Country report. Italy

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Section I – The models of confiscation against legal persons: harmonisation

1. How was the Directive 2014/42/EU transposed in Your national legal order and how did this affect national law in relation to legal persons?

The Directive 2014/42/EU, implemented in Italy with Legislative decree no. 202/2016 (hereinafter L.d. 202/2016), in establishing minimum standards for the freezing, management and confiscation of assets of criminal origin, has established an obligation for Members States to introduce, among others: a) provisions relating to confiscation not based on conviction (at least in the event of illness or flight of the accused or suspect); b) provisions relating to extended confiscation for a specific list of serious crimes; c) provisions relating to confiscation against third parties.

However, the L.d. 202/2016 (as examined in the National Report WP2) did not introduce specific rules which affect legal persons.

In the implementation of the directive, the Italian legislator, with reference to individual criminal cases, or serious crimes defined by a series of instruments mentioned by the directive itself has introduced new cases of direct mandatory confiscation and equivalently by amending the penal code, the civil code, the Presidential Decree 9 October 1990, n. 309, the Law n. 356/1992 and Legislative decree no. 231/2007 (hereinafter L.d. 231/2007).

2. **Which models of confiscation applicable against natural persons, can affect indirectly the assets of legal persons? E.g. If the proceeds are got by the legal persons or when the confiscation involves the share in legal entity held by the convicted person.**

Summary. 1. The Italian strategy against the infiltration of organised and economic crime in the economy. – 2. Confiscation as a strategy against criminal infiltration in the economy. - 2.1. The mafia enterprise (original' mafia businesses; enterprises owned by the 'Mafioso'; enterprises with 'mafia participation')/illicit enterprise. – 3. The problems connected with the confiscation of companies.

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1. **The Italian strategy against the infiltration of organised and economic crime in the economy.**

   The different forms of confiscation against natural persons cannot be applied to legal persons.

However, in the Italian legal system of law each form of confiscation against natural persons can have as object the share in legal entity held by the convicted person if they are the direct or indirect proceeds, or the product or the instrumentalities of crime or the assets of an enterprise, in the direct availability of the confiscation recipient if such assets are considered to be proceeds, products or instrumentalities of an offence, even if in equivalent form (assets of lawful origin, but with a value corresponding to the direct profit of the offence that cannot be confiscated).

This means that the traditional confiscation (Art. 240 Criminal Code – hereinafter C.C.) and the special form of mandatory confiscations, provided for specific crimes by the criminal code or the special legislation, included the extended confiscation (Art. 240 bis C.C.) and the

preventive confiscation (Art. 24 Legislative decree no. 159/2011, NCBC – hereinafter L.d. no. 159/2011) can be applied to the shares or assets of legal persons.

In the cases where they are only "beneficiaries" (legal persons who don't participate in the commitment of the fact but receive directly, without intermediaries, the proceeds of the crime) or "*mala fides* third parties" (legal persons who knew or ought to have known or at least a diligent person would have had reasons for this knowledge) the origin of the instruments, products or proceeds or that the purpose of the transfer was to avoid confiscation, the confiscation is applied against legal person's assets, because the beneficiaries cannot be considered "*extraneus* to the crime" (who are not recipient of the confiscation on the basis of Art. 240 C.C. and other forms of special confiscations).

In order to fight the infiltration of organised and economic crime in business, the Italian system of law provides for four different approaches:

1. various forms of confiscation of the illegal proceeds or directly of the business itself;
2. measures designed to control or influence the management of the business (judicial administration of the firm, i.e. temporary suspension of the management, *ex* Art. 34 L.d. no. 159/2011, so-called *Anti-mafia* Code; judicial control of the business *ex* Art. 34 bis L.d. no. 159/2011);
3. administrative measures to limit the firms' dealings with public administration: "disqualification" (Art. 83 ss. L.d. no. 159/2011);
4. the administrative liability *ex crimine* of enterprises.

The third tool, the "disqualification", is a preventive measure, applied by administrative authorities: prohibition to conclude contracts, obtain authorisations and concessions and, in general, to have legal relations with public authorities, public bodies or companies that are supervised or otherwise controlled by the State or other public entities (Art. 83 L.d. no. 159/2011).

It is possible to apply the disqualification, after the disqualifying disclosure/report (*informativa interdittiva*), of the existence of "any attempts at infiltration by the *mafia*, aimed at influencing the choices and directives of the concerned companies or firms" (Art. 84, § 3 *Anti-mafia* Code). The disqualification paralyses all economic relations, in the broadest sense, between the subject and the Public Administration. This measure, which is imposed with fewer safeguards, can have a significant impact on the firm, blocking all economic relations with public administration, on the basis of the mere suspicion of *mafia* infiltration. It can be useful to prevent the infiltration of organised crime in the legal economy, but in a very problematic way in terms of respect for the safeguard of the rule of law.

The same function is also served by Art. 32 of Law Decree 90/2014 which allows the Prefect, at the proposal of ANAC's Chairman (National Agency against Corruption), to appoint new corporate management or to impose judicial administration on enterprises, either because they are involved in criminal proceedings relating to, *lato sensu*, corruption or they are believed to be present in situations denoting unlawful conduct or criminal events. This applies only to enterprises which have been awarded contracts for public works, services or supplies.

2. Confiscation as a strategy against criminal infiltration in the economy

The traditional strategy applied by the Italian legislator to tackle the infiltration of (organised and economic) crime into the legal economy, and in particular into companies, is based, first of all, on different forms of confiscation (especially extended confiscation), in order to forfeit the criminal proceeds laundered through a business, or to directly seize the business of the criminal organisation (see next section). Generally, in Italian judicial experience, confiscation has served as the main instrument, not only to deprive the *mafia* of illicitly acquired assets, but also to affect their capacity to influence businesses.

Art. 416 bis, § 7 C.C. provides for the mandatory conviction-based confiscation of the proceeds (fruits and reinvestment) and the instruments for *mafiosa* association; it is considered a security measure[740].

Art. 240 bis C.C.[741] provided for seizure and confiscation in case of conviction or plea agreement for serious crimes, such as those regulated under Article 416 bis C.C., criminal *mafia*-type organisations, and connected crimes. This is a form of extended confiscation used when assets have a value disproportionate to the declared income or economic activity of the convicted person[742] and the owner is not able to give a clear explanation of their licit origin[743].

A form of extended confiscation, albeit non-conviction based, is the preventive measures *ex* Art. 24 L.d. no. 159/2011 (*Anti-Mafia* Code)[744]: confiscation of assets which a subject has at his disposal, being disproportionate to declared income or economic activity, or when it results that they are derived from illicit activity or used for reinvestment, and, at any rate, are assets for which the defendant has not demonstrated a legitimate origin.[745]

This confiscation is applied to specific categories of persons who have not been attributed a criminal responsibility through sentencing, but who are considered a danger to society because – according to Art. 16 *Anti-Mafia* Code – they are suspected, based on objectively

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740 A. Barazzetta, *Art. 416 bis*, in E. Dolcini and G. Marinucci (eds.), Codice penale commentato, 3rd ed., Milano, Ipsoa, 2012, p. 4310.

741 Introduced by L.d. No. 21/2018, before Art. 12 sexies of Law Decree June 8th, 1992, No. 306 - converted by Law August 7th, 1992, No. 356.

742 Supreme Court, 17/12/2003, Montella, No. 1182; see *McIntosh v Lord Advocate*, No. 251, which affirm that Court could make the assumption of the illegal origin of the proceeds to confiscate only when there is a significant discrepancy between the accused property and expenditure and the accused's known sources of income. L. Campbell, *Organised crime and the law*, Oxford, Hart Publishing, 2013, p. 189.

743 Constitutional Court, 29/01/1996, No. 18, Basco, (1996) Cass. pen. 1385; Supreme Court, 15/04/1996, Berti, No. 3649; Supreme Court, 17/12/2003, Montella, No. 1182; Supreme Court, 13/05/2008, No. 21357. See A.M. Maugeri, *La confisca allargata. In Centro Prevenzione e Difesa sociale, Misure patrimoniali nel sistema penale: effettività e garanzie*, Milano, Giuffrè, 2016, pp. 63, 68.

744 Before Art. 2 ter Law no. 575/1965, introduced with the Law no. 646/1982.

745 Art. 2 *ter,* L. 575/1965, introduced by Art. 14 L. 646/1982, and now Art. 24 of the Anti-*Mafia* Code.

verifiable facts, of specific crimes[746] or, on the basis of factual evidence, may be regarded as habitual offenders. Alternatively, on account of their behaviour and lifestyle and on the basis of factual evidence, they may be regarded as habitually living, even in part, on the proceeds of crime. For this reason, such ablative measures are defined as *ante* or *praeter probationem delicti.*

Following the recent reforms it is possible to apply preventive confiscation without inflicting personal preventive measures that demand the demonstration of the "current social dangerousness" (not only in the past), and even when the owner died during the proceeding or has died in the five years before the beginning of the procedure (Art. 18 *Anti-Mafia* Code). So it is truly an *actio in rem.*

A lower standard of proof is required (when compared to conviction-based confiscations) regarding the evidence necessary for the application of preventive measures on both a personal and a patrimonial leveL. However, after the recent reform, preventive confiscation ex Art. 24 *Anti-Mafia* Code can be applied only when "it transpires" that the proceeds are derived from illicit activity or used for reinvestment, and no longer merely when "there is reason to believe". This means, in the opinion of the doctrine, that the prosecutor has to *prove* the illicit origin of the proceeds on the basis of the criminal standard of the proof – at least by circumstantial evidence ("serious, precise and concordant", Art. 192 of the Italian Criminal Procedure Code). Yet the Supreme Court does not demand this criminal standard of the proof as it accepts the use of assumptions.[747] These preventive measures can also be applied after an acquittal in a criminal triaL.

Moreover, Art. 34 *Anti-Mafia* Code (before Art. 3 quinquies L. 575/1965) has introduced the confiscation of assets used in the exercise of an economic activity that, based on sufficient

746 First of all the crime of participation in *Mafia, Camorra* or other criminal groups, or suspected of the crimes provided in Art. 51, § 3 *bis* Criminal Procedure Code (crimes connected to criminal organisations, kidnapping for profit, racketeering); or for those who committed preparatory acts to terrorism acts and so on.

747 Supreme Court, United Chambers, 26/06/2014, Spinelli, No. 4880.

grounds, is considered objectively useful for the activity of persons who are considered for preventive measures or are defendant in ongoing criminal proceedings for crimes linked to organised crime. The confiscation is applied where *there is motive to believe* that these assets are the fruit of illicit activity or constitute the reinvestment of such assets, and the owner has not demonstrated a legitimate origin[748]. Regardless of the fact that the property is at the disposal of the *socium sceleris*, the law does not require the existence of a fictitious interposition between the third party and the "proposed", as occurs in the Art. 24 *Anti-Mafia* Code (for the confiscation), as it does not require a "proposed", but only requires sufficient evidence to believe that the exercise of certain economic activities (such as laundering) can still help the activities of the affiliated persons. This has eliminated one of the major obstacles to the identification of assets of illicit origin and the ensuing application of confiscation, namely the difficulties linked to the demonstration of the actual relationship between the dummy and the person whose account the dummy holds. In the case of companies with a plurality of partners, considered for the application of preventive measures, it is not necessary to start as many processes as there are partners, rather it will suffice to simply bring a single case against the same company considered collectively.

The examination of these forms of confiscation is in the Italian Report WP3.

2.1. The *mafia* enterprise (original *mafia* businesses; enterprises owned by the *mafioso*; enterprises with *mafia* participation)/illicit enterprise.

[748] Art. 3 *quinquies,* l. 1423/1956, introduced by Art. 24 Law Decree 306/1992, now Art. 34, § 7.

In the opinion of the doctrine before and, after, also of the Supreme Court[749], in the praxis, with some simplification, the distinction is possible among economic enterprises which are:

1. original *mafia* businesses, characterised by a strong individualization around the dominant figure of the founder, who runs it directly with *mafia* method;
2. enterprises owned by the *Mafioso*, who does not manage directly, but runs the business through a figurehead (dummy) with *mafia* methods;
3. enterprises with *mafia* participation, where the holder is not a figurehead but still represents his interests.

The latter case is more complex because different situations are possible: (a) the company, originally legal, has become a tool in the hands of the *mafia* through extortion, exploitation or money laundering; (b) the company is managed with only some relation to organised crime, *e.g.* simply the depositing of moneys to launder, without alteration of the business cycle. In the first case the company becomes a tool of the criminal organisation, and it is close to the first two cases.

To respond to these situations in Italy, extended confiscation, Art. 240 bis C.C. (after conviction) and Art. 24 *Anti-Mafia* Code (without conviction), and also the confiscation ex Art. 416 bis, § 7 C.C. (in the form of the confiscation of the instrument) are used to forfeit the enterprise that is considered an investment or a tool of a mafia association.

Normally these forms of confiscation can impact only on the illegal proceeds of a crime or on the instrument of that crime, but in order to counter the criminal infiltration into the

[749] Supreme Court, 31/01/2018, Isgrò, No. 32688; See: V. Contraffatto, *L'oggetto della confisca di prevenzione e lo standard della prova*, in A. Balsamo, V. Contrafatto, G. Nicastro, (eds.), *Le misure patrimoniali contro la criminalità organizzata*, Milano, Giuffrè, 2010, p. 117 ss.; A.M. Maugeri, *La Suprema Corte pretende un uso più consapevole della categoria dell'impresa mafiosa in conformità ai principi costituzionali*, in Diritto Penale Contemporaneo, No. 1, p. 339. See, also, F. Siracusano, *L'impresa a "partecipazione mafiosa" tra repressione e prevenzione*, in Archivio penale, 2021, p. 15 ss.; R. Sciarrone (ed.), *Le Mafie del nord. Strategie criminali e contesti locali*, 2nd ed., Roma, Donzelli, 2011, p. 11.

economy, the Italian Supreme Court consider the firm itself as an instrument or proceed of the crime.

In particular, in order to simplify the confiscation of businesses, the Italian Supreme Court uses the category of "*mafia* enterprise" to justify the confiscation of an entire company or of compendiums of all company shares in cases where proceeds of illegal origin have become fused with lawful assets.[750] This category is applied whether the initial capital is of lawful origin and has been invested in an illegal activity (exercised with *mafia* method) or the unlawful initial capital has been invested in lawful activities.

When the illegal proceeds are merged with the company's legal funds, it becomes increasingly difficult to distinguish between lawful and unlawful and this could result in the confiscation of the whole enterprise. Although these forms of confiscation should affect only the illicit proceeds or the reinvestment of criminal assets, the Court forfeits, at least according to the interpretation of a certain case law, the entire contaminated activities, regardless of the illicit origin of the assets.

In the opinion of the Supreme Court, in a typically complex business enterprise, it was not possible to operate with a clear distinction between licit and unlawful goods, given the unique character of a company, which is the combined and synergistic result of capital, capital goods, labour force and other components, legally incorporated and united in the pursuit of the aim represented by the exercise of the company, as defined in civil law (Art. 2555 Civil Code). The overall unit constitutes an autonomous economic and social reality, because the various factors interact with the same aim and complement each other; the contribution of licit components (regarding entrepreneurial capacity and initiative) cannot be discerned from that attributed to illicit resources, especially the subject's companies have been supported by the mafia organisation, in a perverse circuit of common interests.[751]

[750] Supreme Court, 30/01/2009, No. 17988; Supreme Court, 08/02/ 2007, No. 5640.

