50705/11, § 190.

[273] The national courts had examined evidence showing that the applicants had been in contact with members of the Mafia and that there had been a considerable discrepancy between their financial resources and their income (see *Arcuri and Others v. Italy* (dec.), no. 52024/99, ECHR 2001-VII; *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001; *Perre and Others v. Italy* (dec.), no. 1905/05, 12 April 2007; and *Bongiorno and Others*, cited above, §§ 45-51). 192. Examining the purpose of the measure, the Court held in *Silickienė* (cited above, § 67-69) that it concerned "exceptional" circumstances, namely a systematic and well-organised criminal activity (smuggling), and that the confiscation of the applicant's assets could have been "**essential in the fight against organised crime**".

based on the criminal liability or guilt of the person concerned (Constitutional Court, judgement n. 23 of 1964)" [274]; the European Court endorsed the arguments of the Italian Government.

"The Court notes that in this case section 2 (3) of the 1965 Act establishes, where there is "sufficient circumstantial evidence", a presumption that the property of a person suspected of belonging to a criminal organisation represents the proceeds from unlawful activities or has been acquired with those proceeds". However, in the Court's opinion, "Every legal system recognises presumptions of fact or of law. The Convention obviously does not prohibit such presumptions in principle. However, the applicants' right to peaceful enjoyment of their possessions implies the existence of an effective judicial guarantee. Consequently, the Court must consider whether, having regard to the severity of the applicable measure, the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities (see, *mutatis mutandis*, the Agosi judgment cited above, p. 18, § 55).

In this connection the Court notes that the proceedings for the application of preventive measures were conducted in the presence of both parties in three successive courts, the District Court, the Court of Appeal and the Court of Cassation. In particular, the applicants, instructing the lawyer of their choice, were able to raise the objections and adduce the evidence which they considered necessary to protect their interests, which shows that the rights of the defence were respected….. As the Court has noted above, under Article 1 of Protocol No. 1, the proceedings for the application of preventive measures were conducted in the presence of both parties and with respect for the rights of the defence before three successive courts. Those courts could not base their conclusions on mere suspicions and gave full reasons on all the points at issue, which meant that any risk of arbitrariness was avoided."[275].

That being the case, having regard to the margin of appreciation enjoyed by States when they "control the use of property in accordance with the general interest", particularly in the context of a crime policy designed to combat major crime, the Court concludes that the interference with the applicant's right to peaceful enjoyment of his possessions was not disproportionate to the legitimate aim pursued (see the Raimondo judgment cited above, p. 17, § 30, and the Commission decision in the M. v. Italy case cited above, p. 102).

Despite the admission that the assumptions were in accordance with art. 6 ECHR, the European Court affirmed "that preventive measures could not be adopted on the basis of mere suspicions and are justified only when based on the objective establishment and assessment of facts which reveal the behaviour and lifestyle of the person concerned (Constitutional Court, judgment no. 23 of 1964)". "They had to establish and assess objectively the facts submitted by the parties"[276].

"More recently it confirmed that the constitutionality of preventive measures still depends on respect for the rule of law and **the possibility of applying to the courts for a remedy**. Furthermore, the above two conditions are closely linked. Thus it is not enough for the law to indicate vague criteria for the assessment of danger; it must set them forth with sufficient precision to make the right of access to a court and adversarial proceedings a meaningful one (Constitutional

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[274] Commission eur., 15 April 1991, *Marandino*, no. 12386/86, in *Decisions et Rapports (DR)* 70, 78; *Raimondo*, cit., 7; *Prisco*, cit.; 25 March 2003, *Madonia*, n°. 55927/00, in *www.coe.it*, 4; 20 June 2002, *Andersson*, n°. 55504/00, in *www.coe.it*, 4; 5 July 2001, *Arcuri*, n°. 52024/99, in *www.coe.it*, 5; 4 September 2001, *Riela*, n°. 52439/99, in *www.coe.it*, 6; *Bocellari and Rizza*, n°. 399/02, in *www.coe.it*, 8.

[275] Among others, Arcuri case.

[276] Arcuri, cit.: „and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily. On the contrary, the Italian courts based their decision on the evidence adduced against the first applicant, which showed that he was in regular contact with members of criminal organisations and that there was a considerable discrepancy between his financial resources and his income. The domestic courts also carefully analysed the financial situation of the other applicants and the nature of their relationship with the first applicant and concluded that all the confiscated assets could only have been purchased by virtue of the reinvestment of Mr Rocco Acuri's unlawful profits and were *de facto* managed by him, with the official attribution of legal title to the last three applicants being merely a legal dodge designed to circumvent the application of the law to the assets in question (see, *mutatis mutandis*, Autorino v. Italy, application no. 39704/98, Commission decision of 21 May 1998, unreported)""

Court, judgment no. 177 of 1980)". The Court required the respect of the right to defence, demanding "proceeding for the application of preventive measures must be adversarial and conducted with respect for the rights of defence, any violation of those rights entailing their nullity …the presumption concerning the unlawful origin of the property of person suspected of belonging to organisations of the mafia type is not incompatible with art. 24 of the Constitution, which safeguards the rights of the defence, since confiscation can only take place when there is sufficient circumstantial evidence concerning the unlawful origin of the property in question and in the absence of a rebuttal…"[277].

About that, it is important to stress that for the European Court the respect of the civil standard of the proof, - preponderance of evidence – is sufficient in order to demonstrate the illicit origin of the proceeds to confiscate, as affirmed in Balsamo or in Gogitidze case[278]; or "the Court further reiterates that it is not *per se* arbitrary, for the purposes of the "civil" limb of Article 6 § 1 of the Convention, that **the burden of proof shifted onto the applicant in the vetting proceedings** after the IQC had made available the preliminary findings resulting from the conclusion of the investigation and had given access to the evidence in the case file (see ***Gogitidze*** *and Others v. Georgia*, no. 36862/05, § 122, 12 May 2015, in the context of forfeiture proceedings *in rem*, and, *mutatis mutandis*, ***Grayson and Barnham*** *v. the United Kingdom,* nos. 19955/05 and 15085/06, §§ 37-49, 23 September 2008, in the context of a confiscation order in drug-trafficking cases)"[279].

In the recent **Todorov** case the Court has stressed that also in consideration of art. 5 § 1 of Directive 2014/42/EU, clarified by Recital 21 of the same Directive - which requires, "in the case of "extended confiscation", that a national court satisfy itself that the property to be forfeited "is derived from criminal conduct" (and also where a court can "reasonably presume" that it is "substantially more probable" that it was obtained from criminal conduct than from other

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[277] Commission Eur., *Marandino*, cit., 78; ECHR, *Raimondo*, cit., 7; *Prisco*, cit., 62 - 97; 22 Februar 1989, Ciulla v. Italy, *ivi*, Série A vol. 148, 17; 6 November 1980, Guzzardi, *ivi*, Série A vol. 39, 37; *Madonia*, cit., 4; *Andersson*, cit., 4; *Arcuri*, cit., 5; *Riela*, cit., 6; *Bocellari and Rizza*, cit., 8.

[278] *Balsamo*, cit., § 91. The Court also found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1 (compare also with the case of *Silickienė*, cited above, §§ 60-70, where a confiscation measure was applied to the widow of an alleged corrupt public official). More recently in *Gogitidze and Others* (cited above, § 108, concerning a confiscation applied in civil proceedings), the Court also found that the civil proceedings *in rem* through which the applicants - one of whom had been directly accused of corruption in a separate set of criminal proceedings, and two other applicants, were presumed, as the accused's family members, to have benefited unduly from the proceeds of his crime - had suffered confiscations of their property, could not be considered to have been arbitrary or to have upset the proportionality test under Article 1 of Protocol No. 1. The Court found that it was reasonable for all three applicants to be required to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets.

92. In *Gogitidze and Others* (cited above, § 105) having regard to such international legal mechanisms as the 2005 United Nations Convention against Corruption, the Financial Action Task Force's (FATF) Recommendations and the two relevant Council of Europe Conventions of 1990 and 2005 concerning confiscation of the proceeds of crime (ETS No. 141 and ETS No. 198) (see paragraphs 38 and 39 above), the Court observed that "common European and even universal legal standards can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction. Secondly, the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings *in rem*. Thirdly, confiscation measures may be applied not only to the direct proceeds of crime but also to property, including any incomes and other indirect benefits, obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets. Finally, confiscation measures may be applied not only to persons directly suspected of criminal offences but also to any third parties which hold ownership rights without the requisite *bona fide* with a view to disguising their wrongful role in amassing the wealth in question".

[279] ECHR, Xhoxhaj v. Albania, 31.5.2021, Application no. 15227/19.

activities) -, it is necessary that "a causal link, direct or indirect, had to be established, or had to be **presumable**, **between the assets to be forfeited and the criminal activity.** The Supreme Court stated furthermore that the finding of such a link had to **be "logically justified" and based on the individual circumstances of each case**, and that failure to establish a causal link would mean that **any interference with the defendant's property rights is disproportionate** (see paragraphs 104-106 above)"[280].

In ***Paulet*** the ECtHR stated that although that provision 'contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake'[281].

Also the Constitutional Court does not detect the contrast between patrimonial measures and the presumption of innocence. In some rulings on similar cases (art. 708 of the criminal code, art. 12-quinquies of law decree 306 of 199236, art. 12-sexies of law decree 306/'92) it essentially emerges that the Court, while recognising that the measures in question are based on a presumption of the illegitimate illicit origin of the assets, believes that this presumption is reasonable and compliant with constitutional principles (n. 48 of 1994, which declares the unconstitutionality of art. 12-quinquies of law 306 of 1992, See ordinance 675/88 on the extension to socially dangerous people of prevention measures; ordinance 105/88).

