

Italian confiscation preventive measure (non conviction based), art. 24 leg. decree 159/2011 (code of preventive measures)

- **It is applied in a proceeding «in relation to a offence» (recital 13) because**
- **it demands that the recipient is considered «a social danger» because he/she is suspected of criminal activity**
- **confiscation of assets of criminal origin**
(the value of assets is disproportionate to declared income or economic activity, or when *it transpires* that they are 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

notion of criminal matter of ECtHR?

- It does not seem possible to refer to the notion of criminal matter of ECtHR and
- to the relative **Engel (v. Netherlands, 1976) criteria** for **establishing the criminal nature** of a procedure and a measure, because

Engel criteria

- the official formal qualification or the determination of the legal system of belonging;
 - the "very nature" of the infringement with particular reference to its forms of typification and the procedure adopted;
 - the nature of sanction and degree of sanction severity
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- the sub-criteria adopted to establish the nature of the procedure are not so significant because the Court merely requires that
 - the procedure be applied by a public authority on the basis of
 - enforcement powers conferred by law and
 - on the basis of an infringement (nature of the infringement) based on a precept of a general nature addressed to all citizens

it is a broad notion of "criminal matter" which includes

- all measures of an afflictive nature, which pursue general and special prevention purposes;
- the punitive administrative offense falls within this,
- as has been expressly stated in relation to the Ordnungswidrigkeiten of the German legal system or in relation to the Verwaltungsstrafverfahren of the Austrian legal system,
- or disciplinary sanctions when such sanctions "merit the guarantees inherent in the criminal procedure", or, again,
- "proceedings for recovery of an unpaid community charge", considered by the English law "civil in nature"
- or the German detention security measure - the Sicherungsverwahrung (§ 66 StGB).

- - apart from the not always completely consistent and unequivocal use of these criteria in the same ECtHR case law -,
- **the Court has substantially excluded the inclusion in the notion of «criminal matter» of the proceedings for the application of form of confiscation without condemnation,**
- from the Italian preventive confiscation to the British civil recovery or other forms of civil forfeiture

Positive attitude of ECHR towards forms of confiscation without conviction

- not only because it always confirms the substantial compatibility of these measure with the principles of ECHR,
- subtracting them to the principles of criminal law, but
- it approves a more general supranational position which **supports the use of civil forfeiture as a criminal policy strategy against serious criminal phenomena**

ECHR in *Gogitidze* case:

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) (..),
- the Court observes 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”**.



ECHR: “is not of a punitive but of a preventive and/or compensatory nature”

- In the ***Gogitidze case*** (*v. Georgia*, 12 maggio 2015, no. 36862/05) the ECourt HR has confirmed its opinion in relation to the civil forfeiture (*civil proceeding in rem*):
- «the forfeiture of property ordered as a result of civil proceedings *in rem*, without involving determination of a criminal charge, **is not of a punitive but of a preventive and/or compensatory nature**».
- *Civil recovery Butler case*, recently *Todorov v. Bulgaria*

ECHR: Italian preventive confiscation

- measure of prevention has a distinct function and nature from that of criminal sanction.
- does not presuppose a crime and a conviction,
- it seeks to prevent the commission from people who are considered dangerous

- ECTHR, 25 March 2003, *Madonia c. Italia*, n. 55927/00, § 4; *Id.*, 20 June 2002, *Andersson v. Italy*, n. 55504/00, § 4; *Id.*, 5 July 2001, *Arcuri e tre altri c. Italia*, n. 52024/99, § 5; *Id.*, 4 September 2001, *Riela c. Italia*, n. 52439/99, § 6; *Id.*, *Bocellari e Rizza c. Italia*, n. 399/02, § 8.

ECHR, *Butler c. Royaume-Uni*, 26 June 2002, n 41661/98.