[751] Supreme Court, 23/01/2014, No. 16311.

Another way to forfeit an entire enterprise in the praxis of the jurisprudence is to consider the owner *mafioso* and to apply the assumption that if the owner is *mafioso*, the enterprise must be unlawfuL.

The problem here is that a similar assumption is used as a sort of 'experience rule', applicable without checking whether in the concrete case this rule is valid and is realised in practice, and without confirming the presence of an original *mafia* business. Alternatively, there is an enterprise owned by the *mafioso* but managed by a straw man. Provided the assumptions are verified in the concrete case, these two hypotheses do not pose problems, since the companies' funds are of illicit origin and managed with *mafia* method.

More problematic is the case of the enterprise with 'mafia participation', where the holder is not a figurehead but still represents his interests. In this latter case, the court must clearly verify whether the company is managed with mafia methods and when this mafia contamination started, or whether the company has merely had some kind of relationship with organised crime, without alteration of the business cycle.

The latter case, the enterprise with mafia participation, is one that deserves more attention and requires a limiting of the seizure and confiscation only within the bounds of the unlawful proceeds or their reinvestment, rather than an indiscriminate confiscation of the whole enterprise. This is of fundamental importance, in particular, when the company has had only a limited connection with organised crime.

Otherwise, such a wide interpretation of the concept of *mafia* enterprise transforms the confiscation of profits and reinvestment into a form of general confiscation of property. This would constitute 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[752] because the law (Art. 416 bis, § 7, Art. 240 bis C.C. and Art. 24 L.d. no. 159/2011) allows only the confiscation of the crime proceeds and reinvestment.

The same problems arise when the jurisprudence considers a company "totally illicit" and "forfeitable" because illegal proceeds have been invested such that they cannot be discerned.[753] This is a consequence of the extension of application of preventive measures not only against people suspected of being *mafiosi*, but also against those suspected of any habitual criminal activities, including corruption or tax evasion.

It is important to emphasise that the Directive no. 42/2014 in the recital n. 11, and now the Directive no. 2024/1260 in the recital n. 13, establishes, through the definition of the concept of "proceeds", an important limit to the extension of these models of confiscation: ". . . 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 is a very important safeguard against the application of extended confiscation or a preventive measure to entire companies as it allows forfeiture of only those invested illegal proceeds.

In recitals 17 and 18 the Directive suggested the introduction of a clause to ensure compliance with the principle of proportionality in two cases. Firstly, "the relevant provisions could be applicable where [. . .] such a measure is proportionate [. . .] to the value of the instrumentalities concerned". Secondly, "confiscation should not be ordered" in exceptional circumstances, where confiscation would represent an undue hardship for the affected person[754]. These clauses ensure respect for the proportionality principle in cases where illegal profits have been reinvested and their removal would result in jeopardising the viability of a

752 A.M. Maugeri, *La Suprema Corte pretende un uso più consapevole della categoria dell'impresa mafiosa in conformità ai principi costituzionali*, *op. cit.*, p. 337.

753 Supreme Court, 10/06/2013, No. 32032.

754 Para. 18 specifies 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."

business. In Italy, though, these clauses, already present in other legal systems, have not been introduced with the Law no. 202/2016 which has enforced the directive; this represents a violation of the Directive suggestions (only a recital) and a lost opportunity to improve the safeguards in the Italian legal order. Also Directive no. 2024/1260 demands the respect of the proportionality principle, in particular in recital 27 for the confiscation of the instrumentalities value and in recital 33 for the confiscation of unexplained wealth, the new model of NCBC. The introduction of a clause of proportionality, as highlighted elsewhere, could represent an appropriate instrument of judicial discretion to avoid the so-called strangulation effect of the confiscation (recital No. 18 Directive no. 2014/42: «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[755]. This is in accordance, as examined supra, with Art. 49, paragraph 2, of the European Charter of Fundamental Rights and with the most recent case law of the Italian Constitutional Court on confiscation (*e.g.*, Const. Court no. 112/2019).

Contrary to the praxis of the Italian jurisprudence which presumes the illicit origin of the business from the circumstantial evidence (or suspicions) of the *mafia* participation of the owner, it is useful to remember, moreover, the correct approach of the Supreme Court in the "Cinà" case[756]. The Court considers, according with the principle of legality, that the "availability", the proximity or the "will to be at disposal" of the owner with the *mafia* association is not enough circumstantial evidence to infer the illicit origin of the entire business and the corporate shares. The Supreme Court criticises the Court of Appeal on this *issue*. The latter inferred the proof of illicit (*mafiosa*) nature of the assets from the desire,

[755] A.M. Maugeri, *La Direttiva 2014/42/UE*, cit., 308.

[756] Supreme Court, 17/12/2013, No. 12493; in the same direction Supreme Court, 6/6/2019, No. 31549

manifested by C., "to enter into full agreement of intent with an important member of the *mafia*, which is GS, in order to enter into economic and trade relations with other persons - member of the association … so being able to take the privileges that derive for the enterprise from such mafia relation". This last conclusion has been overturned by the Supreme Court, affirming: "This is clearly tautological reasoning because it infers the nature of the assets from the will of the owner to enter into business relationships with Mafia leaders. It is absolutely not sufficient to justify the confiscation of the enterprise".

In the Court's opinion, in order to confiscate the company, it is necessary to demonstrate, according to the standard of the proof of the preventive proceeding (a facilitated standard of proof in comparison with the criminal standard[757]), that the company is "the result of illegal activity" or that the company has actually taken advantage of the holder's adhesion to mafia in carrying out its activities[758]. More specifically, the demonstration is necessary, at least at the level of circumstantial evidence: (a) that the original asset acquisition was made possible by the buyer's unlawful activity though without demanding proof of a direct link, in the form of causal link, between the illegal activity and the obtaining of assets; (b) that the growth and the accumulation of wealth by the company was actually facilitated by the illegal activity of the holder "belonging to the Mafia". In the latter case the Supreme Court requires that the holder, "at least, used his mafia quality to create favourable conditions, putting in place the activities appropriate to impose, illicitly, the enterprise in the market because only in this case, can it be said – according to the provision of the law – that the capital increase is "the result of illegal activities".

The Court states correctly that the illicit origin of the company assets or the corporate shares cannot be inferred from the fact that the owner is suspected (and is, therefore,

[757] See the previous paragraph.

[758] In the same direction Supreme Court, 6/6/2019, No. 31549; Supreme Court., 23/6/2004, No. 35628; Supreme Court, 16/12/2005, No. 1014, L.P.T

considered a danger to society): "The preventive confiscation is not connected with the *mafioso* status of the subject but [derives] from the activity exercised by him".

The Supreme Court has repeatedly stated that, "The existence of adequate evidence of membership to a criminal association is not enough to believe that assets, although large and rapidly acquired, are of illegal origin. It is necessary, [. . .] indeed, to have evidence which suggests that the assets are the result of illegal activity or their reinvestment, due to the disproportion with the declared income or economic activity, or for other reasons"[759].

If the application of these forms of confiscation against enterprises does not respect the rule of law, the risk emerges that today the Court of Appeal of Palermo would try to confiscate the entire enterprise of individuals who wish to be at the disposal of the *mafia*. Tomorrow the jurisprudence can attempt to justify a company's confiscation when the owner is a victim of extortion by a *mafia* organisation. The reason is that he is still economically supporting that organisation and is benefiting from a situation of calm to work. Even these benefits, which are only a consequence of the *mafia* protection in relation to the victim of extortion, would already be sufficient to consider the company *mafiosa* and "confiscatable".

3. The problems connected with the confiscation of companies.

The confiscation of a business is a very effective weapon in weakening mafia power and impeding their infiltration into the legal economy. Indeed, in the opinion of the prosecutors such financial onslaught is more feared than a prison sentence by *mafiosi* and other criminals.

Nevertheless, even setting aside the problems of respect for the rule of law connected with the application of forms of extended confiscation[760]– the consequences of confiscating

[759] Supreme Court, 17/12/2013, No. 12493; Supreme Court., 6/6/2019, No. 31549

[760] C. King and C. Walker, *Dirty assets. emerging issues in the regulation of criminal and terrorist assets*, London, Routledge, 2014; J. Hendry and C. King, *Expediency, legitimacy, and the rule of law: A systems perspective on civil/criminal procedural hybrids*, Criminal Law and Philosophy, Vol. 11, 2017, p. 733.

a business are more complicated than those resulting from the seizure of properties: the risk to the very future of the company and to the jobs it provides, along with the negative social consequences attached to such job losses.

In order to address these issues in Italy, the legislator has introduced specific legislation to guarantee the management of the seized and confiscated businesses, to ensure that during the seizure the company can carry out its activities when the enterprise demands to be saved. Notwithstanding this, in Italy, data from the *A.N.B.S.C.* suggests that the majority of the forfeited companies are closed down and only a very small percentage will be sold, after the definitive confiscation, when they are survived during the seizure.[761]

3. **Which models of confiscation can be applied directly against legal persons? Please, provide us with the related legislative provisions. Does your country provide for criminal liability of legal persons?**

The administrative liability *ex crimine* of legal entities ("administrative responsibility of legal entities for crimes committed in their interest or to their advantage"), has been introduced by the L.d. n. 231/2001, implementing the relevant international obligations.[762] This form of liability has been introduced, primarily, to punish the fundamentally legal enterprise which commits a crime (economic crime). It is provided also for the crime of participation in a criminal association (Art. 416 C.C.) or in a *mafiosa* association (Art. 416 *bis* C.C.). This

761 See: Dossier statistico beni confiscati (13 March 2017) http://www.interno.gov.it/it/sala-stampa/dati-e statistiche/dossier-statistico-beni-confiscati; E. Bivona, *Aspetti critici nei processi di risanamento e sviluppo duraturo delle aziende confiscate alla criminalità organizzata*, in C. Sorci (ed.), *Il bene dell'azienda*, Milano, Giuffrè, 2012, pp. 321 – 355.

762 For example, the Brussels Convention on the protection of the European Communities' financial interests (1995); the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, signed in Brussels on 1997; and the OECD Convention on Combating Bribery of Foreign Public Officials (1999).

administrative liability *ex crimine* of legal entities is applied in a criminal proceeding and represent a useful tool against criminal infiltration in the economy.

L.d. no. 231/2001 has created an independent system of liability that supplements the criminal liability of the natural persons who are the physical perpetrators of crime.

The Decree identifies the criteria to be met in order to hold corporations liable (arts. 5, 6, 7 and 8), defines applicable sanctions (arts. 9-23), lists the crimes that can give rise to enterprise liability (Art. 24 and following), and establishes relevant procedural rules (arts. 34-73).

Pursuant to the Decree, "administrative corporate liability" arises when the following requirements are met:

a) one of the crimes listed in the Decree is committed in the interest or to the advantage of a legal entity. In case of crimes of negligence, where the illegal outcome is not intentional and clearly does not correspond to the interest and/or the benefit of the corporation, interest and benefit are determined with reference to the (omitted) behaviour that gives rise to culpability. For example, in the case of injuries incurred due to violation of workplace health and safety laws, corporate liability arises based on company's failure to maintain its facilities properly with a decision that benefited the company by allowing it to save on costs, even though the injury itself could not have been intended.

b) the crime has been committed by a representative of the defendant corporation. In this regard, L.d. no. 231/2001 makes a distinction between persons who hold "representative, or administrative or managerial positions within the legal entity or in one of its departments, and who have financial and organisational autonomy" (high-level employees) and employees "managed or supervised" by persons holding senior positions (see below).

c) an "organisational fault" within the corporation has been ascertained. This is a core concept of the legal regime established by L.d. no. 231/2001 and refers to the failure to adopt and effectively implement "compliance programs" or "organizational models" (the so-called "231 Models") specifically designed to prevent the commission of crimes in the context of

corporate activities. This element – which must be specifically established together with the others, during a criminal process – requires the judge to assess whether the company has effectively adopted and implemented the "231 Model" to prevent the commission of the offense that occurred, as well as whether it put in place an independent supervisory body overseeing the implementation of the modeL. The judge's positive evaluation may exonerate the company from liability.

The nature of corporate liability under L.d. no. 231/2001 has, therefore, been hotly debated by Italian scholars. Part of the legal doctrine endorsed the thesis of administrative liability, on the basis that this is the term used in the law itself. Others argued that the Decree creates a form of criminal responsibility, relying on the fact that corporate liability arises under the Decree when a crime has been committed and the applicable procedure corresponds to criminal procedure. Others considered the liability established by L.d. no. 231/2001 as a tertium genus, a third type of liability which is a hybrid between the criminal and the administrative systems. This last argument is in particular based on the Government Report on the Decree 15, according to which the liability regime is a sort of distinct but closely connected sub-genre of criminal liability.

The Decree includes different types of sanction (Art. 9) from pecuniary fines (arts. 10-12), disqualification sanctions (arts. 9, par. 2, 13 - 17, 23), seizure and confiscation of the crime proceeds (Art. 19) and the publication of the sentence (Art. 18). Disqualification sanctions have a serious impact on corporate activities, as they entail the suspension or revocation of authorizations or licenses as well as exclusion from financial benefits and funds. Considering this, the Decree in theory prescribes these sanctions only for the most serious cases that meet certain conditions (Art. 13 of the Decree). Another interesting sanction is the definitive disqualification from the exercise of the activity, if the enterprise or one of its organisational units is permanently used for the sole or prevailing purpose of allowing or facilitating the commission of offenses (for example money laundering, forgery).

The confiscation of the proceeds (or the corresponding value) or of the instruments of crime is a main sanction against the enterprise included by Article 9, paragraph 1 c) among the sanctions for administrative illicit activities related to one of the crimes which trigger the liability. Article 19[763],then, details how confiscation works for legal persons. When the legal person is convicted, the confiscation of the profit and the price of the crime are always ordered, with two exceptions: · when possible, the legitimate part is returned to the damaged party; the rights acquired in good faith by a third party are not affected by the restitution. Paragraph 2 then provides that in case the profit cannot be confiscated, an equivalent payment of money, goods or utilities is subject to confiscation.

Another peculiar disposition is the one provided under Article 6, paragraph 5, where the legislator explicitly disciplines the confiscation of profit of a crime against a legal person

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[763] Art. 19, Confiscation

1. Confiscation of the price or profit of the offence is always ordered against the entity upon conviction, except for the part that can be returned to the damaged party. The rights acquired by third parties in good faith are not affected.

2. When confiscation pursuant to paragraph 1 is not possible, it may concern sums of money, goods or other utilities with a value equivalent to the price or profit of the offence.

2-bis. Where the confiscation relates to industrial plants or parts thereof that have been declared of national strategic interest pursuant to Article 1 of Law Decree no. 207 of 3 December 2012, converted, with amendments, by Law no. 231, or plants or infrastructures necessary to ensure the continuity of their production, Article 104-bis, paragraphs 1-septies, 1-octies, 1-novies and 1-decies, of the implementing, coordinating and transitional provisions of the Code of Criminal Procedure, referred to in L.d. no. 271 of 28 July 1989, shall apply.