In some cases the ECHR sentenced Italy for the violation of Article 6 § 1 (right to a fair hearing) of the Convention because the proceedings on the application of preventive measures was not public. The public character of proceedings before the judicial bodies protected litigants against the administration of justice in secret with no public scrutiny and also constituted an instrument which preserved trust in the courts, thereby contributing to the implementation of the goal of Article 6 of the Convention: that is a fair trial. The Court considered it essential that the litigants in proceedings for the application of preventive measures were offered, at the least, the opportunity to request a public hearing before the specialised divisions of the ordinary and appeal courts. The new "against mafia code" has introduced the opportunity to request a public hearing (art. 7); it is important to stress the Court's invitation to consider the stakes in play and the significant effect of the confiscation on the personal and economic situation of the person on trial [282].

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[280] § 212; see § 215: "the national authorities provided at least some particulars justifying the provenance of the assets subject to forfeiture from the established offence, in the context of each specific case" "the domestic courts provided some particulars as to the criminal conduct in which the assets to be forfeited were alleged to have originated, and showed in a reasoned manner that those assets could have been the proceeds of the criminal conduct shown to exist. As long as such analysis has been carried out, the Court will generally defer to the domestic courts' assessment, unless the applicants have shown such assessment to be arbitrary or manifestly unreasonable (see, *mutatis mutandis*, *Arcuri and Others*, decision cited above, and *Bongiorno and Others*, cited above, § 49)". "In order to conclude that the requisite fair balance had been achieved, that is that the interference with the applicants' property rights was proportionate to any legitimate aim pursued, it would require the national authorities to provide at least some particulars as to the alleged unlawful conduct having resulted in the acquisition of the assets to be forfeited, and to establish **some link between those assets and the unlawful conduct** … The Supreme Court has defined the latter link widely, saying that it could be direct or indirect, expressly established or presumable… However, even though according to the facts of the case the existence of a causal link between the 1993 offence committed by the first applicant and the assets acquired by the applicants, usually much later, was by no means evident, as discussed above, the domestic courts examining the forfeiture application made no effort to justify such a link. They pointed to the discrepancy, as established by them, between the first and second applicants' income and expenditure, without giving any further reasons whatsoever, and dismissed the first and second applicant's objections in that regard…. Furthermore, they failed to indicate whether the value of the assets to be forfeited equalled the established discrepancy between the applicants' income and expenditure... Nor did the national courts, as mentioned, ever try to reason that the first applicant had been implicated in any other criminal activity".

[281] *Paulet v the United Kingdom*, App no 6219/08 (ECtHR, 13 May 2014), para 65.

[282] ECHR, *Bocellari and Rizza*, cit., 8; 8 July 2008, *Perre et autres v. Italie*, nº 1905/05, *ivi*; 5 January 2010, *Bongiorno v. Italia*, n. 4514/07. See *also* Costitutional Court, 12 March 2010, n. 93; Cost. Court, 7 March 2011, n. 80, in G.U. 13/03/2011 (http://www.cortecostituzionale.it/).

After this judgement, the Constitutional Court (no. 93/2010) declared the unconstitutionality of the l. 1423/'56 where it did not provide for the public hearing.

5.4. Ne bis in idem principle (the application sine die of the preventive confiscation)

In the opinion of the European CourtHR preventive measures do not violate the principle of substantial ne bis in idem (Article 7 of the IV Protocol) because, again, such "measures cannot be compared to a penalty and, consequently, the applicants cannot claim to have been "criminally prosecuted or punished" in the context of the disputed procedure" [283].

The are two aspects to analyse.

First of all, after the separation of the preventive patrimonial measures from the personal measures (legisl. Decree 92/2008), the preventive confiscation has become a sword of Damocles sine die because it willl possibile to start a preventive proceeding in order to apply the confiscation also if the proposed was dangerous in the past (the dangerousness is not current), he/she was suspected of criminal activity in the past without temporal limits; it is only important that the property has been obtained in temporal connection with the „dangerousness", as examined.

The Supreme Court ruled out the question of constitutional legitimacy raised due to the absence of a deadline to submit the application for the application of the provision in violation of articles 3, 27 and 42 of the Constitution: "The constitutional principles and those contained in the European Convention on Human Rights do not impose a time limit on the possibility of requesting confiscation, nor does the absence of such a limit appear unreasonable (given the particular nature and purpose of the prevention proceeding) and such as to determine an impairment of the right of defense, in providing proof of the legitimate origin of the goods. Indeed, the defense can resort to any means of proof, not only documentary, which after many years may not be easy to find, but also oral and the judge, in evaluating the same, must take into account the difficulties of providing precise proof in relation to income received or expenses incurred in not very recent years"[284].

Also recently the Supreme Court has confirmed that: „The question of the constitutional legitimacy is manifestly unfounded in relation to Articles 18, 29, 34-ter legislative decree 6 September 2011, no. 159, by contrast with the articles 3, 24, § 2, 27, § 2, 111, §§ 1 and 2, of the Constitution and 6, § 1, of the ECHR, in the part in which it is not foreseen, with respect to the moment of the cessation of the dangerousness of the proposed, a time limit for the proposition of the action or the limitation period for the preventive measure, given that the existence of the danger at the time of purchase of the asset constitutes an unavoidable prerequisite for the application of the asset preventive measure, which is transferred to the latter on a permanent and tendentially indissoluble basis, since it is the result of the illicit acquisition by the dangerous subject"[285].

The second aspect concerns the respect of the *ne bis in idem* principle in strictu sensu, this means the validity of *res iudicata* and the possibility to reopen the preventive proceeding against the same property and owner. The lack of a statute limitation rule (the imprescriptibility) for the preventive confiscation is accompanied in practice by the non recognition of the ne bis in idem principle, or, at least even where the application of the principle is affirmed, it is highlighted that it applies *rebus sic stantibus*; the result is a greater efficiency of the prosecution system for illicit enrichment, but with the risk of overcriminalisation effects or of establishing a sort of endless sanctioning circuit.

First of all, the applicability of the ne bis in idem principle between criminal proceedings and prevention proceedings is denied [286], since the prerequisite for the application of a preventive

[283] ECourtHR, Capitani e Campanella c. Italia, 17 November 2011, n. 24920/07, § 30; Cacucci-Sabatelli, 25 August 2015, n. 29797/09, § 2

[284] Court of Cassation, section V, 25 November 2015, n.155.

[285] Cass. sez. II, 25/02/2022, n.11351.

[286] Cass., sez. I, 11 marzo 2016, n. 27147. [286] C.PARODI, *In tema di* bis in idem *tra processo penale e procedimento di prevenzione*, in *Arch. pen.*, 2014, 3.

measure is not an "offence", but a general "condition" of danger, which can be deduced not only from individual unlawful, criminal or administrative facts, but from a broader picture of life habits, relationships and acquaintances [287]. Therefore the criminal proceeding and the prevention proceeding develop on the basis of ontologically different assumptions, so that no constraint arises for the application of a penalty with respect to the preventive measure which only apparently overlaps the first. The Grande Stevens judgement is not considered applicable because, "in terms of the (formal) legal classification of the offence, we are not faced with a comparison between a criminal and an administrative offence, since the assumption of the preventive measure is not an "offence" of any nature, but a "condition" [288]. In reality, as also highlighted by foreign doctrine in relation to other forms of actio in rem [289], the same people and for the same facts can be subjected to the prevention procedure after or at the same time of the criminal trial, or perhaps following the acquittal.

As regards, instead, the application of the ne bis in idem principle in the prevention proceeding, the Supreme Court has established that the principle of "ne bis in idem" is applicable, but the preclusion of the res judicata operates "rebus sic stantibus" and, therefore, does not prevent the re-evaluation of the danger for the purpose of applying a new or more serious measure where further elements are acquired, priorly or subsequently to the res judicata, but not evaluated, which involve a judgment of greater gravity than the danger itself and of inadequacy of the measures previously adopted" [290] (Where the imposition of a new prevention measure is permitted when the previously ordered one is still in force, it is only required that this new measure be adopted with reference to new elements ascertained after the first one and with the consequence that it will effectively start on moment of exhaustion of the measure already in place)[291]. All this always on the basis of the consideration that "The preventive decision does not ascertain the existence of a crime and the responsibility of a person, .. The preventive measure has an instrumental nature, it has an inherent provisional nature, it is aimed at containing social danger and therefore at preventing crimes. Therefore, the structural and systematic affinity with the precautionary measures is evident due to the common nature of instrumentality and provisional nature as decisions "at the state of the documents" which are not immutable" [292].

The European Court in the **Dimitrovi case**[293] contested in relation to an extended form of confiscation, without conviction, the possibility of applying the confiscation also with reference to absolutely dating facts (without statute of limitations and without res judicata) in violation of the principle of legality and foreseeability of the State intervention: "In that regard, the Court notes that in the case at hand the CPA provided that the State's claims under its Chapter Three could not lapse through prescription (see paragraph 25 above), which meant that individuals being investigated under it could be required to provide evidence of the income they had received and their expenditure many years earlier and without any reasonable limitation in time"; "the prosecution authorities were free to "open, suspend, close and open again proceedings at will at any time". All this, coupled with the fact that the procedure under Chapter Three of the CPA was

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[287] Cass., 16.7.2014, n. 32715; [287] sez. II, 21.2.2012, n. 19943, Rv. 252841; sez. VI, 6.10.2015, n. 44608; sez. II, 4.6. 2015, n. 26235, Rv. 264387; sez. VI, 16.7.2014, n. 32715; Sez. II, 21.2.2012, n. 19943, Rv. 252841; sez. VI, 22.3.1999, n. 950, Rv. 214504; Sez. un., 3.7.1996, n. 18, Rv. 205261; C. cost., 22.7.1996, n. 275; Sez. un., 25.3.2010, n. 13426.