- “the forfeiture order was a preventive measure and cannot be compared to a criminal sanction,
- since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs.
- It follows that the proceedings which led to the making of the order did not involve “the determination ... of a criminal charge”

Consistency with ECHR

- From the recognition of the preventive or compensative nature of the anti-mafia confiscation or other forms of civil forfeiture
- derive the consistency of these measure with the right to property (Article 1 of the 1st Additional Protocol to the ECHR)
- and the principle of legality (Article 7) (retroactive application is permitted)
- the presumption of innocence (Article 6 § 2)

no violation of Article 1 of Protocol No. 1 right to property

- the **interference** suffered by the applicant with the peaceful enjoyment of his possessions is **proportionate** to the aim pursued with the weapon of the confiscation, i.e. the fight against the scourge of **drug trafficking**" (*Butler v. Royaume – Uni; Philips*)
- the fight against **Mafia** (Marandino, Madonia,..)
- the fight against **corruption** (*Gogitidze, Telbis and Vizeteu 2018*)
- or, in any case, the fight against the crime (Todorov 2021, Telbis and Vizeteu 2018)

Fight against Mafia

- the fight against organised crime like the Mafia, “ 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, ..»

reversal of the burden of the proof:

**“the Court reiterates there can be nothing arbitrary, for the purposes of the “civil” limb of Article 6 § 1 of the Convention,
in the reversal of the burden of proof onto the respondents in the forfeiture proceedings *in rem*”.**

civil standard “or a high probability of illicit origins”

- “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.
- **“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”.**

ECHR: The verification of the link with the crime (Todorov)

- in examining many forms of extended confiscation, also in the light of art. 5 of Directive 42/2014 and its recital no. 21,
- the Court recognizes the correctness of the procedure that led to the assessment of the unlawful origin of the assets (for all the case *Balsamo v. San Marino*),
- **to ascertain a link between proceeds and criminal activity** - understood in a broad sense and **demonstrable even with presumptions** -,
- **in the absence of which the confiscation represents a disproportionate sacrifice of the right of ownership pursuant to art. 1 I Pr. ECHR.**



PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE in

ECHR, *Varvara v. Italy*, no. 17475/09, 29 March 2014.

- “Accordingly, beyond the contradictions in the various cases concerning measures which are substantially analogous,
- **the Court affords weaker safeguards for more serious, indeed more intrusive, confiscation measures,**
- **and stronger guarantees for less serious confiscation measures.**
- **Some “civil-law” measures and some “crime prevention” measures which disguise what is in effect action to annihilate the suspect’s economic capacities, sometimes on threat of imprisonment should they fail to pay the sum due, are subject to weak, vague supervision, or indeed escape the Court’s control, while other intrinsically administrative measures are sometimes treated as equivalent to penalties and made subject to the stricter safeguards of Articles 6 and 7 of the Convention”.**

- “The repercussions of the Court’s case-law can be considerable in cases of enlarged confiscation as a measure to attach property in general (e.g. Article 43a of the German Criminal Code and Article 229-49 of the French Penal Code),
- property having an unlawful purpose (e.g. § 72 of the Swiss Criminal Code and § 20b of the Austrian Criminal Code)
- and property suspected of having an unlawful origin (e.g. § 73d of the German Criminal Code, section 20b (2) of the Austrian Code and section 7 of the Portuguese Law no. 5/2002)”.

Punitive nature of confiscation without conviction in the autonomous meaning of the ECHR

- Limit the right property or permits to forfeit the whole property
- Limit the freedom of economic activity
- stigmatise the person affected, without a demonstration of guilt and a conviction

Criminal standard

- It would be more respectful of the safeguards to adopt the **criminal standard of the proof** in order to apply a kind of confiscation which,
- without the conviction and the demonstration of guilty,
- allows to forfeit the whole property of the subject because **the property is considered of criminal origin,**
- **with the connected stigma for the owner:**
- **The assets are confiscated because the owner is involved in criminal activities**
- **The proof of the illegal origin of the assets is the only element that can justify the confiscation in a State based on the rule of law**

“to square the circle”

- The LIBE Committee model is perhaps too ambitious because it attempts “to square the circle”:
- to consider a “criminal sanction” a kind of confiscation without conviction and to apply the safeguards of the criminal matter, but
- it is an interesting model of actio in rem in order to improve the respect of the safeguards.

lex fori

- Art. 23 of the Regulation establishes the principle of the lex fori for the purpose of identifying the rules applicable to the procedure for the execution of the confiscation order:
- only the executing authorities, in fact, are competent to decide on the procedures for its execution and to determine all the measures relating thereto.