Decree-Law no. 69 of 13 June 2023, converted with amendments by Law no. 103 of 10 August 2023, provided (by Article 9-bis, paragraph 4) that "The provisions set forth in paragraphs 1, 2 and 3 shall also apply to seizure or confiscation orders concerning industrial plants or parts thereof declared to be of national strategic interest pursuant to Article 1 of Decree-Law no. 207 of 3 December 2012, converted with amendments by Law no. 231 of 24 December 2012, or plants or infrastructures necessary to ensure their continuity of production, not yet final at the date of entry into force of the law converting the Decree-Law no. 207 into law. 207 of 3 December 2012, converted, with amendments, by Law no. 231 of 24 December 2012, or plants or infrastructures necessary to ensure their continuity of production, not yet final at the date of entry into force of the law converting this decree".

which is not sentenced to be convicted for that crime. When an effective compliance programme is in place, the company is not criminally responsible; however, if the company obtained some advantage from the commission of the crime, it cannot take advantage of the compliance programs. "(…) 5. it is nevertheless ordered the confiscation of the profit that the legal person benefited from the crime, even through the corresponding value". It is mandatory to confiscate the profit coming from a crime committed by individuals in apical position, if the same legal person did not provide for an adequate compliance programme to prevent the crime. This provision has a precautionary *ratio*.

Article 17, Restitution of the consequences of the offence, provides for actions which can be implemented to restore the consequence of the crime. The decree provides that the body makes the profit from the crime available for confiscation, among the actions that legal person can enforce to repair the consequences of the offence and then to escape ban sanctions. In case the legal person did not repair the consequence of a crime, it is sentenced with ban sanctions. In case the legal body does not comply with these ban sanctions, additional measures are taken. Article 23, paragraph 2 provides that, when the legal person does not comply with the pre-emptive disqualification sanctions, the confiscation of the profit of crime is made against the body which benefited from the commission of the crime. An additional provision on confiscation concerns the activity of the judicial commissioner. Under Article 15, paragraph 4 and Article 79, paragraph 2, when the judge rules for a commissarial management instead of a measure or a disqualification sanction, the profit created by the prosecution of the activity is confiscated. This is a real punitive form of confiscation because the proceeds have legal origin. Art. 15 establishes, in particular, that the court can decide the interruption of the legal person's activities as a sanction; the interruption sanction can be judicially replaced by the prosecution of the activities under the direction of a judicial commissioner for the duration of the sanction issued in consideration of the public utility of the activity or the economic consequences of the interruption. Paragraph 4 provides

that the profits, derived from the prosecution of the activities, are confiscated. Periodically every three months the judicial commissioner reports to the judge responsible for the enforcement and to the public prosecutor about the management of the company; when his mandate is concluded, he "determines the amount of profit to be confiscated".

Two forms of seizure are considered by the L.d.: precautionary seizure, which anticipates the following confiscation, is regulated under Article 53, which makes reference to Articles 321 and following Articles of the criminal code; conservative seizure, regulated under Article 54: "if there is a reasonable belief that the guarantees to pay the monetary sanctions, proceedings expenses and other sums owed to the State Property Agency are missing or could be wasted, the public prosecutor, in any time of the proceeding, asks for the conservative seizure of the legal person's movable, immovable assets and credits (…)."Confiscation for legal persons hires a function to restore an economic balance which had been altered by a crime. The approach for confiscation against legal bodies does not lie on juridical basis only but it is intended to widely contrast the economic criminality.

4. **Which is the object of the confiscation and its meaning/interpretation? (proceeds – gross or net of expenses -, products of the crime, instruments of the crime, etc.). Clarify if and in which case it is possible to confiscate the 'value equivalent'.**

The object of the confiscation is the same as if they were natural persons (see previous questionnaire WP 2) when the confiscation against natural persons affects the legal persons, even if, as examined above, in the praxis the confiscation against natural person can affect the whole factory if it is considered the proceed/product of the crime or a contaminated business.

The confiscation provided for Art. 19 Leg. Decree 231/2001 affect the price or profit of the offence, or the corresponding value;

The confiscation provided for Art. 6 (5) Leg. Decree 231/2001 affect the profit of the crime, even through the corresponding value;

The confiscation ex Art. 15 affect the profits of the prosecution of the activities under the direction of a judicial commissioner.

Italian jurisprudence, applying confiscation under Article 19 of L.d. 231/2001, has focused on the question of the gross or net character of the confiscable profit[764].

While affirming the general legitimacy of the confiscation of gross profit, without taking into account the costs associated with illegal activities because otherwise one would in fact be allowing "the offender to benefit from an activity that is intrinsically illegal and carried out exclusively for criminal purposes" - contrary to the rationale of confiscation, which "is aimed at preventing the offender from benefiting in any way from an activity that is contrary to public order and the criminal rules of the system" - it was first affirmed that the notion of profit should be limited where the perpetrator realises services for the benefit of the community (e.g. services rendered or works carried out on the basis of a contract obtained through fraud), taking into account, in accordance with the principle of proportionality, the expenses incurred for this purpose in a lawful context, to the extent that in some judgments at first it seems that the principle of net profit was adopted[765].

[764] On this topic see: A.M. Maugeri, *La nozione di profitto confiscabile e la natura della confisca: due inestricabili e sempre irrisolte questioni*, in *www.lalegislazionepenale.eu*, 17.01.2023, pp. 56-63; Id., *La responsabilità da reato degli enti: il ruolo del profitto e della sua ablazione nella prassi giurisprudenziale*, in *Rivista trimestrale di diritto penale dell'economia*, voL. 4, 2013, pp. 734-746.

[765] Supreme Court, United Chambers, 25/10 – 22/11/2005, Muci, No. 41936; Supreme Court, 23/06/2006, La Fiorita, No. 32627 in CEDCass, No. 235636

The United Sections of the Court of Cassation intervened in the famous Fisia case[766] by upholding the principle of gross profit considering that "the crime does not represent in any system a legitimate title to acquire ownership or other right to property and the offender cannot, therefore, recoup the costs incurred in carrying out the crime. The different criterion of 'net profit' would end up passing on to the State, as has been incisively observed, the risk of a negative outcome of the crime and the offender and, for him, the legal entity would escape any risk of economic loss".

The United Sections, however, precisely because in the present case they are dealing with a company, observe that "The delineated notion of profit from the crime fits - certainly - validly, without any possibility of a more restrictive interpretation, into the scenario of a totally illicit activity", they distinguish, however, the hypothesis in which the profit "especially in the area of the liability of entities involved in a relationship of a synallagmatic nature" derives from "the lawful business activity in the context of which the crime is occasionally and instrumentally realised"; where a synallagmatic activity is carried out on the basis of a contract that remains valid (s.c. "in contract offences", as opposed to structurally illegal "contract offences"), the profit cannot be confiscated *tout court*, as it constitutes the "payment for a service regularly performed by the obligor", even if the contract would not have been concluded in the absence of the fraud, not distinguishing between gross or net profit, but between illicit and lawful profit. Although this drastic solution, which would even entail the

[766] Supreme Court, United Chambers, No. 26654/2008, rv. 239924: "On the subject of the criminal liability of collective entities, the profit of the offence subject to confiscation pursuant to Article 19 of L.d. no. 231/2001 is identified with the economic advantage of direct and immediate causal derivation from the predicate offence, but, in the event that it is consummated in the context of a synallagmatic relationship, the utility possibly obtained by the injured party by reason of the performance by the entity of the services that the contract imposes on it cannot also be considered as such. (In its reasoning, the Court specified that, in reconstructing the notion of profit subject to confiscation, reference cannot be made to company-type assessment parameters - such as, for example, those of "gross profit" and "net profit"- but that, at the same time that notion cannot be dilated to the point of determining an unreasonable and substantial duplication of the penalty in cases where the entity, in performing the contract, which also found its genesis in the offence, engages in an activity whose economic results cannot be placed in direct and immediate connection with the offence)".

non-forfeiture *tout court* of the profit of the crime "in contract", is mitigated by the affirmation of the enigmatic principle that the forfeitable profit is "concretely determined net of the actual utility possibly obtained by the injured party, in the context of the synallagmatic relationship with the entity".

In order to distinguish "contract offences", which are structurally unlawful, from "in contract offences", the Court specifies that "more specifically, in the case where the law qualifies as an offence only the stipulation of a contract regardless of its execution, it is clear that there is an identification of the offence with the legal transaction (the so-called "contract offence") and the latter is entirely contaminated by unlawfulness, with the effect that the relevant profit is an immediate and direct consequence thereof and is, therefore, subject to confiscation. If, on the other hand, the criminally relevant conduct does not coincide with the conclusion of the contract in itself, but affects only the phase of formation of the contractual will or the phase of execution of the negotiation programme (the so-called "in contract offence"), it is possible to identify lawful aspects of the relevant relationship, because the contract is absolutely lawful and valid inter partes (which may only be voidable pursuant to Articles 1418 and 1439 of the Civil Code), with the consequence that the corresponding profit made by the agent may well not be directly attributable to the conduct penalised by criminal law".

Following this line of reasoning, recent case law[767] emphasises, over and above the question of the notion of gross or net profit, that lawful services performed by the offender must be properly compensated. "Since criminal law and civil law regulate different areas, the violation of the criminal law in the case of "in contract offences" could not, according to the United Sections, lead to the nullity of the contract, being the result of a unilateral non-compliance that cannot involve in the radical sanction even of the party for whom participation in the contract is lawfuL. In that case, in fact, not necessarily the implementation of the compulsory programme envisaged in the contract is characterised by illegality, since any "initiative

[767] Supreme Court, 21.10.2020, no. 6607.

lawfully taken" to perform the contractual obligations "breaks any link causal connection with the unlawful conduct", since the contractor who fulfil his obligation, even in part, is entitled to the relevant payment, which cannot be regarded as profit from the offence.

The corollary that follows from this is that the remuneration for a lawful service, even though performed in the context of an unlawful business, "cannot be considered *sine causa* or *sine iure*"; and, therefore, does not constitute profit from an unlawful act, but profit having "legitimate title in the physiological contractual dynamic".

This important judgment of the United Sections of the Court of Cassation is appreciable in the adoption of the "gross criterion", moderated by the need to distinguish the hypothesis in which activities and, therefore, lawful expenditure of the offender, in particular of the legal entity, emerge. However, the solution actually adopted by the Court to mitigate the gross principle in the presence of lawful costs seems rather complicated and has been widely criticised by scholars[768]. The Court claims to calculate the profit "net of the actual utility possibly obtained by the damaged party, in the context of the synallagmatic relationship with the entity", but this notion of "actual utility" of the damaged party is difficult to calculate, to the point of risking making it impossible to confiscate the profit deriving from the so-called "crime in contract" for synallagmatic services or in any case to make the interpretation of the notion of confiscable profit absolutely obscure, as, in fact, emerges in the praxis, where case law has refrained from calculating the profit[769].

In this regard, it has been correctly observed in doctrine that the utility derived from the injured party concerns only those hypotheses in which the injured party from the crime coincides with the contractual counterpart of the offender, and, in any case, has "reduced practical functionality, being based on uncertain parameters and of uncomfortable

[768] E. Lorenzetto, *Sequestro preventivo contra societatem per un valore equivalente al profitto del reato*, in Rivista Italiana di Diritto e Procedura Penale, 2008, p. 1795; T. Trinchera, *Confiscare senza punire. Uno studio sullo statuto di garanzia della confisca della ricchezza illecita*, Torino, Giappichelli, 2020, p. 398.

[769] Supreme Court., 8.4.2013, No. 24277

procedural management", just think of the difficulties of calculating the *utilitas* in a long-term contract or of determining the economic value of complex services[770]. To the contrary, the doctrinaire position that, on the basis of a structural conception of profit (by components)[771] allows the deductibility only of costs realised for lawful services, not only seems to be legally founded and easily applicable, since these are accounted-for costs (the burden of allegation of which may fall on the subject or legal entity), but ends up bringing into agreement the opposing positions, namely both those who, starting from the gross principle, admit the deductibility of only lawful expenses ("costs etiologically and functionally related to the lawful activity"), and those who, even if they accept the net principle, deny the deductibility of the so-called unlawful expenses (the costs necessary for the purchase of goods instrumental to the illicit activity or intrinsically illicit)[772].

The jurisprudence started by the United Sections of the Court of Cassation in the Fisia Italimpianti judgment was, however, strictly followed by subsequent case law[773]. However, there has been no shortage of judgments returning to the criterion of "net profit", at least where a lawful business activity in connection with which an "in contract offence" is committed is concerned[774]; although the distinction, introduced by the United Sections of the Court of Cassation, between "contract offences" and "in contract offences" for the purposes of determining the notion of confiscable profit has been maintained: the delimitation to net profit following lawful expenditure should apply only to " in contract

770 See V. Mongillo, *voce Profitto confiscabile*, in Enciclopedia Giuridica Treccani, 2018; S. Finocchiaro, *Riflessioni sulla quantificazione del profitto illecito e sulla natura della confisca diretta e per equivalente*, in *Diritto Penale Contemporaneo Rivista Trimestrale*, 3, 2020, p. 333.

771 T. Epidendio, *La nozione di profitto oggetto di confisca a carico degli enti*, in Dir. pen. proc., 2008, 1267-1278 ss.

772 A.M. Maugeri, *La nozione di profitto confiscabile e la natura della confisca*, *op. cit.*, 60.

773 Supreme Court, 31.5.2016, No. 23013; Supreme Court, 8.4.2013, No. 24277; Supreme Court, 14.7.2015, No. 33226; Supreme Court, 16.4.2009, Società Impregilo S.p.a., No. 20506; Supreme Court, United Chambers, 26.6.2015, Lucci, No. 31617; Supreme Court, 12.11.2013 No. 8339

774 Supreme Court, 19.3.2013 13061; Supreme Court, 20.12.2011, Angelucci, No. 11808; Supreme Court, 4.4.2012 No. 17451, Mastro Birraio e altri; Supreme Court, 31.5.2012 No. 20976.

offences" and not to "contract offences". It is specified that "if the criminally relevant act affected the phase of identifying the successful tenderer of a public contract, but then the contractor duly performed the services arising from the (in itself lawful) contract, the profit from the offence is not equivalent to the entire price of the contract, but only to the economic advantage gained from the fact of having been awarded the public contract. This advantage corresponds, therefore, to the net profit of the business activity. (In the case at hand, the Supreme Court configured bribery in terms of an 'in contract offence' and stated that the value that may be subject to confiscation is represented solely by the gain obtained as a result of the execution of the synallagmatic exchange, net of the costs incurred in performing the service enjoyed by the Public Administration.)".

Finally, interesting is the jurisprudence which, while echoing the Fisia judgment, specifies that in calculating the victim's utility, account must be taken of the so-called "living costs": the confiscable profit must be calculated 'excluding - within the limits of the so-called living costs - any income earned as a result of lawful services actually performed in favour of the contracting party in the context of the synallagmatic relationship, equal to the 'utilitas' enjoyed by the other party. (In affirming the principle, the Court pointed out that the confiscable profit also includes sums received in relation to services entirely superfluous in the economy of the contract or performed in a manner not in accordance with what was agreed)"[775]. It is specified that in order to determine this concept of "living costs" "the Judicial Authority may make use of the outcome of the investigations carried out by the Judicial Police or, if not exhaustive, of the indications of an appointed consultant or expert, who takes into account, on the one hand, the results of the entity's accounts and balance sheets, and on the other hand, the market cost of that type of service"[776]. This concept of "living costs" has been interpreted by some doctrine as direct costs. The reference to the

[775] Supreme Court, 27.1.2015, No. 9988; Supreme Court, 13.1.2016, No. 8616

[776] Supreme Court, 28.3.2018, No. 23896.

concept of "living costs" may be interesting, insofar as from the lawful costs it would be necessary to exclude the artfully and intentionally inflated costs, which will no longer be lawful costs; certainly such a distinction risks complicating the calculation of the lawful costs, which in any event will require - as the Court points out - the intervention of an expert and, in any event, such a distinction should only be made where the inflated and therefore unlawful nature of the cost clearly emerges.