[288] Cass., 16.7.2014, n. 32715, Rv. 261444.

[289] J.HENDRY-C.KING, *op. cit.*, § 4.1.: "under such proceedings the parties are the same (i.e. the State against the individual), the allegations will often concern the same conduct, and the evidence can even be the same as that relied upon the unsuccessful criminal prosecution".

[290] Cass., sez. II, 22.6.2015, Friolo; Cass., SS.UU. 29.10.2009, n. 600, Rv. 245176; Cass. 21.12.2006, n. 33077, Rv. 235144; Cass. 1.3.2006, 25514 Rv. 234995; sez. I, 16.1.2002, n. 5649, Rv. 221155; SS.UU., 13.12.2000, n. 36, Riv 217668.

[291] Cass., sez. I, 21.9.2006, n. 37788, Rv. 235165; Cass., S.U., 24.10.2009, n. 600, Galdieri, Rv. 245176; Cass., sez. 2, 14.5.2009, n. 25577, Rv. 244152.

[292] Cass., SS.UU., 13.12.2000, n. 36, Riv 217668; Cass. 21.9.2006, n. 33077, Rv. 235144; Cass. 1.3.2006, 25514, Rv. 234995.

[292] Cass., sez. I, 21.9.2006, n. 37788, Rv. 235165.

[293] ECHR, 3.6.2015, Dimitrovi v. Bulgaria, no. 12655/09, § 46

very rarely resorted to after 1989 (see paragraph 28 above), means that the CPA did not meet the foreseeability requirement set out in the paragraph above, which entails that a person should be able – if need be with appropriate advice – to reasonably foresee the consequences which a given action may cause (see, mutatis mutandis, Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV)".

In the same direction more recently in the Todorov v. Bulgarian[294] case the European Court stressed : „201.The Court also observes the 2005 Act's wide temporal application. Its application could, first, be triggered even where the predicate offences had been committed long before its entry into force the State remained entitled to forfeit an asset acquired up to twenty-five years before the opening of confiscation proceedings, with the corresponding obligation of the defendants to prove their income for this whole period. Assets acquired before the 2005 Act's entry into force were forfeitable as well

202. and particularly the lengthy periods of time covered by the retroactive application of the law, rendered the proof of lawful income or lawful provenance of their assets difficult for the applicants

205. Thus, the Court cannot agree with the applicants that the reversal of the burden of proof resulted in itself in a disproportionate interference with their property rights. It will take into consideration, however, the difficulties the applicants might have faced in meeting their burden of proof due to the lengthy periods of time covered by the confiscation proceedings and the other factors described above".

The European Court does not convict Bulgarian for the violation of the principle of legality, but in any case the consideration of the Act's wide temporal application is considered to evaluate the proportionality of the property right sacrifice which the confiscation realises.

6. The confiscation ex art. 34 Antimafia code.

Moreover, **Art. 34 antimafia** code (before art. 3 quinquies l. 575/'65) has introduced the confiscation of assets used in the exercise of an economic activity that, based on sufficient grounds, is considered objectively useful for the activity of persons who are considered for preventive measures or are defendant in ongoing criminal proceedings for crimes linked to organised crime. The confiscation is applied where *there is motive to believe* that these assets are the fruit of illicit activity or constitute the reinvestment of such assets, and the owner has not demonstrated a legitimate origin [295].

Regardless of the fact that the property is at the disposal of the socium sceleris, the law does not require the existence of a fictitious interposition between the third party and the "proposed", as occurs in the art. 24 antimafia code (for the confiscation), as it does not require a "proposed", but only requires sufficient evidence to believe that the exercise of certain economic activities (such as laundering) can still help the activities of the affiliated persons. This has eliminated one of the major obstacles to the identification of assets of illicit origin and the ensuing application of confiscation, namely the difficulties linked to the demonstration of the actual relationship between the dummy and the person whose account the dummy holds. In the case of companies with a plurality of partners, considered for the application of preventive measures, it is not necessary to start as many processes as there are partners, rather it will suffice to simply bring a single case against the same company considered collectively2[296].

7. Procedural Aspects (summary)

[294] ECHR, 13 October 2021, Todorov and others v. Bulgaria, n. 50705/11, §§ 202 ss.

[295] Art. 3 *quinquies,* l. 1423/1956, introduced by art. 24 d.l. 306/1992, now art. 34, § 7.

[296] D.CARDAMONE, *Criminal prevention in Italy From the "Pica Act" to the "Anti-Mafia Code*", in bronzini1-Cardamone_Criminal_prevention_in_Italy_2.0.pdf (europeanrights.eu)

„The preventive confiscation is applied at the outcome of an inquisitorial proceeding, where the rights of the accused are less guaranteed. The accused will have the right to chalenge the decree applying the patrimonial measure (Art. 27 of Italian Legislative Decree n. 159 of 2011, which recalls Article 10 of the same decree, regarding the formalities for challenging personal preventive measures) by appeal and, also, by appeal to the Supreme Court for violation of the law" (challenges that have a suspensive effect with regard to confiscation) and, in the presence of the conditions envisaged by law, to request its revocation[297].

The prosecutor has to demonstrate the subject's dangerousness (at least in the past, no current), the owernship or availability, the dispropotionate value of the assets or their illegal origin.

From the standpoint of **burden of proof**, the jurisprudence has confirmed that the prosecutor must rigorously demonstrate the existence of situations that concretely confirm the formal nature of the ownership, with the aim of leaving the asset effectively and autonomously available to the accused; this availability must be ascertained through rigorous, intense and in-depth investigation, as the judge is required to explain the reasons why he/she believes there might be false intermediation, based on factual elements[298].

As analysed, in the opinion of a part of the authors and certain jurisprudence the standard of the proof of the illegal origin is the criminal standard, at least the circumstantal evidence on the basis of many, serious and coherent elements ("serious, precise and concordant", art. 192 of the Italian criminal procedure code)[299]; there is not reversal of the burden of proof, but only a burden of allegation on the affected person, even if the accused's inability to meet this burden on the points pertinent to the investigation or the silence assume circumstancial value, or can support the evidentiary value of insufficient elements. The illegal origin and the disproportion must be ascertained by the prosecution in relation to each individual asset, and with reference to their time of purchase[300].

7.1. Chamber Hearing in the prevention proceedings.

The application of preventive measures takes place in the context of chamber hearing. The court, within thirty days from the proposal of application of a preventive measure, shall schedule the hearing and shall give notice of the hearing to the person concerned. As already mentioned, the notice of the hearing (article 7 paragraph 2 Anti-Mafia Code) is not only an order to appear in court (vocatio in iudicium), but is also meant to inform the person of the facts in relation to which he/she is called to defend himself/herself. In fact, the notice of the hearing shall contain, under the penalty of nullity, detectable at every stage of the proceedings, "the indication of the measure proposed and the facts on the basis of which the proposal for the application of the preventive measure is based" (Court of Cassation 24 October 1988 n. 2341) . Consequently, in the prevention procedure applies the principle of correlation between the facts complained of and the judicial decision, which cannot impose a stricter measure than the one contained in the notice of the hearing. The Court of cassation has clarified that, for the principle of favor rei, is possible a reformatio pro reo, and therefore to qualify as a common dangerousness the one initially suggested as "qualified" (Court of Cassation 28 June 2006, n. 25701).

7.2. Others procedural guarantees.

Principle of immutability of judges: absolute nullity of the hearing in case the conclusions of the parties are submitted to a panel of judges other than the one which takes the decision. Mandatory

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297 F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 327.

298 Court of Cassation, sec. II, 23 June 2004, no. 35628, Palumbo et al., in C.e.d., no. 229726.

299 See note 200, § 3.

300 F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 327.

presence of the Prosecutor and defence counsel: the Court of Cassation has considered invalid the hearing in chambers held without the presence of defence counsel and without evaluating the request for adjourning of the hearing for the legitimate impediment of defence counsel (Court of Cassation, 29 July 1997 n. 1288).

The individual can request that the hearing be conducted in public and not in chamber (Article 7 Anti-mafia Code "the President orders that the proceedings be conducted in public hearing when the person concerned so requests") (Bocellari and Rizza v. Italy, no. 399/02, 13 November 2007).

7.3. The appeal.

In the appellate proceedings the same defensive guarantees of first instance proceedings apply. For example, the person concerned may request a public hearing. Article 27, paragraph 1 of the Anti-Mafia Code provides that the individual can appeal orders of confiscation and seizure. The persons legitimate to appeal are "the public prosecutor, the public prosecutor appointed to the court of appeal and the individual concerned".

Appellate proceedings respect the adversarial principle, since the presence of the Prosecutor and the defence counsel is mandatory and the individual concerned has the right to be heard by the judges, if he/she so request. The Court of Appeal may review the merits of the decision of the judge of first instance; its decision is taken not only on the basis of the findings contained in the documents filed with the judgment of first instance, but also on the basis of new facts emerged and acquisitions of evidence conducted in the course of appellate proceedings.