Legal persons, art. 23

- 2. A freezing order or confiscation order issued against a legal person shall be executed
- even where the executing State does not recognise the principle of criminal liability of legal persons.

Means of appeal against the recognition and execution of a confiscation decision

- art. 33 (Article 9, § 2 Framework Decision) provides that
- the substantive reasons may be asserted only before the judicial authority of the issuing State, while
- before the judicial authority of the executing State each interested party,
- including third parties of good faith,
- must have appropriate means of appeal to protect their rights, according to the rules applicable in the legislation of that State (which may also provide, if necessary, suspensive effects of the action).

Third parties

- It will be particularly important to provide for particularly streamlined procedures in the individual legal systems that guarantee the protection of the rights of third parties,
- in order to limit as much as possible the suspensive effect of the legal remedy (where the law of the executing State so provides) provided for by art. 33 (formerly 9, § 1 of the framework decision) or
- the refusal of mutual recognition provided for by art. 8 (in the proposal art. 9 (e) precisely in consideration of the rights of third parties in good faith).

the confiscated proceeds are divided between the executing State and the issuing State of the order (Art. 31),

- "The executing authority may submit a proposal to the issuing authority that the costs be shared where it appears, either before or after the execution of a freezing order or confiscation order, that the execution of the order would entail large or exceptional costs".
- As advocated by the Vienna Convention of 1988, the Explanatory Report of the Strasbourg Convention of 1990, the Council Action Plan against Organized Crime of 1997, the United Nations Convention against Organized Crime of 2000 (Article 14), and as envisaged by the same framework decision 783/2006,
- thus encouraging cooperation by the executing State who will benefit greatly from his collaboration.
- In this regard, the US Department of Justice underlined that the division of confiscated assets among the nations that have collaborated in the application of the confiscation
- **"increases cooperation for confiscation at the international level**, creating an incentive in the countries that collaborate with each other,
- regardless to the place where the assets are located or to the jurisdiction that will have the final say in ordering the confiscation ".

Art. 28, Management and disposal of frozen and confiscated property

- recalling art. 10 of Directive 42/2014, calls on
- the Member States to **properly manage seized or confiscated assets to avoid their loss of value**, and
- establishes rules for the destination of confiscated assets
- a particular reflection and a specific cooperation discipline will be necessary to regulate the cases in which the assets seized and then confiscated are **company assets**
- whose value is to be preserved, as well as to guarantee
- the carrying on of the business activity of fundamentally healthy companies or , however, remediable

Reuse for public interest or social purpose

- Art. 10, § 3. Member States **shall consider taking** measures allowing confiscated property to be used for **public interest or social purposes**.
- Recital 35. for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility
- **LIBE Committee** «*each Member State shall provide for the possibility of confiscated property being used for social purposes*» : mandatory.

Freedom finds a tangible expression in property

- as United States Supreme Court observed in *United States v. James Daniel Good Real Property*, freedom finds a tangible expression in property, there is an insoluble bond between right of freedom and property rights
- if a government has an uncontrollable power on property rights of a citizen, all other rights become without value.
- The explanatory report of Article I of ECHR Protocol I affirms that: “property rights are a condition for personal and family independence”.



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

middle-ground system

- drawing on elements from both civil and criminal processes
 - Criminal standard of the proof
 - Presumption of innocence (burden of proof being imposed on the State)
 - Hearsay evidence
 - greater reliance on documentary evidence
- Good compromise between efficiency and safeguards

Thank you for your attention