Recent case law of the Supreme Court does not invoke the criterion of utility, but rather of the value of the lawful service rendered, without specifying how one should assess this value, whether on the basis of a market valuation or on how much was spent to carry it out: "in the matter of preventive seizure for the purpose of confiscating the profit from the crime obtained through a contract vitiated by unlawful conduct at the negotiation or execution stage, the confiscable profit must be determined net of the value of the lawful services rendered by the offender to fulfil the contract, of which the other party took advantage or benefited. (Case of fraud pursuant to Article 640-bis of the Criminal Code, for fraudulent award of a contract relating to reception services for foreign citizens seeking international protection)"[777].

The distinction between "contract offences" and "offences in contract", moreover, is acceptable insofar as the term contract offence refers to cases in which the very stipulation of the contract concretises the offence from which the unlawful profit derives, in the absence of lawful performance in favour of the community or the victim, e.g. fraud against the State in order to obtain undue financing, which has been qualified by the United Sections as a "in contract offence", whereas the second section of the Supreme Court[778] has brought the criminal type in question under the heading of "contract offences", concluding that "since

[777] Supreme Court. 21.10.2021, No. 40765; accordingly: Supreme Court. 27.9.2007, No. 37556; Supreme Court. Chamber 6, 26.3.2009, No. 17897; Supreme Court. 27.1.2015, No. 9988; Supreme Court. Chamber 2, 8.10.2010, No. 39239.

[778] Supreme Court. 5.5.2008, CED Cass, 603446.

there is total immedesimation of the offence with the legal transaction, the entire price is seizable, without making any reference to the distinction between this and the profit". In any case, this distinction between "contract offences" and "in contract offences" seems questionable where the perpetrator of the offence performs lawful services and, therefore, lawful expenses that should be taken into account; apart from the ambiguity of the distinction itself, which is essentially doctrinal and not entirely consolidated even in doctrine. The same case law, in fact, arrives at diametrically opposed solutions in establishing whether we are dealing with a "contract offence" or an "in contract offence"; in addition to the above-mentioned case of fraud against the State, it may be recalled that civil jurisprudence, contrary to the view taken by the Supreme Court's own criminal section, for example, also includes corruption in the notion of "contract offence", with the consequence, for example, that the deductibility of costs connected with lawful services should be excluded in the event that the tender was obtained due to such an offence: a consequence that cannot be accepted for the reasons examined, apart from the violation of the principle of equality that would result, for example, from the different treatment applied in the case where the contract resulted from fraud, as was the case in the Fisia case. Such uncertainties on the part of the jurisprudence itself risk representing a violation of the principle of legality and precision, in the absence of clear and certain criteria of distinction.

According to the most recent case law, in line with the Fisia decision, "With regard to the criminal liability of entities, the profit that may be confiscated pursuant to Article 19 of L.d. no. 231 of 8 June 2001 is identified with the economic advantage of direct and immediate causal derivation from the predicate offence, so that, where the latter is integrated by a wholly unlawful economic transaction, the confiscation must cover the entire amount involved, without any distinction between "gross profit" and "net profit". (Case relating to the money laundering, by a credit institution, of the proceeds of the crimes of tax fraud and embezzlement, in which the Court held that the entire sum involved in the unlawful

transactions could be confiscated, and not only the profit made by the aforementioned institution)"[779].

The profit that may be confiscated pursuant to Article 19 of L.d. no. 231/2001 can be identified also in savings of expenses by the legal person, as it was affirmed by the United Sections of the Supreme Court of Cassation: "On the subject of the criminal liability of collective entities arising from negligent offences committed in breach of a prevention rule, the profit subject to the direct confiscation referred to in Article 19 of L.d. no. 231/2001 is identified in the cost savings that result from the failure to adopt some onerous precautionary measure or in the performance of an activity in a condition that is economically favourable, even if less safe than it should be"[780]. Accordingly, the same principle has been continuously reaffirmed, also in relation to other offences (for example: "On the subject of preventive seizure for confiscation, the profit from the crime of organised activity for the illegal trafficking of waste, referred to in Article 452-quaterdecies of the Criminal Code, susceptible of being seized, also for equivalent purposes, may be constituted by the saving of expenses, i.e. by the economic advantage obtained, in an immediate and direct manner, from the crime and consisting in the non-disbursement of those "dutiful" costs, not borne as a result of the offence, objectively identifiable in their identity and economically assessable on the basis of criteria capable of ensuring their quantification, according to a high degree of logical probability)[781].

5. **Which are the elements to be realised and/or to be assessed for its application? e.g., conviction for a crime, property or availability of the confiscation**

[779] Supreme Court, Sec. II, No. 30656/2023, rv. 28491.

[780] Supreme Court, United Chambers, Sentenza No. 38343 of 24/04/2014 (hearing) (registered on 18/09/2014) Rv. 261117.

[781] Supreme Court, Chamber 3, No. 45314 of 04.10.2023 (registered on 10.11.2023) Rv. 285335.

object, link -between the crime and the proceeds/instruments/products, etc., disproportionality (*"the value of the property is disproportionate to the lawful income of the convicted person"*), illegal origin (suspects/presumption of illegal origin), temporal connection with the crime, the lack of a justification of the legal origin by the owner, etc.

The elements to be realized are the same for the forms of confiscation which were applied to natural persons and indirectly to legal person (see previous questionnaire WP 2).

For the confiscation provided for in Art. 19 L.d. no. 231/2001: the conviction for a crime of the legal person; link between the crime and the price or proceeds, which must derive from the crime (like for the price or proceeds of the crime provided for Art. 240 C.C.).

In particular, the corporate liability provided for by the L.d. no. 231/2001can only be asserted in relation to certain crimes established by law.

It is necessary that the crime is committed by individuals who hold certain roles in the organizational structure of the entity (Art. 5 e 6, c. 1, L.d. no. 231/2001).

The entity is responsible for crimes committed in its interest or to its advantage:

a) by people who hold representation, administrative or management functions of the entity or one of its organizational units with financial and functional autonomy as well as by people who exercise, even de facto, the management and control of the same;

b) by persons subject to the management or supervision of one of the subjects referred to in letter a).

The entity is not liable if it proves that:

a) the management body has adopted and effectively implemented, before the commission of the crime, organizational and management models suitable for preventing crimes of the type that occurred;

b) the task of supervising the functioning and observance of the models and ensuring their updating has been entrusted to a body of the entity with autonomous powers of initiative and control;

c) the persons committed the crime by fraudulently evading the organization and management models;

d) there has been no omitted or insufficient supervision by the body referred to in letter b).

6. **Which are the elements to demonstrate in order to apply the *freezing* order against the legal persons?**

The elements to demonstrate are the same for the forms of confiscation which were applied to natural persons and indirectly to legal persons (see previous questionnaire WP 2)**.**

For the seizure provided for in Art. 53 L.d. no. 231/2001 the United Sections, in settling the interpretative contrast, confirmed the need for the preventive seizure order aimed at confiscation to indicate the motivation, albeit concise, of the *periculum in mora*, to be related to the reasons justifying the anticipation of the ablative effects before the definition of the judgement, and of the *fumus commissi delicti*.[782]

Paragraph 1-bis of Art. 53, L.d. no. 231/2001 extends the scope of the precautionary action to much more extensive "objects" than the discipline of the relative definitive sanction provides. The reference to the sequestration of the "corporation" appears excessive and inapplicable and risks introducing an additional precautionary sanction not envisaged by the law.

[782] Supreme Court, United Chambers, 24.06.2021 (registered on 11.102021), No. 36959, Pres. Fumu, est. Andreazza, ric. Ellade).

The impossibility of seizure of the profit of the offence may also be only transitory, without the need for a general prior search of the assets constituting the profit of the offence.[783]

Preventive seizure for the purpose of confiscation for equivalent may also be ordered when the impossibility of finding the assets, constituting the profit of the offence, is transitory and reversible, provided that it exists at the time of the request and adoption of the measure, since there is no need for a prior generalised search for them.[784]

The preventive seizure functional to confiscation for equivalent may also affect each of the competitors indifferently for the entire amount of the ascertained profit, even if then the expropriation cannot be duplicated or in any case exceed in *quantum*, the overall amount of the same profit (case in which it was considered legitimate to order the seizure of the entire profit of the offence of money laundering obtained by two companies in which the applicant held a minority shareholding but was de facto administrator) (Chamber 6, 17713/2014).

Where it is not possible to seize money or other fungible assets or assets directly attributable to the profit of a tax offence committed by the organs of the legal person itself in the person or persons (including the legal person), preventive seizure for confiscation for equivalent purposes against the organ of the legal person is permitted (Chamber 3, 15465/2015).

On the subject of the criminal liability of legal entities and persons, for the preventive seizure of assets whose confiscation is mandatory, possibly also for equivalent, and therefore, according to the provisions of Art. 19, of the assets constituting the price and profit of the offence, there is no need to prove the existence of indications of guilt, nor their seriousness, nor the *periculum* required for preventive seizure pursuant to Art. 321, paragraph 1, of the Code of Criminal Procedure, it being sufficient to ascertain their confiscation once it is abstractly possible to subsume the fact in a given hypothesis of crime (Chamber 2, 41435/2014).

[783] Supreme Court, United Chambers, No. 10561/2014.

[784] Supreme Court, United Chambers, No. 10561/2014.

It is legitimate to maintain the preventive seizure for the purpose of confiscation of the assets of a company against which proceedings for administrative liability arising from a crime are pending even when bankruptcy proceedings are instituted against the entity, since such legal vicissitude does not deprive the criminal court of the power to assess, at the outcome of the proceedings, whether to order confiscation, and, if so, with what extension and limits (Chamber 2, 41354/2015).

Article 53 - Preventive seizure

1. The judge may order the seizure of the things that can be confiscated pursuant to Article 19. The provisions of Articles 321 (3, 3-bis and 3-ter), 322, 322-bis and 323 of the code of criminal procedure, insofar as they are applicable, shall be observed.

1-bis. Where the seizure, carried out for the purposes of confiscation for equivalent purposes provided for in Article 19(2), relates to companies, businesses or assets, including securities, as well as shares or cash, even if on deposit, the judicial custodian shall allow their use and management by the corporate bodies exclusively for the purpose of ensuring business continuity and development, exercising supervisory powers and reporting to the judicial authority. In the event of breach of the aforementioned purpose, the judicial authority shall take the consequent measures and may appoint an administrator in the exercise of shareholder powers.

With the appointment, the fulfilments of Article 104 of the implementation, coordination and transitional rules of the Code of Criminal Procedure, pursuant to L.d. No. 271 of 28 July 1989, are deemed to be fulfilled. In case of seizure to the detriment of companies operating establishments of national strategic interest and their subsidiaries, the provisions of Decree-Law No 61 of 4 June 2013, converted, with amendments, by Law No 89 of 3 August 2013,

shall apply. [Paragraph added by Article 12(5-bis) of Decree-Law No 101 of 31 August 2013, converted, with amendments, by Law No 125 of 30 October 2013.]

7. **Can this model of confiscation be applied when the crime is statute barred (i.e. after the prescription) or somehow (in particular circumstances) without the conviction?**

For the model of confiscation against natural persons see Report WP2.

For confiscation provided for by Art. 19 L.d. no. 231/2001 the answer is no. On this regard recent Supreme Court's case law has stated that it is not possible to apply the confiscation against the legal person when the predicate offense is time barred[785]. The reasoning of the Supreme Court was developed as follows: "It is appropriate that the examination of the grounds of appeal be preceded by brief considerations of the systematic framework of the institution in question, which is the confiscation provided by L.d. No. 231 of 8 June 2001. Such confiscation represents a real main penalty, mandatory and autonomous, when it is ordered against an entity held liable for an administrative offence resulting from a crime; the case law of this Court has repeatedly expressed this view. It is the same legislative text, moreover, which at Article 9(1)(c), attributes to the confiscation in question a sanctioning nature. L.d. No. 231/2001, implementing the OECD Convention of 17 December 1997, which in Article 2 obliges member states to take "the measures necessary to establish the liability of moral persons", introduced in our legal system a specific and, in many respects, innovative punitive system for collective entities, going beyond the traditional *principle societas delinquere et puniri non potest*; this resulted in the identification of original disqualifying, pecuniary and ablatory sanctions, in strict functional dependence on the liability ascertained.

[785] Supreme Court, Chamber 1, No. 50729 of 20.10.2023 (registered on 19.12.2023), Rv. 285685.

This is a sanctioning system that departs from the traditional schemes, centred on the distinction between penalties and security measures, or between main penalties and accessory penalties, and which aims to establish a direct derivation link between liability and penalty. The functional relationship in question is recognisable, therefore, not only for the confiscation of the price and profit of the crime, provided for by Article 19, paragraph 1, L.d. no. 231, but also for the value confiscation, provided for by the subsequent paragraph 2; as has been effectively pointed out by case law "confiscation assumes more simply the physiognomy of an instrument aimed at restoring the economic balance altered by the alleged offence, the effects of which - precisely economic - have in any case benefited the collective entity, which would otherwise end up obtaining a genetically unlawful profit". The qualification of confiscation as a principal penalty is certainly an innovative legal provision, since in our penal system confiscation is confiscation is catalogued, as a general rule, among the patrimonial security measures (Art. 240 of the Criminal Code), founded on the dangerousness deriving from the availability of things used or intended to commit the crime, or which are the product, the profit, the price (or are intrinsically criminal), and aimed at preventing the commission of further crimes. Subsequently, hypotheses of mandatory criminal confiscation of goods instrumental to the commission of the offence and of the profit derived therefrom were introduced into the legal system; and, again with the aim of preventing the perpetrator of the offence from enjoying the profit thereof, numerous hypotheses of so-called value-based confiscation were legislatively regulated, in cases where it was not possible to directly attack the profit itself. There is no doubt therefore, by the literal expression used by the legislature, and by the described sanctioning and special-preventive function assigned to it that the confiscation regulated by Article 9(1) of L.d. no. 231/2001, in relation to the subsequent Article 19, takes the form of a real administrative sanction, consequent to the crime. As a sanction of administrative offence, dependent on the offence, the confiscation referred to in Article 19 of L.d. no. 231/2001 is certainly subject to

the statute of limitations set out in Article 22 of the same decree. This Court has in fact already specified that this term concerns both the offence, which can no longer be prosecuted after five years from the commission of the predicate offence, and the administrative penalty definitively imposed, which must be collected or otherwise enforced, on pain of extinction, within five years from the final passage of the sentence pronounced against the legal person; without prejudice, as regards the penalty, to the effects of any relevant interruptive causes under the Civil Code".

8. **Which is the legal nature of the confiscation against legal persons? (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - *ante delictum* criminal prevention measure -, security measure in a broad sense, administrative measure, civil measure *in rem*, a civil consequence of committing an offense - provided for by criminal law -, another type of autonomous - *sui generis* - instrument, etc.)**

The confiscation provided for by Art. 19 L.d. no. 231/2001 is considered as a sanction rather than as a security measure. On the nature of this form of confiscation see answer to question § 7 supra.

For the other forms of confiscation against natural persons, which can affect the assets of legal persons see previous questionnaire WP 2.