The decision of the Court of Appeal can be appealed by the public prosecutor and the person concerned before the Court of Cassation (without suspensive effect), within ten days of the communication or notification of the filing of the decision[301]. The appeal can be made only on points of law. The appeal for inadequate reasoning is not expressly provided for in the law; however, the case law has affirmed that appeal is permitted in cases where "the motivation, although formally present, is vitiated by errors so grave that the reasons for the decision are unintelligible"[302].

More generally, the effort of jurisdictionalisation of preventive measures proceeds both through appropriate legislative interventions, such as l. 161/2017 which modified the discipline of the preventive procedure in terms of guarantees in various aspects, both at a jurisprudential level, as most recently with the recognition by the United Sections (of the Supreme Court) of the applicability of the grounds for recusal envisaged by the 'art. 37, paragraph 1, of the proc. pen. code, "in the event that the judge has previously expressed merit assessments on the same fact against the same subject in another preventive proceeding or in a criminal trial". In this way the impartiality of the judge is guaranteed[303].

7.4. Revocation.

With regard to preventive confiscation (see below), Article 28 of Italian Legislative Decree no. 159 of 2011 introduced the possibility of revocation, which allows the confiscation to be rendered ineffective in the event that the conditions for its application are shown to be no longer valid. Under penalty of inadmissibility, the request for revocation must be submitted within six months from the date upon which one of the cases permitting the request occurred, unless the concerned party is able to prove that he/she was unaware of it through no fault of his/her own. The formalities of the revocation process are the same as those for the extraordinary appeal (usable against final judgements) referred to as a revision (Articles 630 et seq. of the Italian Code of Criminal Procedure), and will be available in one of the following mandatory scenarios: a) in the

[301] Article 10, paragraph 4, Anti-Mafia Code, which reproduce the article 4, paragraph 11, of the 1956 Act.
[302] D.CARDAMONE, *op. cit.*
[303] Cass., sez. un., c.c. 24.2.2022, Lapelosa.

event of the discovery of new decisive evidence after the conclusion of the proceedings; b) in the event that facts ascertained with definitive penal judgements, arising or becoming known after the conclusion of the prevention proceedings, absolutely exclude the existence of the conditions for the application of the confiscation; c) in the event that the ruling on the confiscation was motivated, exclusively or in a determining manner, based on documents recognised as false, falsehoods during the trial, or an event envisaged by the law as a crime. Definitive confiscation entails the assumption of the asset's ownership by the State.

8. The protection of third parties in the preventive proceeding.

With regard to preventive confiscation, in order to protect third parties, the accused's assets cannot be subjected to preventive seizure or confiscation when they have been legitimately transferred to third parties in good faith at any time: in this case, the seizure and confiscation are carried out in relation to other assets of equivalent value and of legitimate origins available to the accused, even through a third party (Article 25 of Italian Legislative Decree no. 159 of 2011).

From the reasoning of the Constitutional Court can be deduced that the system of protection of third parties introduced by the Code Anti-Mafia and from Act no. 228/2012 provides for a reasonable balance between protection of third parties and confiscation.

The Constitutional Court, in the judgment of 28 May 2015 n. 94, declared the constitutional illegitimacy of article 1, paragraph 198, of the Act n. 228/2012, insofar as it does not include among creditors who are to be satisfied within the limits and in the manner indicated therein also the holders of credits from employment. The Constitutional Court affirms that that the lack of protection for claims that do not fall within those protectable pursuant to art. 1, paragraph 198, Act 228/2012, is in contrast to article 36 of the Constitution because it "prejudices the right, granted to the worker by the first paragraph of that provision, to a remuneration proportional to the quantity and quality of his work, and in any case sufficient to ensure a free and dignified existence for him and his family". Given the general prohibition to start or continue enforcement actions on the confiscated property, set out in art. 1, paragraph 194, Act 228/2012, the worker may not be able to act for the payment of his credits, both when his debtor's assets are insufficient to satisfy his claim, and in the event of confiscation of the entire estate of the employer. According to Constitutional Court, the sacrifice of the creditor-worker does not have a reasonable justification in the balance between the interests underlying prevention measures, and therefore is in violation of article 36 of the Constitution.

The judgment affirms some general principles useful to resolve some issues related to the protection of third party creditors. The system designed by the Anti-Mafia Code is in conformity with the Constitution 'as a whole' because it is based on a reasonable balance of interests. The legal framework in force is the result of the balance between two interests that oppose each other: on the one hand, the interests of the creditors of the persons subjected to a financial measure not to suddenly lose their right to have their claims satisfied; on the other hand, the public interest to ensure the effectiveness of financial measures and the achievement of its purposes, consisting in depriving the individual of profits of illegal activities. The Constitutional Court, by a decision of 5 June 2015 n. 101, declared the manifest inadmissibility of the issue of constitutionality raised for violation of articles 3, 24 and 41 of the Constitution and, therefore, affirmed the compliance with the Constitution of third party creditors' protection system introduced by the Anti-Mafia Code, with specific reference to the provisions aimed at ensuring adequate certainty as to the substance of the claim and its priority with respect to the preventive measure.

Chapter IV of Italian Legislative Decree no. 159 of 2011 contains a comprehensive system for the protection of third parties (accessible to all creditors), based on an incidental verification of the

disputed claims and the subsequent establishment of a "payment plan", with time frames inspired by the insolvency law[304].

Furthermore, the third party has the right to attend the proceedings (Article 23 of Italian Legislative Decree no. 159 of 2011) and to independently challenge the first instance ruling (Article 27 of Italian Legislative Decree no. 159 of 2011), as well as the possibility of requesting the revocation of the confiscation (Article 28 of Italian Legislative Decree no. 159 of 2011).

In particular, with regard to **preventive seizure**, if the seized assets are formally owned by a third party (or a third party is able to claim real or personal usage rights to the seized assets), *they shall be called upon by the Court, with a motivated decree, to present themselves during the proceedings, within the thirty days following the enforcement of the seizure order* (Article 23 of Italian Legislative Decree no. 159 of 2011). At the hearing, the concerned parties will have the opportunity to make their case with the assistance of an attorney, as well as to request any elements useful for the purposes of the confiscation ruling. If the latter is not ordered, the Court will order that the assets be returned to their owners.

The participation of the third parties in the proceedings, however, is not infallible: it follows that, in the event that they should fail to present themselves, the validity of the order will not be revoked. The third parties will then be able to make their case at an enforcement hearing, once they have already lost possession of their assets. According to the jurisprudence of legitimacy, since he/she is not part of the criminal trial, the unrelated third party has no opportunity to make his/her case during the course of the trial[305], nor to challenge the portion of the criminal sentence regarding the confiscation[306] (although, as mentioned above, he/she can challenge the seizure provision).

The third party can therefore only await the final decision and *call for enforcement proceedings, since, pursuant to art. 676 of the Italian Code of Criminal Procedure*, he/she is only able to use enforcement hearings to claim his/her right to have the confiscated asset returned[307]. The enforcement judge will be responsible for ascertaining the good faith of the third party, since the retention of his/her right to the confiscated asset depends upon that requirement[308]. It must, however, be taken into consideration that the aforementioned Article 104-bis (1-quinquies) Disp. Att. of the Italian Code of Criminal Procedure now states that "during the trial third parties vested with property interests or personal rights of enjoyment on seized assets, available to the accused in any capacity, must be summoned".

Furthermore, in order to ensure the protection of third parties in good faith, Article 52 of Italian Legislative Decree no. 159 of 2011 states that the confiscation **mustn't affect the credit rights** of any third parties indicated by documents with ascertained dates prior to the seizure, as well as any real guarantee rights established prior to the seizure, provided that the following conditions are met: a) that the accused does not have other assets suitable for satisfying the credit upon which the patrimonial guarantee can be enforced, with the exception of credits backed by legitimate pre-emptive rights on seized assets; b) that the credit is not instrumental to the illegal activity or to that which constitutes its fruits or the re-use thereof, provided that the creditor demonstrates good faith and an unawareness of the illegal activity; c) in the case of promise of payment or acknowledgement of debt, that the underlying relationship is proven; d) in the case of debt securities, that the bearer proves the underlying relationship and that which legitimises their possession.

10. Seizure „for prevention" envisaged by the „Anti-Mafia Code".

Seizure for prevention is ordered by the Court, even *ex officio*, with a motivated decree, in relation to the assets that could be directly or indirectly available to a person against whom a proposal for

