Co-funded by the European Union

Project RECOVER – Crime doesn't pay (GA no. 101091375)

General Recommendations for the Italian System of Law – Prof. A.M. Maugeri

Summary: 1. Proposal of reforms in the light of the Directive n. 42/2019 and the proposal of a new Directive on asset recovery and confiscation. - 1.1. Further suggestions de iure condendo for a general discipline of the confiscation. - 2. Correspondence of the Italian extended confiscation to the model of Directive no. 42/2014 and needs to reform. - 3. 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). Proposals of reform.

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

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.
These proposals take into account the proposals made by the Palazzo Commission in 2013[1], taken up by the Marasca Commission in 2017[2] .

In the light of supranational instruments and the work of the reform commissions (including the Pisapia and Grosso commissions), as well as the latest proposals put forward by the Italian Association of Criminal Law Professors[3], it is, first of all, necessary to provide for a common discipline, as well as an articulation of the discipline that distinguishes the three fundamental types of confiscation: of the proceeds of the crime; of the instruments of the crime; of so-called intrinsically illicit things, each species of which actually implies its own and differentiated discipline.

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[4] 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

[1] "Schema per la redazione di principi e criteri direttivi di delega legislativa in materia di riforma del sistema sanzionatorio", Ministerial commission chaired by Professor Palazzo, in *Dir. Pen. Cont.*, 10 February 2014.

[2] The Commission, chaired by Dr. Gennaro Marasca, established with D.M. Justice 3 May 2016, and composed of magistrates and university professors, for the elaboration of a proposal for the implementation of the transposition delegation of the so called principle of "tendential code reserve in criminal matters (c.d. "tendenziale riserva di codice in materia penale").

[3] Linee di riforma in tema di pene alternative edittali (March 2021), coord. Prof. F. Palazzo, 63 ss. in *https://www.aipdp.it/allegato_prodotti/172.*

[4] „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".

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"[5].

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)[6]. 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[7] 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[8]. 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[9].

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) [10]; 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[11].

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 confiscation ex art.

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

[6] 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.

[7] 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".

[8] 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.

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

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

[11] 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.

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[12]), 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) [13]. 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)[14].

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).

1.1. 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[15] 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)[16], 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[17].

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 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[18]. 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

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[12] 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.

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

[14] 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.

[15] 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".

[16] 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.'

[17] 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".

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

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)[19].

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[20]. 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[21].

3) The removal of the profit from third parties (including legal persons) should be guaranteed, as established by the jurisprudence[22] 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[23].

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 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"[24]. The European legislator would like to ensure the confiscation of the illicit proceeds notwithstanding the evasive manoeuvres of suspected or accused

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[19] 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.

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

[21] 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.

[22] 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.

[23] 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.

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

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)[25].

[25] 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.

2. 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 [26].

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 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."[27]) 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"[28].

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"[29]; 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"[30]. 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.

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[26] 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.

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

[28] 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

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

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

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[31]; 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 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"[32]). This element is relied on by Article 12 *sexies* of Law Decree 306/1992, now art. 240 bis of the Italian system[33], 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[34]) - 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[35].

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).

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

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

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

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

[35] 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

In the 2022 draft directive this model of confiscation remains the same in art. 14[36], which includes in two paragraphs what is written in one paragraph in art. 5 of the current directive.

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.

[36] **Extended confiscation**

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.

3. 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). Proposals of reform.

The Article 4, paragraph 2,[37] 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 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.[38]

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[39].

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"[40]. 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."[41] It is also stated that: "Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court."[42] 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[43], 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".

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[37] In the proposal for the Directive, this was set out in the Article 5.

[38] 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.

[39] 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.

[40] Dir. 2014/42, para. 22.

[41] Dir. 2014/42, recital 13.

[42] Dir. 2014/42, recital 10.

[43] 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)

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 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)[44], 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[45], 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[46].

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

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[44] 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.

[45] 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.

[46] 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"

property is derived from criminal offences, 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 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[47], 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[48] 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[49].

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[50] and pursuant to art. 437 StPO[51] 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[52].

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 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

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- [47] 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.

[48] „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".

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

[50] 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.; .

[51] § 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.

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

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.)[53] - 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".

3.1. **The improvment of the safeguards.**

The Italian preventive confiscation has to be included in the Regulation (1805/2018)'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[54] - 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) [55].

The contradictory, moreover, is imposed by the principle of jurisdiction claimed by the Constitutional Court itself [56] and presupposes adequate evidentiary and judgment rules inherent to the strictly procedural phase[57].

The doctrine disputes that this procedure is too bent on an inquisitorial structure[58], 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[59]. 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

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[53] See note 200, § 3.

[54] 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.

[55] Cass., sez. VI, 19.7.2017, *Maggi e altro*, n. 40552, *Mass. Uff.* n. 271055.

[56] C. cost., n. 2, 10 and 11 of the 1956, n. 45/1960, n. 23/1964.

[57] 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.

[58] 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.

[59] M.MONTAGNA, *Procedimento applicativo delle misure ablative di prevenzione*, cit., 457.

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[60].

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[61].

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'"[62].

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[63].

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, first of all in terms of safeguards.

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[60] A.M.MAUGERI, *La riforma delle misure di prevenzione patrimoniali ad opera della l. 161*/2017, cit., 362 ss.

[61] 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.*

[62] Balsamo, in Relazione Tavolo XV *Mafia e Europa*, coordinated by Prof.ssa Maugeri, in *https://giustizia.it/giustizia/it/mg_2_22.page*.

[63] C.Grandi, 341 s.