9. **For each model of confiscation against legal persons:**

The confiscation provided for by Art. 19 L.d. 231/2001 is applied in a criminal trial on the basis of the rules of criminal procedural code and the criminal standard of the proof about the link between the price or proceeds and the crime.

For the other forms of confiscation against natural persons, which can affect the assets of legal persons see previous questionnaire WP 2.

- **Which is the procedure for its application? (the qualification/nature, the competent authority, the different steps, etc.)**

In general terms, the procedure for the ascertainment of the administrative-criminal responsibility of legal persons and the application of the confiscation, should be guaranteed by the forms of the criminal trial, to which Articles 34 and 35 L.d. 231/2001 refer, in general, as well as, specifically, the provisions contained in the regulatory framework: Article 34 which refers to the forms of the criminal trial insofar as they are compatible; Article 35 which equates the legal entity with the defendant (natural person), from a procedural point of view, applying to the entity the rules concerning the defendant, also in this case, insofar as they are compatible. The reference made in to the provisions of the Code of Criminal Procedure is clearly intended to prevent phenomena of "rejection" of the discipline referred to by the general system in which it is intended to operate, on the other hand, there is no doubt that the legislative choice made was inspired not only by the need to make the ascertainment instruments effective, but also by the intention to provide the legal entity, subject to proceedings, with a system of guarantees which, due to the applicability of harsh sanctions of criminal nature, requires respect for the jurisdictional guarantees set out in Article 6 of the

ECHR[786] and Article 14 of the International Covenant on Civil and Political Rights, as well as respect for the constitutional safeguards typical of criminal procedure, under the specific profile of the principle of personal culpability, as it was affirmed by the Supreme Court[787].

It is worth stressing that, according to recent Supreme Court's case law[788], the confiscation under Art. 19 of L.d. no. 231/2001 can be applied also in the case of application of the s.c. penalty on request (plea bargaining, s.c. *patteggiamento*). In relation to the liability of entities pursuant to L.d. no. 231/2001, the Supreme Court of Cassation ruled on the subject of confiscation (Article 19 of L.d. no. 231/2001), application of the penalty on request (Article 63 of L.d. no. 231/2001) and the review by the Court of Cassation. Despite the fact that the confiscation referred to in Article 19 of L.d. no. 231/2001 is undoubtedly configured as a penalty (and despite the fact that such penalty is likely to produce even very afflictive effects) - reads the decision - "Article 63, paragraph 2 of L.d. no. 231/2001, in regulating the reduction agreed in the plea agreement, expressly mentions the disqualification penalty and the pecuniary penalty imposed on the entity, but is silent on the confiscation. This does not mean, however, that confiscation cannot be imposed unless previously agreed in the case of plea bargaining'. By virtue of its mandatory nature (Article 19 of L.d. no. 231/2001 states that confiscation "shall always be ordered") - the Court continues - "it must be ordered even where it has not been previously agreed by the parties, given that, at the time of the plea-bargaining request, the defendant was in any event in a position to foresee its application". This being clarified, as regards the Court of legitimacy's review of the confiscation ordered, a distinction must be made between two hypotheses:

[786] On the application of the right to remain silent to the legal person see recently: A. Keller, *Il diritto al silenzio dell'ente accusato ai sensi del D. Lgs. 231/2001*, in www.sistemapenale.it, 6 October 2023.

[787] Supreme Court, United Chambers, No. 26654/2008, rv. 239924.

[788] Supreme Court, Chamber 6, No. 18652 of 11.05.2022.

- "where the confiscation has been agreed between the parties, the only remedy available in the Court of Cassation is represented by Art. 448, para 2-bis, Code of Criminal Procedure, which, in limiting the recourse "to grounds relating to the expression of the defendant's will, to the lack of correlation between the request and the judgment, to the erroneous legal qualification of the fact and to the illegality of the penalty or security measure", covers the defendant from the risk of errors made ex post, during the implementation of an agreement in the definition of whose contents he has, however, participated and for which he has consequently assumed responsibility";

- if, on the other hand, the confiscation was not included in the prior agreement between the parties, the protection provided by the system in respect of the defendant expands to the extent of allowing the control of legitimacy according to the broader general parameters dictated by Article 606, paragraph 1, of the Code of Criminal Procedure, thus providing a remedy in respect of any undue, as such unforeseeable, violation of the rights, albeit of a patrimonial nature, of the defendant".

- **Which is the standard of the proof/is the reversal of the burden of the proof admitted?**

The confiscation under Art. 19 L.d. no. 231/2001 can be applied only once the administrative liability of the legal person for an offence has been found beyond any reasonable doubt, hence a full criminal standard of proof is applicable.

- **Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?**

There is not a proportionality clause in the Italian system of law to better guarantee the respect of the principle of proportionality when the confiscation against a company can have disproportionate effects, but the recent case law of the Supreme Court is more concerned with this issue.

According to ECtHR- Sec. IV - 5 April 2022 - Pres. Y. Grozev - CĂlin v. Romania (No 54491/14) it constitutes a disproportionate interference with the right to property, within the meaning of Article 1, Prot. No. 1 ECHR, for a criminal seizure to continue for more than a decade, as it entails an excessive burden on the applicant (1). It is a violation of Article 6(1) ECHR not to provide a remedy to challenge the excessive duration of the criminal attachment, including by awarding compensation in separate civil proceedings (2).

The European Court of Human Rights, with the ruling of 5 April 2022, held that the seizure of assets ordered during a Romanian criminal proceedings wasn't proportionate to the aim pursued, taking into account the duration of the measure, the value of the assets belonging to the applicant, the lack of opportunity to challenge effectively the measure imposed in criminal proceedings, and the lack of evidence that he could have obtained compensation in separate civil proceedings. The applicant was deprived of the possibility of using and disposing of his assets and contesting seizure before a court, at least for a period of more than ten years; therefore, there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention. The author emphasizes the harmony between this ruling and the recent case-law of the Supreme Court of Cassation about the role played by the proportionality in the restrictions of the right to peaceful enjoyment of the property in seizure.[789]

In this direction recently the Supreme Court has established that "However, the Court considers that, in the silence of L.d. no. 231/2001, the partial release of the amounts seized to pay the tax debt should be allowed, on the basis of a constitutionally oriented

[789] ECtHR, 21 January 2021, Kosurnyikov et. al. vs. Hungary, §§ 18 ss.

interpretation of the principle of proportionality of the precautionary measure, where it is necessary in order to avoid, as a result of the application of the preventive seizure and the mandatory impact of the tax obligation, the definitive cessation of the entity's activity before the trial is concluded"[790].

The jurisprudence of legitimacy, however, in subsequent pronouncements, has radically changed its orientation and has stated that the principles of proportionality, adequacy and gradualness, dictated by Article 275 of the Code of Criminal Procedure for precautionary measures personal precautionary measures, are also applicable to real precautionary measures.

The proportionality of the real precautionary measure is, in fact, the subject of a prior and inescapable evaluation inescapable prior assessment by the judge in the application of real precautionary measures, in order to avoid an exaggerated compression of the right to property and free private economic initiative private initiative.

The original reference to Article 275(2) of the Code of Criminal Procedure was then enriched by the reference to the recognition of the principle of proportionality made at supranational level by EU law (Article 5(3) and (4) TEU, Article 49(3) and Article 52(1) of the Charter of Fundamental Rights) and by the case law of the European Court of Human Rights, which interpreted the provisions of the European Convention on Human Rights on this point.

In this interpretative perspective, there are several interpretations enunciated by case law of the canon of proportionality in the matter of preventive seizure so-called impeditive.

The judge, therefore, must not only adequately justify the impossibility of achieving the same result by resorting to other and less invasive precautionary instruments[791] or with a less invasive interdictory measure [792], but must also modulate the seizure ordered - where this is

[790] Supreme Court., Chamber 6, 11.012022, No. 41126/2021, Sunsky S.r.L., § 12.

[791] Supreme Court, 28.05.2019, Frontino, No. 29687.

[792] Supreme Court, 16.01. 2013, Caruso, No. 8382.

possible - in such a way as not to compromise the functionality of the property subjected to constraint even beyond the effective necessities dictated by the precautionary need that is intended to be contained[793]; in in particular, the judge is required to conform the lien in such a way as not to cause the unnecessary sacrifice of rights the exercise of which would not prejudice the precautionary purposes pursued.

An important recognition of the canons of proportionality and adequacy, which must preside over the application of real precautionary measures, was also made by the constitutional jurisprudence in in Judgment No. 85 of 2013 (27). Ruling on the regulations introduced by Law Decree no. 207 of 2012 and intended to conform the preventive seizure adopted by the judicial authorities on large portions of the Ilva plant of the Ilva plant in Taranto, the Constitutional Court[794] held that the ratio of the regulations censured consisted in achieving a reasonable balance between fundamental rights protected by the Constitution and, in particular, to health, to a healthy environment, and to work, from which derives the constitutionally relevant interest in maintaining employment levels.

In this ruling it was noted that, given that all the fundamental rights protected by the Constitution are in a relationship of mutual integration, it is not possible to identify one of them that has absolute prevalence over the others; the protection of the same must, moreover, always be systemic, and not broken up into a series of uncoordinated norms in potential conflict with each other, and this settlement must also be pursued in the execution of real precautionary measures.

The Constitutional Court has, in fact, noted that Article 1 of Law Decree no. 207 has conformed the legal discipline in this sense, introducing a new normative determination within Article 321, paragraph 1, of the Code of Criminal Procedure, in the sense that the

[793] Supreme Court, 22.05.2021, Onorati, No. 17586.

[794] Constitutional Court, 09.05.2013, No. 85, in *Giur. cost.*, 2013, p. 1424.

preventive seizure, where the conditions provided by paragraph 1 of the provision are met, must allow the right of use, unless, in the future, the prescriptions of the law are transgressed. It therefore constitutes a violation of the principle of proportionality to subject to seizure for confiscation for equivalent purposes an asset of a value far greater than the estimated confiscable profit, even if with a lien 'formally' limited to the amount of that profit [795].

The person subject to the measure in rem, therefore, in the event of disproportion between the economic value of the assets to be confiscated indicated in the confiscation decree and the amount of the subjected to the attachment, may contest this excess in order to obtain a reduction of the seizure, by submitting an appropriate request to the public prosecutor, to the judge competent to rule on the precautionary measure, or appeal to the court of review[796].

The jurisprudence of legitimacy has, moreover, affirmed that the preventive seizure finalized to the confiscation may also be applied the criterion of the minimum necessary sacrifice, which requires that the real constraint functional to the future expropriation be shaped in such a way that affects the interests involved as little as possible.

It is precisely the reference to the principle of proportionality has, furthermore, allowed the United Sections of the Supreme Court [797] to sanction that the measure of preventive seizure referred to in Art. 321, para 2, Code of Criminal Procedure, finalized to the confiscation referred to in Art. 240 C.C. must contain the concise motivation also of the *periculum in mora*, to be related to the reasons that make necessary the anticipation of the ablative effect of the confiscation with respect to the definition of the judgement, except that, in the hypothesis of seizure of the things whose manufacture, use, port, possession or The United Sections

[795] Supreme Court, 27.01.2015, No. 12515, Picheca, in *C.E.D. Cass.*, No. 263656; Supreme Court, 09.01.2014, Anemone, No. 15807,

ivi, No. 259702.

[796] Supreme Court, 12.07.2012, No. 10567, Falchero, in *C.E.D. Cass.*, No. 254919; Supreme Court., 21.07.2015, No. 36464, Armeli, Rivi, No. 265057; Supreme Court., 10.05.2019, No. 29431, Fraone, *ivi*, No. 276272; Supreme Court. 28.02.2018, No. 26340, Ferrara, *ivi*, No. 272882.

[797] Supreme Court, United Chambers, 24.06.2021, No. 26959, Ellade, in *C.E.D. Cass.*, No. 281848, in *Guida dir.*, 2022, 1, p. 82,

noted that such motivation is also necessary in view of the "respect of the criteria of proportionality whose necessary value, with reference precisely to the real precautionary measures, and in consonance with the statements of the supranational jurisprudence, this Court has deemed it necessary to emphasise on several occasions in order to avoid an exasperated compression of the right to property and free private economic initiative" [798].

In the reading of the United Sections, "the principle of proportionality, constantly referred to by the case-law of the ECHR Court in the assessment of interference with the right to property protected by Article 1, Prot. 1, ECHR, [799] also constitutes one of the general principles of European Union law[800] and is expressly sanctioned by Article 52(1) of the Charter of Nice" according to which the legitimacy of limitations on the right to property necessarily implies respect for the principle of proportionality and must necessarily respond "to objectives of general interest recognised by the Union or to the need to protect the rights and freedoms others" so that the limits to the right of ownership "do not go beyond what is necessary to achieve them [801]".

The same pronouncement points out that Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumental property and proceeds of crime in the European Union and Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018, on mutual recognition of freezing and confiscation orders in criminal matters criminal matters, have provided that, "when issuing a freezing order or a confiscation order, the issuing authorities shall ensure compliance with the principles of necessity and proportionality".

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[798] Supreme Court, Chamber 5, No. 8152 del 21.10.2010, Magnano,

in *C.E.D. Cass.*, No. 246103; Chamber 5, No. 8382 del 16.01.2013, Caruso, *ivi*, No. 254712; Sez. III, No. 21271 del 07.05.2014,

Konovalov, *ivi*, No. 261509; Chamber 2, No. 29687 del 28.05.2019, Frontino, *ivi*, No. 276979

[799] ECtHR, Grand Chamber, of 05.01.2000, Beyeler v. Italia; ECtHR, Grand Chamber, of 16.07.2014, Alisic c. Bosnia and Herzegovina; ECtHR, 21.02.1986, James et al. v. UK.

[800] See CJEU, 03.12.2019, C-482/17

[801] CJEU 08.06.2010, Vodafone et al., C58/08, EU:C:2010:321, § 51.

Recently, the Sixth Criminal Section of the Court of Cassation [802] affirmed, with reference to the regulation of the liability of the entities, that the principle of proportionality of the precautionary measures, in the face of the taxability *ex lege* of the proceeds of illicit activity provided for by Art. 14, paragraph 4, of Law no. 537 of 1993, allows the court to authorise the partial release of the sums subject to preventive attachment for confiscation in order to enable the entity to pay the taxes due on them as profits from unlawful activities, when the amount of the property seized, albeit legitimately determined in an amount corresponding to the price or profit of the predicate offence, risks determining, also in reason of the incidence of the tax obligation, even before the trial was finalised, the cessation definitive cessation of the entity's activity, resulting in a substantial inhibition for the economic operation of the entity itself, to the extent of causing its paralysis or definitive cessation definitively.

In the same ruling, the Court reiterated that the principle of proportionality, therefore, does not operates exclusively as a limit to judicial discretion in the genetic phase of the precautionary measure precautionary measure, but requires the judge, throughout the entire phase of its effectiveness, to graduate and modelling the content of the constraint imposed, also in relation to the contingencies that may intervene, so that it does not entail more incisive restrictions of fundamental rights than those strictly functional to protect the precautionary needs to be satisfied in the case at hand.