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304 Court of Cassation, JC, 22 February 2018, no. 39608.
305 Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, in C.e.d., no. 262283.
306 Court of Cassation, sec. I, 14 January 2016, no. 8317.
307 Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, cit.
308 Court of Cassation, sec. I, 8 January 2010, no. 301, P.g. in c. Capitalia Service J.v. s.r.l. et al., in C.e.d., no. 246035

prevention measures has been submitted, when their value is disproportionate to the subject's declared income or occupation, or when, based on „sufficient evidence", there is reason to believe that they are or constitute the re-use of the fruits of illegal activities (Article 20 of Italian Legislative Decree no. 159 of 2011).
In cases of urgency, there is the possibility of the seizure being carried out „in advance" with respect to the hearing. In this case, if there is a real danger that the assets intended to be confiscated will be lost, removed or alienated, the Public Prosecutor at the court of the capital city of the district where the person lives, the Public Prosecutor at the court in whose district the person resides, the national anti-Mafia and counterterrorism Prosecutor, the chief of police, or the director of the anti-Mafia investigative directorate may, upon submitting the proposal, ask the president of the court responsible for applying the preventive measure to order the seizure of the assets before the date of the hearing has been set. The president of the court arranges for this with a motivated decree within five days of the request. The ordered seizure ceases to be effective if not validated by the court within thirty days of the proposal.
Moreover, during the course of the proceedings, in cases of particular urgency, the seizure is ordered by the president of the court with a motivated decree, and ceases to be effective if not validated by the court within the next thirty days (Article 22 of the Italian Legislative Decree no. 159 of 2011).
Finally, there is also the possibility of „subsequent" seizure and confiscation, which can even be adopted after the application of a personal prevention measure, at the request of the legitimised subjects (Article 24(3) of Italian Legislative Decree no. 159 of 2011).
In order to subject an asset to seizure for prevention purposes, its current direct or indirect availability to the subject undergoing the prevention procedure must be proven. The *fumus* consists of the presence of a link between the asset and the illegal activity, deduced from „sufficient clues" indicating that the asset is or constitutes the re-use of the fruit of illegal activities. With regard to a disproportion with respect to the subject's declared income or occupation, the jurisprudence has clarified that reference to the ISTAT indexes is not sufficient, as it is necessary to verify the inadequacy of the income obtained by the family unit with respect to the value of the acquisitions, based on the established data[309].
In terms of duration, the seizure for prevention purposes ceases to be effective if the courts does not file the confiscation decree within one year and six months from the date upon which the assets came into the judicial administrator's possession. In the case of complex investigations, this deadline may be extended for six-month periods by court decree (Article 24(2) of Italian Legislative Decree no. 159 of 2011).
The seizure for prevention purposes is revoked by the court when it is determined that it is targeting assets of legitimate origins or assets that could not have been directly or indirectly available to the suspect, or in any other case in which the proposal for the application of the patrimonial prevention measure is rejected. The court orders the resulting transcripts and annotations to be entered into the public registers, the corporate books, and the business register"[310].

10. Correspondence of the Italian non-conviction based confiscation order to the model of Directive no. 42/2014 and to the models of the proposal of Directive (art. 15 and 16).

The Article 4, paragraph 2,[311] of the Directive introduces non-conviction based confiscation in limited circumstances with a view to addressing cases where criminal prosecution cannot be exercised because the suspect is permanently ill, or when his flight or illness prevents effective prosecution within a reasonable time and poses the risk that it could be barred by statutory

[309] Court of Cassation, sec. V, 4 February 2016, no. 14047, Fiammetta, in C.e.d., no. 266426.
[310] F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 320 s.
[311] In the proposal for the Directive, this was set out in the Article 5.

limitation. In the original proposal Art. 5 included also the case of the suspect's death; the Italian system of law provide for this case (art. 18 "Antimafia code") .

It seems possible to apply without conviction only the confiscation of the property provided by Article 4, paragraph 1 ("Where confiscation on the basis of paragraph 1 is not possible") of the Directive and not also the extended confiscation by Article 5, as it has already been established in several legal systems.[312]

The Directive, therefore, does not accept the common model of *actio in rem*, and non-conviction based confiscation does not become an alternative to confiscation post-conviction, applied in order to implement the forfeiture of estate with more impact, but fewer safeguards[313].

It is very important to stress that neither Article 4(2) nor paragraph 15 of the Directive excludes the possibility that a Member State may introduce forms of confiscation without conviction in other situations; both specify that non-conviction based confiscation has to be guaranteed "at least in the cases of illness or absconding of the suspected or accused person". The Directive explicitly states: "This Directive lays down minimum rules. It does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence"[314]. Furthermore, the Directive takes no position on the essential safeguards that must accompany such confiscation.

The Directive, in fact, allows MSs to choose the nature of the confiscation: "Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures."[315] It is also stated that: "Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court."[316] Article 4 concerns confiscation in relation to a criminal offence, but it allows Member States to choose whether confiscation should be imposed by criminal and/or civil/administrative courts.

This means that the preventive confiscation is not prohibited by nor it does conflict with the Directive 42/2014, even if such Italian model of non-conviction based confiscation is not provided for in the Directive.

Also the model of non-conviction based confiscation proposed in the proposal of Directive 2022[317], art. 15, is not a real model of actio in rem, but is intended to guarantee the application of confiscation "where criminal proceedings have been initiated but the proceedings could not be continued because of the following circumstances: illness of the suspected or accused person; absconding of the suspected or accused person; death of the suspected or accused person; immunity from prosecution of the suspected or accused person, as provided for under national law; amnesty granted to the suspected or accused person, as provided for under national law; the time limits prescribed by national law have expired, where such limits are not sufficiently long to allow for the effective investigation and prosecution of the relevant criminal offences".

This is possible in the praxis of the traditional and extended confiscation in the Italian legal system: with the possibility of the trial in absentia ("contumacia", also the conviction is possible); when the crime is statute barred or amnestied in the case law (Supreme Court, Lucci 2015) and pursuant to art. 578 bis c.p.p. for the confiscation ex art. 322 ter c.p. (also for the confiscation of the value) and for the extended confiscation ex art. 240 bis c.p., and also for every form of mandatory confiscation through an extensive application (inacceptable analogical application) of

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312 See J.P.RUI, '*The Civil Asset Forfeiture Approach to Organised Crime: Exploring the Possibilities for an EU Model*' (2011), 3 *European criminal law associations'* forum 2, 153.

313 See for France, C.CUTAJAR, "*Compte rendu du colloque: « Identification, saisie et confiscation des avoirs criminels*", in (2010) 11 *Caiers de la securite* 211 ss.

314 Dir. 2014/42, para. 22.

315 Dir. 2014/42, recital 13.

316 Dir. 2014/42, recital 10.

317 Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation COM/2022/245 final, in EUR-Lex - 52022PC0245 - EN - EUR-Lex (europa.eu)

the art. 578 bis c.p.p. in case law (even if art. 578 bis c.p.p. demands – differently from art. 15 – a not final conviction and that the confiscation order is already issued); pursuant to art. 578-*ter* when the prevention procedure is started after the criminal trial - in the context of which a conviction has already been adopted in the first instance - is *unproceedable* (concluded before the conviction becomes definitive for reasons not concerning the merits); in the case of death during the trial and after the not final conviction in the case law, and (after the reform introduced by Law. 161/2017) for the extended confiscation after the final conviction pursuant to art. 183 quarter Disp. Att. of the Criminal Procedure Code.

In any case in the circumstances listed in the art. 15 of the new directive proposal, it will be always possible to start a prevention proceeding to apply the preventive confiscation.

Art. 15 demands that the application of the confiscation without a prior conviction is possible „only insofar as the national court is satisfied that all the elements of the offence are present" and the notion of 'criminal offence' „shall include offences listed in Article 2 when punishable by deprivation of liberty of a maximum of at least four years"; this means that in order to apply this model of confiscation a court, also on the basis of a lower standard of the proof („is satisfied" and not convinced or fully convinced)[318], has to be satisfied that a specific crime, listed in Article 2 when punishable by deprivation of liberty of a maximum of at least four years, has been perpetrated. The proceeding to apply the confiscation has to respect the affected person's rights of defence, „including by awarding access to the file and the right to be heard on issues of law and fact".

This model of confiscation is not a "pure" non-conviction based confiscation, but is more a case where the procedure aimed at non-conviction based confiscation is accessory to a criminal trial, from which it becomes autonomous when "it could not be continued".

The real actio in rem is not included in art. 15: it doesn't contemplate a proceeding destinated to verify only the criminal origin of the assets to forfeit, also for the lack of legal justification of the asset origin, without convicting the crime perpetrators.

The adoption of an actio in rem is imposed by the Directive proposal through art. 16, **Confiscation of unexplained wealth** linked to criminal activities, inspired by the German „Selbständige Einziehung" (§ 76a, § 4) launched in 2017[319], but in a residual way, only "where confiscation is not possible pursuant to Articles 12 to 15" and only „ when (c) the national court is satisfied that the frozen property is derived from criminal offences committed in the framework of a criminal organisation". The European legislator would like to adopt this model of non conviction based confiscation only to face the organised crime. The same justification which supported the introduction of the preventive confiscation, even if in recent years it has become a tool to fight each forms of crime, able to produce proceeds. Also in the United Kingdom civil recovery was presented as a key strategy in the fight against organised crime[320].

The standard of the proof seems lower than the criminal standard, because the court has to be satisfied, and not convinced or fully convinced, but in any case in „determining whether the frozen property is derived from criminal offences, account shall be taken of all the circumstances of the

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318 For the criminal standard of the proof, SAKELLARAKI A., *EU Asset Recovery and Confiscation Regime – Quo Vadis? A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?*, in *New Jour. Eur. Crim. Law*, 2022, n. 4, pp. 494 ss.; C.GRANDI, *Mutuo riconoscimento in materia penale e diritti fondamentali. Il nodo delle confische*, Torino 2023 (in corso di pubblicazione), 321.

319 Notwithstanding the German delegation considered the final version of art. 1 with „proceeding in criminal matter", expression of a compromise, too unbalanced in favor of the need for efficiency of penal cooperation; C.GRANDI, *op. cit.,* 305.

