GUIDELINES FOR THE ITALIAN LEGAL SYSTEM

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In Italy the forms of freezing and confiscations orders which are covered by the REG are:
- the traditional model of confiscation (art. 240 of the criminal code)
- the special forms of mandatory confiscation, provided for in criminal code or in special laws and connected seizure order (articles 321-323 of the code of criminal procedure)
- extended confiscation pursuant to art. 240 bis c.p. and connected seizure orders (articles 321-323 of the code of criminal procedure)
- preventive confiscation (art. 24 and 34 d.lgs. 159/2011) and connected seizure orders (art. 20)

1. Mutual recognition of the Italian traditional confiscation model.

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[1].
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.

2. Mutual 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

[1] 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.

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[2].

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, 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")[3].

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.

3. The application of the Regulation n. 1805/2018 to the preventive confiscation.

The Italian preventive confiscation can be included in the scope of the Regulation[4], 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

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[2] 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.

[3] 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".

[4] 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.

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 [5].

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 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»[6].

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

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[5] 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".

[6] (15G00152) GU Serie Generale n. 203 of the 02-09-2015).

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 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[7] - 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) [8]. The contradictory, moreover, is imposed by the principle of jurisdiction claimed by the Constitutional Court itself [9] and presupposes adequate evidentiary and judgment rules inherent to the strictly procedural phase[10]. The doctrine disputes that this procedure is too bent on an inquisitorial structure[11], 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[12]. 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[13].

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[14].

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'"[15]. 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[16].

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

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[7] 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.

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

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

[10] 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.

[11] 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.

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

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

[14] 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.*

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

[16] C.Grandi, 341 s.

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 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")[17].

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"[18].

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[19].

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[17] 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".

[18] Only as possible option, C.GRANDI, *op. cit.*, 293 s.

[19] 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.