It is interesting to quote the whole reasoning developed by the Supreme Court, as it underlines the paramount importance of the principle of proportionality applicable to precautionary seizure against legal persons, provided both by national and supranational sources, aimed at guaranteeing a fair balance between individual rights and efficiency in the fight against crime: "In the regulation of the criminal liability of the legal person, no provision expressly provides for the possibility of permitting the partial release of sums seized for

[802] Supreme Court, 11.01.2022, No. 13936, in *Guida dir.*, 2022, p. 18; Supreme Court, United Chambers, No. 36072 of 19.04.2018, Botticelli, Rv. 273548.

confiscation to pay taxes on income unlawfully gained through the commission of the predicate offence. However, the Panel considers that, in the absence of L.d. no. 231/2001, the partial release of the sums seized to pay the tax debt must be allowed, on the basis of a constitutionally oriented interpretation of the principle of the proportionality of the precautionary measure, where it is necessary in order to avoid, as a result of the application of the preventive seizure and the imperative impact of the tax obligation, the definitive cessation of the entity's activity before the trial is finalised. In such cases, in fact, the seizure for confiscation would not only fulfil its lawful function of apprehending the price or the illegally gained profit for the purpose of the subsequent confiscation, but would also lead to an excessive compression of the freedom to exercise the business activity (Art. 41 Italian Constitution, Art. 16 of the Charter of Fundamental Rights of the European Union), the right to property (Art. 42 Italian Constitution, Art. 1 of Prot. no. 1 ECHR), the right to work (Art. 4 Italian Constitution, Art. 15 of the Charter of Fundamental Rights of the European Union), jeopardising the very legal existence of the entity. The seizure for confiscation would, in fact, result in a form of definitive disqualification from the activity referred to in Article 16(3) of L.d. no. 231/2001, already operating in the precautionary measures and independently of a definitive finding of liability of the entity. This would unduly overlap the effects of precautionary measures which, in the scheme of L.d. no. 231/2001, are structurally and functionally distinct: such as the preventive seizure for confiscation, under Article 53, and the prohibition from carrying on business activities under Art. 9, second paragraph, letter a), and Art. 45 of L.d. no. 231/2001. This disqualification measure, however, constitutes the extrema ratio, since, according to Article 46(3) of L.d. no. 231/2001, it "can only be ordered as a precautionary measure when all other measures prove inadequate". Article 25(1) of n.d. No. 231/2001 in relation to the predicate offence of trafficking in unlawful influences, however, does not allow the application of interdictory measures as a precautionary measure, and in the system of the criminal liability of legal persons, the applicability, as a precautionary

measure, of interdictory sanctions that are not among those that can be definitively imposed at the outcome of the trial on the merits is excluded. If the above-mentioned conditions were met, therefore, the preventive seizure would violate the canon of proportionality enshrined, also with reference to precautionary measures in rem, in Article 275 of the Code of Criminal Procedure and at supranational level by European Union law (Article 5(3) and (4) TEU, Article 49(3) and Article 52(1) of the Charter of Fundamental Rights) and by the European Convention on Human Rights, as interpreted by the ECtHR, and which performs "an instrumental function for the adequate protection of individual rights in criminal proceedings and a finalistic function, as a parameter for verifying the justice of the solution taken in the concrete case". The United Sections of the Court of Cassation, moreover, have recently stated that 'any precautionary measure, in order to be said to be proportionate to the objective to be pursued, should require that any interference with the peaceful enjoyment of property strike a fair balance between the divergent interests at stake (...)'. Article 46(2) of L.d. no. 231/2001, moreover, expressly states that "any precautionary measure must be proportionate to the seriousness of the offence and to the sanction that may be imposed on the legal entity'. Respect for the canon of proportionality, together with those of adequacy (Article 46(1) of L.d. no. 231/2001) and gradualness (Article 46(3) of L.d. no. 231/2001), of the precautionary measure ordered against the entity, is, therefore, the subject of an unavoidable prior assessment by the judge. The jurisprudence of legitimacy has specified that, precisely in implementation of the canon of proportionality, the judge, when ordering a disqualifying precautionary measure or proceeds to appoint a judicial commissioner, must limit, where possible, the effectiveness of the measure to the specific activity of the legal person to which the offence refers. The principle of proportionality, moreover, does not operate solely as a limitation on judicial discretion in the genetic phase of the precautionary measure, but requires the judge, throughout the entire phase of its effectiveness, to graduate and shape the content of the constraint imposed, also in relation to the contingencies that

may arise, so that it does not entail more incisive restrictions of fundamental rights than those strictly functional to protect the precautionary needs to be met in the case in question. With reference to preventive seizure for confiscation, moreover the canon of proportionality does not end with the prohibition to seize assets whose value exceeds the estimated confiscable profit, but requires the judge to modulate the seizure in such a way that it does not determine an exasperated compression of the right of ownership and of free economic initiative of the entity seized, going beyond what is strictly necessary with respect to the purpose pursued. The legitimate purpose of guaranteeing, pending the definition of the trial on the merits, the execution of the confiscation through the seizure of the profit of the crime must not exceed what is strictly necessary with respect to the end pursued and must, therefore, be realised in forms that, while guaranteeing its effectiveness, prove adequate to the protection of other rights of constitutional importance deserving of protection and the exercise of which does not prejudice the precautionary requirements pursued. The judge, therefore, at the time of the adoption of the precautionary measure in rem and in its subsequent enforcement dynamic, must avoid that the constraint in rem, by exceeding its own purposes and going beyond the scope of its typical effects, results in a substantial inhibition of the economic operation of the subject seized, to the point of determining its paralysis or definitive cessation. Therefore, the Court considers that, in implementation of the principle of proportionality of the precautionary measure, the judge may authorise the partial release of the sums subject to preventive seizure with a view to confiscation in order to allow the entity to pay the taxes due on them as profits of unlawful activities, when the amount of the seizure ordered, albeit legitimately determined to an extent corresponding to the price or profit of the offence, is likely to determine, also by reason of the impact of the tax obligation, even before of the trial, the definitive cessation of the activity of the entity. In such specific cases, the partial release of the seized sums must be considered admissible under the strict condition of the demonstration of a seizure aimed at confiscation that, in its

concrete afflictive dimension, jeopardises the current operations and, therefore, the very existence of the economic entity and for the sole limited purpose of paying the tax debt, with express constraint of destination and payment in "controlled" forms. On the other hand, there do not appear to be any express or systematic preclusions to this eventuality, which is, moreover, imposed by the need to give concrete effect to the constitutional value of the principle of proportionality of precautionary measures. The preventive seizure in the system of the criminal liability of the entity, in fact, must be ordered and executed not only in compliance with the canon of proportionality set out in Article 46 of L.d. no. 231/2001, but must also allow "continuity" in the economic operation of the entity. Article 53, paragraph 1-bis, of L.d. no. 231/2001, introduced by Article 12, paragraph 5-bis, of Law no. 125/2013, provides, in fact, that "Where the seizure, carried out for the purposes of the confiscation for equivalent purposes provided for in paragraph 2 of Article 19, concerns companies, businesses or assets, including securities, as well as shares or liquid assets, even if on deposit, the judicial custodian allows the use and management thereof by the corporate bodies exclusively for the purpose of ensuring the continuity and development of the company, exercising supervisory powers and reporting to the judicial authority". The rationale of this provision is clearly to prevent the precautionary measure taken from paralysing the ordinary business activity, thereby jeopardising its continuity and development, and Article 53(1-bis) of L.d. No. 231/2001 expressly assigns the function of supervising the use of the seized sums, the management of the company and reporting to the judicial authority to the judicial administrator custodian. The implementation of the purposes of business continuity indicated by this provision cannot, however, be precluded or even thwarted in cases, such as the present one, where the appointment of a judicial administrator custodian is lacking and, therefore, the same must in any event be pursued by the court. Moreover, under the rules governing the criminal liability of legal entities, the amount of the confiscation and, by way of correlation, of the preventive seizure for the same purpose, legitimately determined to be

equivalent to the price or profit of the predicate offence, may be reduced in the course of the proceedings as a result of restorative conduct implemented post-delictum by the entity, such as the provision of the profit obtained for confiscation pursuant to Article 17 of L.d. no. 231/2001 and the restitution of the price or profit of the offence to the injured party pursuant to Article 19, paragraph 1 of L.d. no. 231/2001. More generally, it is precisely the canon of proportionality of the penalty that allows, in a constitutionally oriented interpretative perspective, to reduce the amount of the confiscation or even to conform its object so as to ensure the canon of the "minimum necessary sacrifice". The ECtHR in the ruling G.I.E.M. (European Court of Human Rights, Grand Chamber, 28 June 2018, G.I.E.M. s.r.l. and others v. Italy), in particular, stated that Article 1 of Protocol No. 1 requires, "for any interference, a reasonable relationship of proportionality between the means employed and the aim pursued, and that "this fair balance is broken if the person concerned has to bear an excessive and exaggerated burden". Directive 2014/42/EU on the freezing and confiscation of instrumental property and proceeds of crime in the European Union, in recitals 17 and 18 urges respect for the principle of proportionality. In particular, recital 17 contemplates the introduction of an onerousness clause, allowing for the non-application of confiscation if 'it represents an excessive deprivation for the person concerned, based on the circumstances of the individual case, which should be decisive', adding, at the same time, that 'it is appropriate that Member States make very limited use of this possibility and have the possibility not to order confiscation only when it would lead to a critical livelihood situation for the person concerned'. On the basis of the foregoing findings, it must therefore be ordered to annul the contested order and refer the case back to the Court of Rome for a new trial to ascertain whether the strict conditions outlined above exist for allowing, in implementation of the canon of proportionality of the precautionary measure, the partial release of the credit balances of the current accounts seized from the entity for the sole purpose of enabling payment of the taxes. The Court of Rome will therefore have to

ascertain, on the basis of the allegations of the parties: (1) whether the appellant company can provide for the payment of the taxes due as a result of the application of Article 14(4) of Law No 537 of 1993 on the basis of available resources or by resorting to bank credit; (2) whether the failure to pay the taxes due jeopardises the continuity of the institution's operations. In the event of a positive assessment of the above conditions, the Court may order the partial release of the seized sums for the sole purpose of allowing the discharge of the tax debt pursuant to Article 14(4) of Law No 537 of 1993 in a "controlled" manner and, therefore, in the absence of a judicial administrator to carry out the task, for example by resorting to forms negotiated with the tax authorities or by setting up an ad hoc current account".

- **Is the trial in absentia possible in your legal system in order to apply the confiscation?**

10. Yes

- For the confiscation without conviction: **can this form of confiscation be applied also in case of acquittal?**

Yes, see questionnaire WP 2.

11. **For each model of confiscation against legal persons, does it comply with the principles of:**

- **legality? legal specificity of a statute?**

- **non-retroactivity of the /more severe/statute?**

Supreme Court's case law[803] is well settled in denying, according to the principle of non-retroactivity of criminal law (*nullum crimen, nulla poena sine praevia lege poenali*, as stated in Art. 25 Cost. and Art. 2 L.d. no. 231/2001) the applicability of the confiscation to criminal offences which were not included in the catalogue of enumerated predicate offences provided by L.d. no. 231/2001 at the time of the perpetration of the criminal offence. In this regard, with reference to the crime of criminal association under Art. 416 C.C. (which was added to the catalogue of predicate offences which determine the administrative liability *ex crimine* of legal persons under Leg. Decree no. 231/2001 by Law no. 94/2009), the Supreme Court has recently affirmed that: "With regard to compliance with the principles of legality and non-retroactivity reaffirmed by Article 2 of the same L.d., reference must in any case be made to the date on which the conduct constituting the offence was committed and not to the time at which the profit was obtained. The principle of legality established by Article 2 cited subordinates the application of the sanctioning measures to an express legislative provision, both with regard to the offence and to the type of sanction, specifying that it must have come into force before the criminal act was committed. It follows that it is the commission of the fact that must be taken into consideration in order to ascertain the applicability of the sanction, and by "fact" must be understood precisely that which constitutes the offence. In other words, it is the moment at which the offence is committed that is relevant for the purposes of the application of the penalties provided by Article 9 of L.d. no. 231/2001, in the sense that, on the basis of the related provision in Article 2, the entire sanctioning discipline of the decree did not apply in relation to "facts" committed before its entry into force. The moment of acquisition of the profit, on the other hand, is completely irrelevant for the purposes now considered, in that it constitutes only the object of the penalty-forfeiture, which meets its necessary prerequisite in the existence of an offence

[803] See Supreme Court, Chamber 4, No. 47010 of 17.12.2021, Rv. 282703.

committed when the above-mentioned L.d. was already applicable. In light of such considerations, it is clear, by reason of the typically punitive nature of the ablative measure, that it cannot be retroactive applying to conduct committed prior to the existence of the requirements and conditions for the administrative liability of the entity, since only the conduct temporally covered by the existence, in the catalogue of alleged offences, of the criminal association offence is relevant. Therefore, for the purpose of correctly determining the profit, all the criminal association conduct perpetrated prior to the entry into force of the legislative amendment No. 94 of 15 July 2009 (pursuant to Article 2, paragraph 29) should have been consistently excluded".

- **the right to private property?**

See supra § 9

- **the proportionality?**

See supra § 9

- **the right to a fair trial?**
- **the right to defence?**
- **the presumption of innocence?**
- **the ne bis in idem principle?**

According to recent Supreme Court's case law, related to the predicate offence of misappropriation of funds, fraud to the detriment of the State, a public body or the European Union or for the purpose of obtaining public funds, computer fraud to the detriment of the State or a public body and fraud in public procurement, "On the subject of the administrative liability of entities for the offence referred to in Article 24 of L.d. No. 231 of 8 June 2001,

there is no breach of the principle of "ne bis in idem" where the legal entity is sentenced, in criminal proceedings, to the relevant administrative penalties with simultaneous value confiscation of its assets to the extent of the profit gained and, in a distinct administrative accounting proceedings, to compensation for the damage suffered by the public administration, since such measures, although of a sanctioning nature, pursue different purposes. (In its reasoning, the Court specified that while confiscation is imposed in the collective interest and with a social-preventive function, the sentence to pay damages pursues the effect of reinstating the assets of the public body, impoverished by the criminal conduct ascertained in the criminal proceedings). It is worth mentioning the reasoning developed by the Supreme Court in the relevant part: "the measure of confiscation for equivalent constitutes an ablatory instrument, it is imposed in the collective interest and with a social-preventive function; in this specific case, it differs markedly from the sentence of compensation for damages, pronounced in administrative accounting proceedings in favour of the public body impoverished as a result of criminal conducts already ascertained in criminal proceedings, which pursues the effect of reinstating the assets of the subject injured by such conducts through the payment by the responsible party of the necessary pecuniary amount. Confiscation, whether direct or by equivalent, affects the assets of the convicted person and transfers utilities to the Treasury, while the compensation for damages remedies the financial damage suffered by the body granting the public contribution, in whose sole interest it is recognised, giving it the right to receive pecuniary benefits equivalent, and increased with accessories, to those obtained by the defendant in breach of the law and of the regulation of the disbursement procedure. Therefore, the complained duplication of sanctions/bis in idem does not exist, because the two autonomous proceedings, the criminal proceedings and the accounting proceedings, have given rise to different effects, of which only one, the confiscation, is substantially punitive in nature for the person responsible. This conclusion is in accordance with the case law of the European Court of Human Rights,

which has extended the principles expressed in Article 4 Protocol 7 of the European Convention on Human Rights also to the relationship between criminal proceedings and administrative proceedings when in concrete terms the sanction applied in the latter case is substantially criminal in nature (European Court of Human Rights, Grande Stevens and Others v. Italy, 4/03/2014; European Court of Human Rights, Grand Chamber, A and B v. Norway, 15/11/2016). To this end, it has identified three alternative criteria to identify the criminal or non-criminal nature of the charge and the related sanction, represented by the legal qualification of the measure assigned by the national system, its nature and its degree of severity.[804] Having compared the case in question with the parameters outlined by the supranational court, it follows that compensation for damage in the Italian legal system is extraneous to the category of criminal sanction, because in terms of definition it constitutes a reparatory remedy provided for in favour of the injured party, belonging to substantive civil law and extraneous to the criminal system, which deals with it only if the same is ancillary requested in the criminal proceedings by means of the constitution of a civil plaintiff, is in the nature of compensation for a pecuniary reduction suffered as a consequence of the commission of an unlawful act and affects the patrimonial sphere of the person subject to it, not personal freedom, as is the case with penalties in the proper sense".