320 J.HENDRY-C.KING, *Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids,* in *Crim Law and Philos*, 2016, 4 **:** „in the build up to POCA by then—Prime Minister Tony Blair, who in September 1999 stated that 'we want to ensure that crime doesn't pay. Seizing criminal assets deprives criminals and criminal organisations of their financial lifeblood' (Performance and Innovation Unit 2000:13). Initiated as a result of perceived inadequacies of existing criminal processes in controlling highlevel and high-value organised crime, civil recovery enables the seizure of 'criminal' proceeds in the absence of a criminal conviction and on a reduced standard of proof"

case, including the specific facts and available evidence, such as that the value of the property is substantially disproportionate to the lawful income of the owner of the property". The disproportinality is also in this case an important evidence of the criminal asset origin, among other „specific facts and available evidence". So it is not possible to interpretate this rule as imposing the shift of the burden of the proof, as in the British model of unjustified wealth order[321], because the prosecutor has to give evidence of the criminal origin of the asset („account shall be taken of all the circumstances of the case, ..."). It is problematic to establish the standard of the proof: the use of the term „satisfied" suggests a lower standard, notwithstanding the recital 33 imposes the respect of the presumption of innoncence[322] and the recital 36 demands that „This Directive should be implemented without prejudice to ...Directive (EU) 2016/343/EU" on the presumption of innocence. In the Italian translation it is not used the verb „satisfied" (soddisfatta), but „convinced" (convinta) which can be interpreted – also in consideration of the recital 33 and 36 – as a criminal standard[323].

In the German system of law in the opinion of some authors the standard of the proof of the criminal origin of the asset in order to apply the **Selbständige Einziehung" (§ 76a, § 4**) is always the criminal one, that is the „full conviction" of the judge pursuant to § 261 StPO[324] and pursuant to art. 437 StPO[325] this discipline hasn't introduced a form of reversal of the standard of the proof; despite it is an actio in rem, and not in personam, the proceeding is criminal in front a criminal court[326].

The rule demands in any case that the court has to be satisfied not only that the „the frozen property is derived from criminal offences committed in the framework of a criminal organisation", but also from specific offences „referred to in Article 2 when punishable by deprivation of liberty of a maximum of at least four years". This means that the Court has to be satisfied of the illegal origin of the asset to forfeit from specific crimes, and this means a more serious and significant effort to prove the criminal origin of the asset to forfeit, even if in some case it is difficult to give evidence of specific crimes and the available evidence consists more in the lack of evidence of the legal origin.

Art. 16 establishes that "Before a confiscation order within the meaning of paragraphs 1 and 2 is issued by the court, Member States shall ensure that the affected person's rights of defence are respected including by awarding access to the file and the right to be heard on issues of law and fact".

In the end, it is possible to affirm that in the Italian legal system the preventive confiscation is sufficient to satisfy also this model of „**Confiscation of unexplained wealth linked to criminal activities"** because preventive confiscation was created to combat the infiltration of organized

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• [321] A.M. MAUGERI, *La confisca di prevenzione come sanzione del possesso ingiustificato di valori, tra fattispecie* ad hoc e unexplained wealth orders, in *La pena, ancora: fra attualità etradizione, Studi in onore di Emilio Dolcini*, a cura di C.E.PALIERO, F.VIGANÒ, F.BASILE E G.L.GATTA, Giuffrè Editore - Milano, 2018, 919 ss.

[322] „The Directive should provide for specific safeguards and judicial remedies in order to guarantee the protection of their fundamental rights in the implementation of this Directive in line with the right to a fair trial, the right to an effective remedy and the presumption of innocence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union".

[323] In this direction seems C.GRANDI, op. cit., 324.

[324] ESER-F.SCUSTER, § 76a, § 14; T.BETTELS, *La repressione della criminalità organizzata in Germania*, 134; doubtful K.Höft, § 76a Abs. 4 StGB, cit. 202. *Contra* M.Böse-V.Weyer, Germany, AA. VV., *Improving confiscation. Procedures in the European Union*, a cura di A. Bernardi, Napoli 2019, p. 259 ss.; .

[325] § 437 Special provisions for independent confiscation proceedings
When deciding on independent confiscation under Section 76a(4) of the Criminal Code, the court may base its conviction that the object is the result of an unlawful act, in particular on a gross disproportion between the value of the property and the lawful income of the person concerned. In addition, it may also take into account in its decision:
1.the outcome of the investigation into the offence that gave rise to the proceedings,
2.the circumstances under which the object was found and seized, and
3.the other personal and economic circumstances of the person concerned.

[326] M.HEGER, *Stellungnahme. Zur Vorlage an den Rechtsausschuss*,

crime into the economy and this form of confiscation can be applied when a „national court is satisfied that the frozen property is derived from criminal offences committed in the framework of a criminal organisation" and the proceeds of crime „punishable by deprivation of liberty of a maximum of at least four years" are included; the standard of the proof could be considered lower than the criminal standard in the opinion of the Supreme Court (notwithstanding in the end, also the Supreme Court demands that the presumption are based on "serious, precise and concordant" circumstantial evidence, according to art. 192 c.p.p.)[327] - assuming that a standard lower than the criminal one is compatible with the claims of the Regulation in terms of safeguards (recital n. 18) –, despite the recent efforts of the jurisprudence and the most guarantee interpretation proposed in doctrine and accepted by a part of the jurisprudence (art. 192 c.p.p.); in any case the disproportionate value of the property is considered an „available evidence"; „the affected person's rights of defence" should be respected „including by awarding access to the file and the right to be heard on issues of law and fact".

11. The application of the Regulation n. 1805/2018.

The Italian preventive confiscation can be included in the scope of the Regulation[328], in the notion of confiscation order issued "within the framework of proceedings in criminal matters" (art. 1 REG) for some arguments.

Not only, as analysed, the autonomous EU concept of „proceeding in criminal matters" demands only a link with the crime, but furthemore with specific reference to the issue of confiscations without conviction, the EU Commission itself has recently underlined that, for the purposes of the Regulation, the provision can be considered adopted in the context of a "procedure in criminal matters" to the extent that a connection with a crime is present [329].

In consideration of this autonomous concept of proceeding in criminal matter, the preventive confiscation is included because it is applied in **a proceeding «in relation to a offence»** (recital 13 of the Regulation) because it demands that the recipient is considered «a social danger» for the reason that he/she is suspected of criminal activity and the assets are confiscated because are the proceeds of crime (the disproportionate value of the assets is a circumstantial evidence of the criminal origin, or the assets have to be derived from illicit activity or used for reinvestment, and, at any rate, are assets for which the "dangerous" owner has not demonstrated a legitimate origin).

Not only, the proceeding for the application of the preventive confiscation essentially assumes the characteristics of an **enforcement proceeding** and takes place before a **criminal court** (even if today with the reform of the judicial system introduced by law no. 161/2017, the court should have interdisciplinary skills - civil, bankruptcy, criminal, etc..). The **same Italian legislator** has considered the *prevention procedure* criminal where in art. 3, letter. d) of Legislative Decree 7 August 2015, n. 137 (Implementation of framework decision 2006/783/GAI) also includes confiscation

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[327] See note 200, § 3.

[328] This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters.

[329] European Commission, *Commission Staff Wrking Document: Analysis of non-conviction-based confiscation measures in the European Union*, Brussels, 15 April 2019 (OR. en) 8627/19 JAI 413 COPEN 172 DROIPEN 62, SWD (2019)1050 final, 11.04.2019, 55: "The Regulation extends the scope of freezing and confiscation orders compared to the former mutual recognition framework. It applies to all freezing and confiscation orders issued within the framework of proceedings in criminal matters. For confiscation orders, a link to a criminal offence (by means of a final penalty or measure imposed by a court following proceedings) is required. Thus, the Regulation covers classic conviction-based confiscation as well as extended confiscation and non-conviction based confiscation if these are issued within the framework of proceedings in criminal matters. It will, however, not apply to freezing or confiscation orders issued within the framework of proceedings in civil or administrative matters. The confiscation Regulation closes an important lacunae and has the potential to vastly improve crossborder cooperation by providing law enforcement authorities with an efficient tool to confiscate the proceeds of organised crime even when they are laundered or hidden in other EU Member States".

pursuant to art. 24 and 34 of Legislative Decree no. 159/2011- and the proceeding for the adoption of the extended confiscation ex art. 240 bis c.p. - in the context of decisions taken in *criminal proceedings*: «d) confiscation order: a measure issued by a judicial authority in the context of criminal proceedings, which consists in definitively depriving a person of an asset, including confiscation orders pursuant to article 12-sexies of the decree-law of 8 June 1992, n. 306, converted, with modifications, by law 7 August 1992, n. 356, and those arranged pursuant to articles 24 and 34 of the code of anti-mafia laws and preventive measures, pursuant to legislative decree 6 September 2011, n. 159, and subsequent amendments»[330].

Not only, but the change of the expression "criminal proceeding" used in the proposal of Regulation with "proceeding in criminal matter" - as stressed in the "Council of the European Union Interinstitutional File: 2016/0412 (COD)2016/0412 (COD), doc. n. 12685/17 of 2.10.2017" - has been the result of the pressure of the Italian delegation, which - supported by some other delegations - observed that the proposed wording of the scope of the Regulation as defined in Art. 1(1), with the words "criminal proceedings", posed a problem, since its system of so-called "preventive confiscation" would be excluded. According to Italy, its system of confiscation would not fall, at least not entirely, within the notion of "criminal proceedings" as currently used in the proposed Regulation. However, Italy suggested using the concept of Article 82(1) TFEU and referring to "proceedings in criminal matters". This would allow to include its **system of preventive confiscation**, whereas freezing and confiscation orders issued within the framework of proceedings in civil and administrative matters would explicitly be excluded; confiscation orders issued under its system of preventive confiscation have **a clear link with criminal activities** and therefore **fall in principle within the framework of proceedings in criminal matters. Similar procedural safeguards** as in criminal proceedings, notably foreseen by the six Directives on procedural rights, **are adequately respected.**

During the meetings of the Working Party on Judicial Cooperation in Criminal Matters (COPEN), on 28 September 2017 a number of Member States indicated that they could support or at least accept the modification requested by Italy. Member States stressed that the mutual recognition of (freezing orders and) confiscation orders in the European Union would be greatly enhanced if this system could benefit from the application of the Regulation. It was underlined that the Italian system is considered to be one of the most effective confiscation systems in the European Union. Member States would not be obliged to have themselves such a system, but **they should merely be able to recognize and execute confiscation orders issued by Member States under such a system**.