- **and other relevant rights – what sort of?**

12. **For each model of confiscation:**

[804] ECtHR, 08.06.1976, Engel v. The Netherlands; 09.01.1995, Welch v. the United Kingdom; 28.11.1999, Escoubet v. France; 30.08.2007, Sud Fondi and others v. Italy.

- **Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure against legal persons?**

The Court of Cassation, with a recent order[805], raised a question on the constitutionality of Article 2641 of the Italian Civil Code, which provides for the mandatory confiscation for corporate crimes, in the part in which it subjects to value confiscation also the assets used to commit the crime (indirectly affecting the legal person). In the case at hand, the offences of market rigging (Article 2637 of the Italian Civil Code) and obstruction of supervisory functions (Article 2638 of the Italian Civil Code) were committed by means of financing for the purpose of illegally altering the price of the shares and creating an artificial representation of the amount of the regulatory capitaL. The total amount of the financed capital had amounted to Euro 963 million. Therefore, the Court of Vicenza had ordered against the defendants the value confiscation of that amount, pursuant to Article 2641, paragraph 2, of the Italian Civil Code, which subjects to value confiscation the means used to commit the crime.

The Court of Appeal of Venice had ordered the revocation of this measure, considering that it was a manifestly disproportionate sanction, as well as being detached from the seriousness of the offence and from the individual contributions to the offence, due to the automaticity of the commensuration criterion, in open contrast with the principles enshrined in Articles 3 and 27, paragraph 1, of the Italian Constitution (reasonableness and proportionality). The Prosecutor General at the Court of Appeal challenged this ruling, claiming violation of the law, with reference to Articles 2641 of the Italian Civil Code, 101, paragraph 2, and 25, paragraph 2, of the Italian Constitution, as well as with regard to the principles of legality of

[805] Supreme Court, Chamber 5, Order of 27.02.2024 (hearing of 14.12. 2023), No. 8612, in www.giurisprudenzapenale.com.

the penalty and separation of powers. In particular, the Prosecutor General contested the arguments developed by the Court of Appeal, observing that:

(a) Article 2641(2) of the Italian Civil Code provides for the value confiscation of assets used to commit offences without introducing quantitative correctives aimed at individualising the confiscation to the peculiarities of the concrete case

b) the assessment of disproportion expressed by the Court of Appeal, ends up preventing the application of confiscation, which the legislator has constructed as mandatory;

c) the assessment by the Court of Appeal of the absence of an individual profit introduces a regulatory parameter not provided for by Article 2641 of the Italian Civil Code and extraneous to the nature of the institution, which concerns not the profit but the assets used to commit the offences.

The Supreme Court first of all stated that "the provision in Article 2641(1) of the Italian Civil Code provides for the confiscation of assets used to commit offences. According to the settled jurisprudence expressed by this Court (...) constitute "property used to commit the offence" referred to in Article 2638 of the Italian Civil Code, which may be confiscated pursuant to Article 2641, first and second paragraph, of the Italian Civil Code, including through the seizure of assets for an equivalent value, loans granted by a credit institution to third parties for the purchase of shares and bonds of the same institution and aimed at representing an economic reality of the credit institution's assets other than the actual one, obstructing the functions of the public supervisory authorities. Article 2641 of the Italian Civil Code, with both the first paragraph and the second paragraph (...), which provides for value confiscation, does not introduce any quantitative parameter related to the peculiarities of the concrete case". Secondly, the Court censured the reasoning of the Court of Appeal, according to which "always and in any case, the confiscation of the goods used to commit the crime, pursuant to Article 2641, second paragraph, of the Italian Civil Code, represents

a *quid pluris* superabundant compared to the imprisonment penalty system: this implies an assessment of disproportion of the value confiscation in itself considered (...), with the consequence that, in all likelihood, the motivation (...) translates (...) into the prospect of an abrogating interpretation of the provision". The Supreme Court formulated its assessment of the relevance of the question of constitutionality as follows: "the criticisms addressed by the appellant (...) to such an approach are well-founded, since the reasoning of Court's decision comes to the conclusion of the need to disapply the rule indicated (...) always and in any case (...). That being so, the third plea in the Prosecutor General's appeal appears to be admissible: and this makes the question of legitimacy that is being raised relevant".

At this point, the Court gave an account of recent amendments to provisions - which provide for similar types of confiscation - which have eliminated the hypothesis of confiscation of assets used to commit the offence. This concerns in particular:

- the Constitutional Court's Ruling No. 112 of 2019, which declared the constitutional illegitimacy of Article 187 sexies TUF, insofar as it provided for the mandatory confiscation, direct or by equivalent, of the product of the offence and of the assets used to commit it, and not only of the profit, referring to the administrative offence of manipulative market rigging;
- Article 26(1)(e) of Law no. 238 of 23 December 2021, which, inter alia, amended Article 187(1) of the Consolidated Law on Finance (which provides for the confiscation of assets used to commit the offence of market rigging), excluding from the confiscation hypothesis the case of assets used to commit the offence.

In the view of the Supreme Court, "both interventions (...) are clearly inspired by the principle that, in cases of offences concerning market abuse, confiscation should be limited to profit alone, as such ablation fully guarantees the restorative function. In other words, it is intended to limit the ablatory intervention characterised by punitive-sanctionary components, since if

it were extended to the product and the means used to commit the offence, it could assume a disproportionate character (...). These principles would seem to apply also to Article 2641 of the Civil Code, a provision concerning confiscation in the case of the crime of market rigging, as well as in the case of the crime of obstruction of supervision, given the identity of the application rationale and the scope of this provision with respect to those cited above. In fact (...) it is precisely a value confiscation mechanism structurally related to the assets used to commit the offence that is constructed by the legislator in terms that do not guarantee in the abstract (...), the proportionality of the sanction, understood as that of the necessary adequacy to the fact, considered in its objective and subjective components, which represents the retributive justification of the penalty". In light of these considerations, the Court identified the constitutional parameters considered to have been violated. Articles 3 and 27, paragraphs 1 and 3, of the Italian Constitution, since "the wide discretion granted to the legislator, in the field of criminal law, as regards the determination of the penalties to be imposed for each offence, is subject to a series of constraints deriving from the Constitution, including the prohibition to impose penalties that are manifestly disproportionate in excess in relation to the crime". In the Court's view, 'proportionality must be assessed in relation to the seriousness of the conduct covered by the abstract case, in the awareness that excessively severe penalties tend to be perceived as unjust by the convicted person, and thus end up being an obstacle to his re-education'. Articles 3 and 42 of the Constitution, 1 Protocol 1 ECHR, 17 CDFUE, which constitute the constitutional, conventional and European Union foundations for the protection of property, on which the rule in question infringes. Article 49(3) CDFUE, which establishes the principle that "the penalties imposed must not be disproportionate to the offence" and which informs, inter alia, the EU regulation of ablative measures of a pecuniary nature. Such principles, in the opinion of the Court, "do not justify the rule censured here, in the light of the afflictive component deriving from the disproportionate - because not correlated to any real advantage achieved - worsening of the

situation of the recipients of the measure, compared to that resulting from the application of merely restorative instruments and taking into account the range of sentences provided by the offence". Lastly, the Court clarified that the decision to raise an issue of constitutionality, rather than a reference for a preliminary ruling to the Court of Justice of the European Union, was dictated in particular by the need to issue a decision valid *erga omnes* by the Constitutional Court. In conclusion, the Court raised "a question of constitutionality of Article 2641, first and second paragraph, of the Italian Civil Code, in the part in which it subjects to value confiscation also the assets used to commit the offence, in relation to Articles 3, 27, first and third paragraphs, 42 and 117 of the Italian Constitution, the latter with reference to Article 1 of the First Additional Protocol to the ECHR, as well as to Articles 11 and 117 of the Italian Constitution, with reference to Articles 17 and 49, paragraph 3, of the ECHR".

The Supreme Court of Cassation recently ruled that "the question of constitutional legitimacy of Article 12-*bis*(1) of L.d. No. 74/2000, on the ground that it is contrary to Articles 3, 42 and 117 of the Constitution in relation to Articles 1 prot. no. 1 ECHR and Article 49 of the Charter of Fundamental Rights of the European Union, is manifestly unfounded, in so far as it provides for value confiscation and, therefore, for the seizure thereof from the representative, whether legal or *de facto*, of a legal person, where it is not possible to carry out the direct confiscation of the profit from the offence, even in the form of savings of expenses, from the legal person, inasmuch as the confiscation, by its punitive nature, is based on the commission of a conduct related to tax offences, perpetrated by the natural person in the interest or to the advantage of the legal person"[806].

- **Is there any significant national case law of your Supreme Court on the application of freezing or confiscation measures against legal persons?**

[806] Supreme Court, Chamber 3, No. 11086 of 04.02.2022, registered on 28.03.2022, Rv. 283028.

See supra and replies to questionnaire WP 2 with regard to models of confiscation applicable to natural persons which affect indirectly legal persons.

12. Are there European Court of Human Rights cases in relation to "Your" model of confiscation against legal persons? Please, explain the position of the ECHR about "Your" model of confiscation against legal persons.

In its well-known decision *G.I.E.M. S.r.L. and Others v. Italy* (applications nos. 1828/06, 34163/07 and 19029/11) the European Court of Human Rights, assessing the legitimacy of the Italian s.c. building confiscation for the crime of unlawful allotment (s.c. confisca ubanistica, on which see report WP 2) under Article 44 § 2 of Presidential Decree no. 380/2001, in the part relevant here found a violation of Article 7, concluding that, in view of the discrete nature of the legal personality of companies in relation to that of their directors and shareholders, the principle of legality meant that the entities concerned (the applicant companies) could not be punished for acts engaging the criminal liability of others (the individuals concerned). Consequently, to apply confiscation to legal entities who were not parties to the proceedings in question was incompatible with Article 7 (see § 274 of the decision: In conclusion, having regard to the principle that a person cannot be punished for an act engaging the criminal liability of another, a confiscation measure applied, as in the present case, to individuals or legal entities which not parties to the proceedings, is incompatible with Article 7 of the Convention). After this ruling the Italian Supreme Court affirmed that "On the subject of confiscation for the offence of unlawful allotment, the principle according to which that measure may not be ordered against a legal person that has remained extraneous to the judgment, expressed in Article 7 of the ECHR, as interpreted in

the judgment of the ECtHR of 28/06/2018 in the case of GIEM S.r.L. and Others v Italy, is respected through the participation of the legal person in the execution proceedings, in which it may raise all the issues, in fact and in law, that it could have raised in the judgment on the merits"[807]. On the same topic the Supreme Court has affirmed that "In relation to the offence of unlawful allotment, the non-participation of the entity in whose name and on whose behalf the unlawful activity was carried out in the proceedings that ended with the conviction does not preclude the confiscation, pursuant to Article 44, paragraph 2, of Presidential Decree No. 380 of 6 June 2011, of the unlawfully allotted land and of the unlawfully constructed works owned by the entity, since the entity cannot be considered an extraneous third party due to the lack of the necessary requisite of good faith. (Case in which the Court held that the decision to reject the application for revocation of the confiscation order submitted in the interest of a company was not erroneous, stating that the company could not be considered extraneous to the facts for which its de facto directors had been prosecuted in the criminal proceedings and that, therefore, its non-participation in those proceedings was not relevant)"[808].

13- Is there any CJEU decision concerning "Your" confiscation model against legal persons?

No.

14. In Your system of law are there other efficient measures to prevent the or react against the involvement of corporations in crime (and in particular in organised crime), in other words alternatives to freezing and confiscation (e.g. in Italy judicial administration or judicial control) for targeting the illegal assets of legal persons?

[807] Supreme Court, Chamber 3, No 17399 of 20.03.2019, registered on 23.04.2019, Rv. 278763.

[808] Supreme Court, Supreme Court, Chamber 3, No. 42115 of 19.06.2019, registered on 14.10.2019, Rv. 277057.

Judicial administration (Art. 34 L.d. no. 159/2011)

The judicial administration (before Art. 3 *quarter* L. 575/'65, introduced by Law Decree no. 306/1992; now Art. 34 L.d. no. 159/2011), applies to assets used in the running of an economic activity which, based on sufficient grounds, is considered objectively useful for the activity of persons who are considered for preventive measures or are defendant in ongoing criminal proceedings for crimes linked to organised crime.[809]

The court orders the judicial administration of firms or assets which can be used, directly or indirectly, to carry out economic activities in two situations:

Firstly, if there are sufficient reasons to believe that these economic activities are directly or indirectly undertaken under the conditions of intimidation or submission provided for in Article 416-bis C.C. (*mafiosa* association), and therefore these businesses are victims of *mafia* (*i.e.* the firm is forced to pay the bribe); or secondly may, however, facilitate the activities of the suspect or defendant.[810]

This tool is an interesting alternative to confiscation because it better facilitates the continued running of the business. It consists only of the removal of the company's managers for a period of time (12 months – renewable until 24 months). The court charges a judge (delegated) and a judicial administrator who has to manage the business. The judicial administrator has to present statements about the economic activity and reports *ex* Art. 36 L.d. 156/2011 to the public prosecutor.

The purpose of the measure is to interrupt the facilitating activities, the use of the economic activity to support the activities of suspects or defendants. It aims also to prevent

[809] See Tribunal of Milano, 27.01.2017, 4 ANPP 421; Supreme Court, 16.10.2013, No. 7449. Mangione, 2000, 348; Licata, 2011, 1088.

[810] Persons in respect of whom there is a preventive measure proposed or applied, or persons subject to criminal proceedings for any of the offenses provided for in Articles 416-*bis C.C.*, 629 C.C. (extortion – blackmail), 630 C.C. (abduction), 644 C.C. (usury), 648-*bis* C.C. (money laundering) and 648-*ter* C.C. (use of money goods or utilities of unlawful origin).

others by direct intervention on administration. This should not be confined to the mere management but must also aim to remove the conditions that have caused the measure. This is a temporary measure, which can be concluded by the simple revocation of the measure, if the conditions of mafia infiltration have been removed. Likewise, there is the restoration of ordinary management alongside a "judicial control" for a maximum of three years, based on the obligation to communicate to the Questor and to the Tax Police a series of information on management acts; or, as mentioned earlier, the confiscation of properties when there is reason to believe that they are the result of illicit activities or that they constitute re-use (Article 34, paragraph 7).

The object of the judicial administration (Art. 34) is the entire business, not only the proceeds or the instruments of crime. It is an order in rem.