Some other Member States expressed doubts about the advisability of accepting this modification. They observed that the Italian system of preventive confiscation seems to be of a hybrid nature (criminal/administrative), and they wondered whether this system would be covered by the legal basis of Art. 82(1) TFEU.

In order to address these concerns, the Presidency invited the Council Legal Service to give its opinion on this issue. The opinion of the Legal Service is set out in doc. 12708/17. The Presidency considers that the decision on the extension of the scope to include the systems of preventive confiscation, such as the Italian system, is a political one and therefore guidance by the Ministers is required. In the end the more extended expression has been adopted, in order to include also the Italian preventive confiscation.

In the context of a debate on the matter by the EU ministries of Justice (UE, Cons. JAI, 12/13 October 2017), it was specified also that certain preventive confiscation systems are included in the Regulation scope. Provided that the choice to confiscate «soit clairement en rapport avec des activités criminelles et que des garanties procédurales appropriées 'appliquent».

With this modification, then, as emerges in Recital (13) and as emerges in the press release of 8 December 2017 on the orientation reached by the Council on the proposed Regulation, it is

[330] (15G00152) GU Serie Generale n. 203 of the 02-09-2015).

proposed, among other things, to ensure that mutual recognition covers a broad spectrum of confiscations, including those adopted without conviction and including certain preventive confiscation systems, provided that there is a link to a crime: proceedings focused to forfeit the proceeds or instruments of offenses.

Also in the opinion of the Italian desk of Eurojust the prevention proceeding is included in the concept of proceeding in criminal matter" ex art. 1 REG: "During negotiations, Italy obtained that Regulation 1805 apply to any freezing and confiscation order issued "in the context of proceedings in the field of criminal proceedings" (and not only to proceedings aimed at the judicial ascertainment of criminal liability for specific criminal acts). It follows that also measures adopted in the framework of prevention proceedings can be enforced under Regulation's provisions. In order to make resort to such a fundamental tool easier, both the Italian Desk (note of 2 December 2020) and the Ministry of Justice (DAG circular of 18 February 2021 0035566.U) provided colleagues with information and practical suggestions.

Moreover, on 12 March 2021, the Italian Desk and the Ministry of Justice signed an operational agreement aimed at coordinating their respective areas of competence on the matter. That following designation of the Ministry of Justice as the entity entitled to receive passive requests and convey active ones (see notification and declaration of Italy of 17.12.2020).

In particular, in order to take into account Eurojust's specific area of competence, it was agreed that the Italian Desk of Eurojust must be involved whenever the execution of seizure measures has to be coordinated with execution of personal precautionary measures or investigation activities (searches, witness hearings, technical activities) to be carried out simultaneously with seizures in different countries».

In the end, the preventive confiscation has to be included in the Regulation's scope, but it would be important not only to adopt a criminal standard of the proof of the criminal asset origin, but also to improve the respect of the procedural safeguards according to the recital n. 18 of the Regulation, which demands the respect of the procedural rights set out in Directives 2010/64/EU (6), 2012/13/EU (7), 2013/48/EU (8), (EU) 2016/343 (9), (EU) 2016/800 (10) and (EU) 2016/1919 (11), and which imposes, above all, that "the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular, the essential safeguards for criminal proceedings set out in the Charter should apply to *proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation".*

About that, the doctrine criticizes this procedure for the lack of guarantees of the criminal trial: an only "apparent" judicial guarantee would apply and the principle of the adversarial procedure - the observance of which is demanded by the European Court of the Human Rights also in relation to the preventive proceeding by virtue of article 6, § 1[331] - is violated where this proceeding does not guarantee the taking of evidence in cross-examination (at least when it is repeatable) and the evidence has already been formed in the preliminary investigation phase without cross-examination (in the preventive procedure it is not necessary to take the declarative evidence between the parties, being sufficient that the proposed has, through the examination of the documents, the possibility of full knowledge of their content and the right to counter-argument) [332]. The contradictory, moreover, is imposed by the principle of jurisdiction claimed by the Constitutional Court itself [333] and presupposes adequate evidentiary and judgment rules inherent to the strictly procedural

[331] The Edu Court peacefully recognizes the right to be heard (adversarial procedure) also in civil matters, as an expression of the principle of a fair trial pursuant to art. 6 ECHR, see ECHR, 22.9.2009, *Cimolino* c. *Italia*, n. 12532/05, § 43; 11.12.2007, *Drassich c. Italia*, § 33; 16.2.2006, *Prikyan e Angelova c. Bulgaria*, § 52; 13 ottobre 2005, *Clinique de Acacias e Altri c. Francia*, § 38; 25.10.2013, *Khodorkovskiy and Lebedev v. Russia*, n. 11082/06 e 13772/05, § 707.

[332] Cass., sez. VI, 19.7.2017, *Maggi e altro*, n. 40552, *Mass. Uff.* n. 271055.

[333] C. cost., n. 2, 10 and 11 of the 1956, n. 45/1960, n. 23/1964.

phase[334]. The doctrine disputes that this procedure is too bent on an inquisitorial structure[335], starting from the lack of a real separation between the preliminary phase of investigation and the phase dedicated to the judgment and evaluation of the test themes[336]. For further considerations on the reforms introduced in the preventive proceeding by l. 161/2017 and on the reforms necessary to guarantee due process pursuant to art. 6 of the ECHR and in compliance with the claims of art. 8 of Directive 42/2014, as well as in order to increase mutual trust at the basis of judicial cooperation and mutual recognition, reference is made to the examination carried out elsewhere[337].

In any case, the "Union of Criminal Chambers" (a lawyers association) disputes the introduction of unacceptable procedural limitations such as remote hearings, or the lack in the reform of those minimum procedural adjustments capable of making the defense effective such as, just to name a few, the granting of terms to appear congruous and respectful of the constitutional provisions and the elimination of the limit of the sole violation of the law among the defects reportable in front of the Supreme Court[338].

As highlighted in the works of the General States of the fight against the Mafia, indeed, "the reform text does not address some of the issues - such as those relating to the exercise of the right to probation, the methods of conducting the preliminary investigation, the system of knowability of the acts formed by the prosecution - which appear more relevant for the complete achievement of a 'due process of prevention'"[339]. Another important proposal is that the legislative outline of the proposal of application of the measure should be filled with contents: only by defining the contours of the introductory act of the public party, it will be possible to allow a full explanation of the right of defense also in the prevention proceeding[340].

In any case, also in relation to this form of confiscation the affected can challenge the application of mutual recognition by proving that the fundamental guarantees of criminal matters have been violated in the concrete case (a specific violation of fundamental rights) and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) ("the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence") and 19, h) („in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a

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334 Cfr. CISTERNA, *La natura promiscua della confisca tra misura di sicurezza e sanzione punitiva in rapporto alle nuove tecniche sanzionatorie della criminalità del profitto*, in A.BARGI-A.CISTERNA, (eds.), *La giustizia patrimoniale penale*, Torino, Giappichelli, 2011, 93; MONTAGNA *Procedimento applicativo delle misure ablative di prevenzione e garanzie del giusto processo*, *ivi*, 453 ss.

335 L.FILIPPI, *Il procedimento di prevenzione patrimoniale*, Padova, Cedam, 2002, 69; A.MANGIONE, La misura di prevenzione patrimoniale fra dogmatica e politica criminale, 2001, Padova, Cedam, 263; ID., "Le misure di prevenzione anti-mafa al vaglio dei principi del giusto processo", in (editor) F.CASSANO, *Le misure di prevenzione patrimoniali dopo il "pacchetto sicurezza*, 2009, NelDiritto Editore, 20 ss.; C.VALENTINI, *Motivazioni della pronuncia e controlli sul giudizio per le misure di prevenzione*, 2008, Padova, Cedam, 72. Cfr. A.QUATTROCCHI, *Lo statuto della pericolosità qualifcata sotto la lente delle Sezioni Unite*, in *Diritto penale contemporaneo – Rivista trimestrale*, 2018, 1, 82 ss.; MAZZA, *La decisione di confisca dei beni sequestrati*, in S.FURFARO (editor), *Misure di* prevenzione, Torino, Utet Giuridica, 2013, 480.

336 M.MONTAGNA, *Procedimento applicativo delle misure ablative di prevenzione*, cit., 457.

337 A.M.MAUGERI, *La riforma delle misure di prevenzione patrimoniali ad opera della l. 161*/2017, cit., 362 ss.

338 Unione camere penali, *Modifiche al sistema delle confische: l'Unione delibera lo stato di agitazione*, *http://www.camerepenali.it/cat/8550/modifiche_al_sistema_delle_confischel'unione_delibera_lo_stato_di_agitazione.html.*

339 Balsamo, in Relazione Tavolo XV *Mafia e Europa*, coordinated by Prof.ssa Maugeri, in *https://giustizia.it/giustizia/it/mg_2_22.page*.

340 C.Grandi, 341 s.

relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence")[341].

This seems the solution more reasonable respect the hypothesis, proposed in doctrine, that - also in consideration of the leading cases Aranyosi and the Gavanozov II - the prevention procedure presents a deficit with respect to both the fundamental and structural principles, a deficit which "depends on a situation of law, deriving precisely from the incompatibility of the discipline of preventive confiscation with the guarantees whose observance conditions the operation of the mutual recognition mechanism"[342].

In order to improve the application of the Regulation n. 1805/2018, in conclusion, the improvement of the harmonisation through the new proposal of Directive will be important, because - in line with what was established by the German Constitutional Court - the Luxembourg judges themselves recognized that national standards on fundamental rights regain depth - also as a function of impeding mutual recognition obligations - in areas where the level of harmonization achieved on a European scale is limited[343].

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341 S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: A headlong rush into Europe-wide harmonisation*?, in *NJECL* 2022, 206 s.: „The European legislator's efforts to tighten up the terms of the grounds for refusal and prevent an 'excess of guarantees' from hindering the machinery of mutual recognition has led to some truly disconcerting redundancies. The *exceptionality* of the situation and the *specificity* of the circumstances of the case are not enough; it is also necessary that the violation is *manifest*, that the right affected is of particular importance and that the conviction of the executing authority as to the likelihood of such an attack is based on *substantial* grounds and on *specific and objective* evidence".

342 Only as possible option, C.GRANDI, *op. cit.*, 293 s.

343 C.GRANDI, *op. cit.*, 314 who quoted Court of Justice UE, 30 May 2013, C-168/13 PPU, *Jeremy*; K. LENAERTS, J. A. GUTIÉRREZ-FONS, *The European Court of Justice and Fundamental Rights in the Field of Criminal Law*, in AA. VV., *Research Handbook on European Criminal Law*, cit., 7 ss.; V. MITSILEGAS, *EU Criminal Law*[2] (Modern Studies in European Law), Oxford (Hart Publishing), 2022, 215; A. WILLEMS, *The Principle of Mutual Trust*, cit., 97.

ART. 240 CRIMINAL CODE

Art. 240 C.C., Confiscation "1. When a conviction occurs, the court may order the confiscation of the assets that were used or were intended to commit the crime, and of things which are the product or the profit of the crime.

2. The confiscation always concerns: 1) assets that constitute the price of the offense; 1bis) assets and computer devices used in whole or in part to commit the offenses referred to in articles 615-ter, 615- quater, 617-quinquies, 617-sexies, 635-bis, 635-ter, 635-quater, 635-quinquies, 640-ter and 640- quinquies5 ; 2) assets, the manufacture, the use, the carriage, the possession or the sale of which constitutes a criminal offense, even if a conviction is not made.

3. Paragraph 1 and numbers 1 and 1-bis of paragraph 2 shall not apply if the asset, the good or the computer device belong to a person unrelated to the crime. Paragraph 2, number 1-bis, shall also apply in case of application of the penalty on request of the parties pursuant to Article 444 of the Code of Criminal Procedure6 .

4. Paragraph 2 shall not apply if the asset belongs to a person unrelated to the crime and the manufacture, the use, the carriage, the possession or the disposal may be authorised by administrative approval.

ART. 322ter of Criminal Code, **Confiscation**.

Confiscation of profit and price is mandatory for crimes committed by public officials against the public administration; in particular for crimes provided under articles 314 (embezzlement), 315 (embezzlement against a private person), 316 (embezzlement taking advantage of other's error), 316-bis (embezzlement against the State), 316-ter (misappropriation of funds against the State), 317 (concussion7), 318 (corruption to exercise the function), 319 (corruption for an activity against the function), 319-ter (corruption in judicial acts), 319-quarter (improper induction to give or promise utility), 320 (corruption of a person in charge of public service). • When goods which should be confiscated belong to a third person unrelated to the crime, a confiscation of goods of an equal value is disposed.

ART. 240 BIS CRIMINAL CODE, EXTENDED CONFISCATION

In cases of conviction or plea bargain pursuant to article 444 of the criminal procedure code, for some of the crimes envisaged by article 51, paragraph 3-bis, of the criminal procedure code, by articles 314 (embezzlement), 316 (embezzlement taking advantage of other's error), 316-bis (embezzlement against the State), 316-ter (misappropriation of funds against the State, 317 (extortion), 318 (bribery for the performance of an official function), 319 (bribery for actions contrary to official duties) , 319-ter (bribery in judicial proceedings), 319-quarter (undue inducement to give or promise benefits), 320 (bribery of a public service employee), 322 (incitement to bribery), 322-bis ((embezzlement, extortion, undue inducement to give or promise benefits, bribery, and incitement to bribery of members of the International Criminal Court, European Community bodies, and officials of the European Community and of foreign countries), 325 (use of invention or discoveries known by reason of office), 416 (criminal association), carried out for the purpose of committing the crimes envisaged by articles 453 (counterfeiting o currency, spending and introducing counterfeit currency into the State, in conspiracy with others), 454 (alteration of currency), 455 (spending and introducing counterfeit currency into the State, not in conspiracy with the others), 460 (counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps), 461 (fabrication or possession of watermarks paper), 517-ter (manufacture and sale of goods produced by usurping industrial property rights) and 517-

quarter (counterfeiting of geographical indications or designations of origin of agricultural and food products), as well as articles 452-quarter (environmental disaster), 452-octies first paragraph (aggravating circumstances for environmental crimes), , 493-ter (improper use of credit or payment cards), 512-bis (fraudulent transfer of funds), 600-bis, first paragraph (child prostitution), 600-ter, first and second paragraph (child pornography), 600-quater .1 (possession of pornographic material with minors) relating to the conduct of production or trade of pornographic material, 600-quinquies (tourist initiatives aimed at exploiting child prostitution), 603-bis (illicit brokering and exploitation of labor), 629 (extortion), 644 8usury), 648 (receiving stolen goods), excluding the case referred to in the second paragraph, 648-bis (money laundering), 648-ter (use of money, assets or utilities of illicit origin) and 648-ter.1(self-laundering) , from article 2635 of the civil code (corruption between private parties), or for some of the crimes committed for purposes of terrorism, even international, or of subversion of the constitutional order, it is always ordered to confiscate the money, assets or other utilities whose origins are unable to be justified by the convicted person and of which, even through a natural or legal person, he / she appear to be the owner or have the availability thereof in any capacity, for a value that is disproportionate to his / her income declared for tax purposes or his/her economic activity. Whatever the case, the convicted person cannot justify the legitimate origins of the assets on the assumption that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion, unless the tax obligation was extinguished through compliance with the law. Confiscation pursuant to the above provisions is ordered in the case of conviction or plea bargain for the crimes referred to under articles 617-quinquies (installation of equipment designed to intercept, impede or interrupt telegraph or telephone communications), 617-sexies (falsification, alteration or suppression of the content of computer or electronic communications), 635-bis (damage caused to computer and telematics systems), 635-ter (damage caused to computer information, data or programs utilised by the State or by another public authority, or otherwise of public utility), 635-quarter (damage caused to computerised or telematics systems), 635- quinquies (damage caused to computerised or telematics systems of public utility) when the conduct described therein affects three or more systems. In the cases described in the first paragraph, in the event that the money, assets and other utilities referred to in the same paragraph cannot be confiscated, the judge orders the confiscation of other sums of money, assets and other utilities of legitimate origin in the availability of the offender, for an equivalent value, even through a third party. (1) Article inserted by art. 6, paragraph 1, legislative decree 1 March 2018, n. 21.

ART. 24 LEGISLATIVE DECREE N. 159/2011

Art. 24 Confiscation 1. The court shall confiscate the seized goods of which the the person against whom the proceedings can be instituted can not justify the legitimate origin and of which, even by interposing a natural or legal person, be a holder of or have the availability in any way in a disproportionate value to their own income, declared for income tax purposes, or your own economic activity, as well as goods that result to be fruit of illicit activities or constitute re-employment.

In any case, the proposal cannot justify the legitimate origin of the goods by claiming that the money used to purchase them is the proceeds or reuse of tax evasion. If the court does not order the confiscation, it can also apply ex officio the measures referred to in articles 34 and 34-bis if the conditions set forth therein are met.

1-bis. When the court orders the confiscation of total shareholdings, it also orders the confiscation of the relative assets established in the company pursuant to articles 2555 and following of the civil code. In the confiscation decree concerning shareholdings, the court specifically indicates the current accounts and assets set up in the company pursuant to articles 2555 and following of the civil code to which the confiscation extends.

2. The seizure provision loses effectiveness if the court does not deposit the decree pronouncing the confiscation within one year and six months from the date of placing the assets in possession by the judicial administrator. In the case of complex investigations or relevant patrimonial compendiums, the term referred to in the first sentence can be extended by reasoned decree of the court for six months. For the purpose of calculating the aforementioned terms, the reasons for suspending the terms of duration of pre-trial detention are taken into account, provided for by the code of criminal procedure, as compatible; the term remains suspended for a period not exceeding ninety days where it is necessary to proceed with the completion of expert assessments on the assets of which the person against whom the procedure has been initiated appears to be able to dispose, directly or indirectly. The term also remains suspended for the time necessary for the definitive decision on the objection request presented by the defender and for the time starting from the death of the defendant, which occurred during the proceeding, up to the identification and summons of the subjects envisaged by article 18, paragraph 2, as well as during the pending terms envisaged by paragraphs 10-sexies, 10-septies and 10-octies of article 7.

2-bis. With the definitive revocation or cancellation provision of the confiscation decree, the cancellation of all transcripts and annotations is ordered.

3. Seizure and confiscation may be adopted, at the request of the subjects referred to in article 17, paragraphs 1 and 2, when the conditions are met, even after the application of a personal prevention measure. The same court that ordered the personal preventive measure shall decide on the request, with the forms envisaged for the relative procedure and in compliance with the provisions of this title.