The owner must not be considered for preventive measures and, first of all, has not to be considered 'dangerous' because he/she is suspected of being involved in criminal activity, even if in the past. Otherwise, seizure and confiscation *ex* Art. 20 – 24 L.d 159/2011 will be applied. The owner has to be 'the third party' in relation to the facilitated person and the business must genuinely be on his/her property and at his/her disposal. If the entrepreneur were merely a front or straw man of the facilitated person, his assets could be immediately subjected to the preventive seizure and preventive confiscation (Art. 24 L.d. 159/2011), which may affect all the assets owned by the suspect or those which are, directly or indirectly (through straw man), at his disposal.

The activities both of parties subjected to preventive measure and of defendants must be facilitated. In the opinion of some authors these activities have to be criminal[811], but the jurisprudence has affirmed that the application of this measure does not demand that the facilitated activity is unlawful and that the economic activity, with facilitating nature, is being

[811] See Supreme Court, 16.10.2013, No. 7449. See also: A. Mangione, *La misura di prevenzione patrimoniale fra dogmatica e politica criminale*, Padova, Cedam, 2000.

exercised in an unlawful manner. It is sufficient that: (1) the supported person is also only proposed for a preventive measure or prosecution for one of the offenses mentioned above, and (2) that such activity, although exercised in a legitimate manner, offered an aiding contribution to the persons referred to above.[812]

The aim is to expel the criminal organisation from the company's business, to reclaim the business, in particular when the company is only a victim of organised crime. The purpose is the "decontamination" of fundamentally healthy economic activities affected by mafia infiltration. This measure should alleviate any danger of infiltration of organised crime whilst also eliminating potential distorting effects for the free market.

The judicial administration intends to intervene in that "grey zone" of relations between the mafia (or other serious forms of crime) and enterprise, where the "classical" preventive measures are not easy to apply, and where these measures are aimed at tackling the phenomenon of contamination of sound economic-entrepreneurial activities.

The more frequent use of judicial administration can be of great significance to the companies, in particular for more complex and big companies to remain outside criminal plots. Regarding this, the adoption of organisational-management models - as that imposed by the mentioned previously L.d. no. 231/2001 - by the firms is considered worthy by the jurisprudence.

Judicial (compulsory) administration has been considered, in fact, in some judgements as a non-punitive deterrent to the infiltration by the mafia or organised crime.

In this regard, the TNT plc case is of great interest. The Dutch company, working in Lombardy, was placed under judicial administration by the Court of Milano due to the *'Ndrangheta* infiltration". TNT used small cooperatives connected with '*Ndrangheta* in order to run its business in Italy. After only five months, the Court overruled the measure because the multinational company adopted trustworthy compliance measures in order both to cut

[812] Tribunal of Milano, 24.06.2016, No. 6, https://www.penalecontemporaneo.it/.

the connections with organised crime, which had motivated the initial judicial intervention, and to introduce adequate preventive tools for averting the risk of future "relapses".[813]

For the "parent company", TNT, it is not demonstrated that there was a clear self-interest in entertaining privileged relations with companies controlled by the criminal organisation. The Court correctly demands the ascertainment of an objective element, the nexus of instrumentality between a specific business and *mafiosi* interests, and a subjective element, the awareness by those who work for the enterprise of the "quality of the facilitated person and of his aims".

In the light of these stringent requirements, the measure has to work as a "bistoury" (surgical knife) to operate selectively in the considered economic activities. The Court observes, in fact, that the measure of temporary suspension cannot indiscriminately extend to "all the assets attributable directly or indirectly to a particular person" but should concern only "those certain economic activities" that facilitate criminal interests. "A request for temporary suspension against a legal person cannot be accepted if it is founded only on the assumption that his legal representative has facilitated the criminal group with other economic activities". The law (Art. 34), the Court highlights, demands that the "only objective requirement for the temporary suspension is the effective and conscious facilitation of such persons".

Moreover, the Court of Milan has affirmed in a recent order that the judicial administration "is not repressive but preventive". Its objective is not to punish the business person who is connected to criminal association, but to counter the mafia contamination[814].

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813 Tribunal of Milano, April 2011. C. Visconti, *Contro le mafie non solo confisca*, in Diritto Penale Contemporaneo https://www.penalecontemporaneo.it, 20 January 2012, pp. 1-6

814 Tribunal of Milano, 24.06.2016, No. 6, cit. See G. Capecchi, *La misura di prevenzione patrimoniale dell'amministrazione giudiziaria degli enti e le sue innovative potenzialità, in* Diritto Penale Contemporaneo https://www.penalecontemporaneo.it, 4 October 2017, pp. 1-29.

The Court affirms that the proximity to criminal interests detected in the business, can be grounds for censorship "exclusively in terms of its negligent relationship".

In this case, the proceeding was against F.M. SPA and its 100% controlled N. SPA, a semi-privatized public-sector entrepreneurial holding, notoriously responsible for planning, setting up and managing large-scale exhibition events. This group of institutions had been made subject to Art. 34 of the Anti-Mafia Code, thanks to elements of criminal infiltration. In short, the Court considered the manager responsible for facilitating criminal infiltration into the business.

The originality of this order lies in the affirmation that judicial administration measures should be understood as "imposed also in favour of entrepreneurship and its transparency". It presents new facets compared to previous case law and it limits itself to the appointment of a judicial administrator to implement or introduce anti-mafia requirements. The Court imposes on the managers an instruction to: a) subject a series of important negotiations to countersignatures of the judicial administrator, and b) to give immediate impetus to the study and adoption of an adequate organisation model.

In addition, the jurisprudence has recently specified that, in the case of illegal infiltration into a subsidiary company, through the creation of working relationships with persons involved in organised crime, the temporary suspension must be extended to the parent company. This extension is necessary when the subsidiary company hasn't real autonomy.[815]

Evolution of the praxis

In the past, due to the criminal strength of the Mafia, this judicial administration wasn't applied. It was, indeed, more likely that the economic activities would fall, directly or indirectly, under the control of the criminal organisation and the holder was often considered

[815] Tribunal of Milano, 28.09.2016, in www.dejure.giuffre.it.

a member of the criminal organisation or an aider (external complicity). Regardless, he was considered a danger to society and consequently subjected to confiscation.

The situation has changed in recent years as it has become increasingly common for the judges to assess the requirements of Article 34 in regard, for example, to multinational and large banks in economic relations with the *'Ndrangheta* present in Lombardy. Moreover, there are large companies, holding either public or private wealth, with proven relationships with *Cosa Nostra* and *'Ndrangheta* that help secure lucrative contracts for public works in Sicily and Calabria; or consortiums of cooperatives, of national importance, in connection with the Roman mafia organisation, *Mafia capitale* case (in which corruption has played a significant role).

In all these cases, as affirmed by Pignatone, the public prosecutor of Rome, the behaviour of one or more company managers, willing to enter into business relations with mafia associations – normally on the basis of a mutual benefit calculation – does not bring into question the origin and lawful formation of the company's assets. Without prejudice to any criminal responsibility of the individuals, these are forms of mafia influence that do not justify seizure and confiscation, but that can be "cured" (treated), for example, through the removal of directors and/or colluding executives, or by switching suppliers and subcontractors, and so on[816].

Advantages and disadvantages of judicial administration (temporary suspension)

The judicial administration has the advantage, in terms of efficiency, of allowing the court to affect the whole business even if only some partners are involved in criminal activities.

[816] G. Pignatone, *Mafia e corruzione: tra confische, commissariamenti e interdittive*, Diritto Penale Contemporaneo Rivista Trimestrale, 4, 2015, p. 259.

In terms of respect of the safeguards of the rule of law, as well as from an economic point of view, judicial administration is not definitive and serves to ensure the continuity and productivity of the enterprise.

The more serious disadvantage is the risk of affecting the actual victim of the mafia or organised crime. This risk is increased with the reform, introduced by the recent Law n. 61/2017, which does not demand the double verification, necessary in the former version of the law: first of all, of the apparent evidence that the company is a victim; and secondly, as a result of further investigations and on the basis of factual elements, of the fact that the enterprise victim supports the activities of the party subjected to preventive measure or the defendant. The demonstration of the fact that the firm is a victim is deemed sufficient.[817] The law appears to admit that paying the bribe is a way to help the *mafia*, to give a contribution to the criminal association; it expresses the culture of suspicion.

This crosses, in particular, the line of acceptability when the measure is applied, in cases of aiding somebody under investigation as the judicial administration could impact upon the business of a third party, who is not defendant in a criminal trial, simply because it (the business) could facilitate the person under investigation, presumed innocent according to Art. 27, § 2 Italian Constitution[818].

There are many doubts about the respect of the principle of guilt as the owner is not considered a danger (suspected) or guilty: he is a third party. Constitutional Court n. 487/1995 rejects the question of constitutionality by noting that the holders of those economic activities which aid the "*Mafia* phenomenon, cannot be considered third parties with respect to the realisation of those interests", because the free management of their assets helps to strengthen the economic presence of organised crime in the area. Therefore, the choice to carry out an activity with these connotations entails, by definition, the awareness

[817] Tribunal of Milano, 27.01.2017, cit.; Tribunal of Milano, 24.06.2016, no. 6, cit.

[818] A.R. Castaldo, *L'amministrazione giudiziaria va proposta con cautela*, Il Sole24 ore, 4 July 2016.

of the consequences that may arise, thus allowing the exclusion of the subjective situation of "substantial guiltlessness". In the opinion of the Constitutional Court, the owners of the business, subjected to judicial administration, are in some way collaborators of the mafia; there is "contiguity to *mafia*".

For the Court of Milan, moreover, negligent facilitation is considered enough; the Court downgrades the "aware conduct of facilitation", demanded by the Constitutional Court, to "negligent conduct", a concept which, indeed, is not entirely clear[819].

Moreover, an appeal against this measure is not provided for by the law; it is possible only against the confiscation, connected to this measure (when the court has reason to believe that the property has an illegal origin and the owner is not able to justify the origin), or against the renewal of the order.

According to case law of the Court of Milan[820], the judicial administration measure under Art. 34 *Anti-Mafia* Code, "has, in the first instance, a merely precautionary function aimed at preventing a given economic activity, which has connotations facilitating the mafia phenomenon, from being used as a useful support tool for the activities of criminal associations, and not necessarily an ablative function (provided for in the regulatory system as possible and anchored to further evidence)". The purpose of the procedure is to "sterilise" the company and its economic activity from the mafia contagion; "the new course imparted by the company to its organisational method may already at this time entail a reassuring prospect of the disappearance of those heavy infiltrations that had motivated the adoption of the measure "[821].

819 Tribunal of Milano, 28.09.2016, cit.

820 Tribunal of Milano, Chamber specialised in preventative measures, Decree 24 June 2016, Pres. Roia, No. 6.

821 Tribunal of Milano, Chamber specialised in preventative measures, Decree 24 June 2016, cit.

Or, again, the Court of Milan[822] speaks of a "preventive-therapeutic" purpose, "not (...) repressive as much as preventive, i.e. aimed not at punishing the entrepreneur who is part of the criminal association, but rather at countering the mafia contamination of healthy businesses, subjecting them to judicial control with the aim of removing them, as quickly as possible, from criminal infiltration and returning them to the free market once they have been cleansed of the polluting elements"[823].

The measure of judicial administration should also be understood as provided in favour of entrepreneurial activity and its transparency. In the UBER case, the Court of Milan repeats the same expressions and specifies that in the case in point, the judicial administration "has determined concrete effects in terms of a substantial business clean-up, especially in companies such as Uber Italy Srl (and the transferee Uber Eats Italy Srl), which, as a result of the measure, can enter the food delivery market, a market still characterised by areas of vast irregularity, with a new management and organisational model unequivocally oriented towards favouring situations of transparency and legality in negotiating relations and in the provision of food delivery services, having carried out in this perspective a planning and economic effort of primary importance". The importance of the adoption of a modern "prospective-cooperative" model for the prevention of "entrepreneurial deviance" is highlighted; the Court in this case exalts the proactive and open collaboration of the managing bodies "directed at treasuring the intervention of the Court, looking at it not as a compression of the business right, but as a valuable opportunity to improve one's business organisation. This is also the result of a judicial administration which, according to a modern "prospective-cooperative" model of prevention of "entrepreneurial deviance", has set up a relationship of collaboration directed at stimulating the Company to adopt autonomously

[822] Tribunal of Milano, Chamber specialised in preventative measures, Decree 24 June 2016, cit.

[823] Tribunal of Milano, 27.05.2020, No. 9, Uber Italy S.r.L.

the measures of reorganisation, where possible, in harmony with the purposes of the measure of prevention in question and with the coordinates traced by the decree that ordered it"[824].

In similar terms in the Tecnis case, after the revocation of the judicial administration which lasted 6 years with the relative release from seizure of the shares, the Court specifies that "What is certain is that the management of the corporate colossus, with the intervention of the State, has undoubtedly made it possible to eliminate those impurities and contacts with organised crime which certainly existed until the Iblis operation"; it speaks of "a path already taken to return to legality or at least to distance the company from the environments of organised crime"[825].

Lastly, this therapeutic interpretation and functionalisation of the institution in question, as well as its instrumentalisation in guaranteeing business continuity, is authoritatively affirmed by the United Sections of the Court of Cassation[826] which point out how judicial administration and judicial control, as an alternative response to seizure and confiscation, "are not aimed at severing the relationship with the owner but at restoring the business to free competition, following a path of amendment". Artt. 34 and 34-bis of L.d. no. 159/2011, therefore, satisfy the need to "safeguard business continuity, avoiding economic losses", guaranteeing "the effectiveness of management interventions" and protecting "the employment needs" of healthy companies. This leads to the correct suggestion of approaching them as a homogeneous sub-system..." in which the "concrete possibilities that the individual company (may) fruitfully complete the path towards realignment with the healthy economic context must be assessed, also by availing itself of the controls and

[824] Tribunal of Milano, 27.05.2020, No. 9, Uber Italy S.r.L., cit.

[825] Tribunal of Catania, 15.02.2016, Tecnis s.p.a. et. Al.

[826] Supreme Court, United Chambers, 26.09.2019, No.46898.

solicitations (in the case of the administration, even real intromissions) that the delegated judge may direct in guiding the infiltrated company "[827].

As regards legal remedies the Supreme Court has stated that, since these measures are part of "a single sub-system", all "the decisions of the court on the requests for judicial control" and "on the admission to judicial administration" must be considered subject to "the general means of appeal provided for in Article 10 of L.d. No. 159/2011", as "unjustified regulatory aporias" cannot be tolerated in the face of "incisive effects entirely comparable on assets and homogeneous interests "[828].

The judicial control of enterprise (new Art. 34 bis)

One fascinating new instrument is the judicial control of an enterprise (Art. 34 bis) provided by the law n. 61/2017 (reform of the Anti-Mafia code) and introduced by the legislator in order to tackle the criminal infiltration in the economy without adopting the more invasive tools, which remain available.

Where there is only occasional activity of supporting ('facilitation') the business of suspects (persons in respect of whom a preventive measure is proposed or applied) or a defendant, described in paragraph 1 of Article 34 (analysed above) the court orders the judicial control of a company if there is a real danger of mafia infiltrations. It is applied for a period of not less than one year and not more than three years.

The content of the judicial control is less invasive than that of a temporary suspension because the Court doesn't replace the management but rather, while allowing the owners of the company to run the activities, appoints a judicial commissioner with specific control tasks

[827] Supreme Court, Chamber 2, 28.01.2021, No. 9122.

[828] Supreme Court, United Chambers, 26.09.2019, No. 46898, § 5.

relating to the management of the business. He can impose stringent requirements or prescriptions. This measure includes the obligation for those who own, use or manage the goods and companies, to communicate to the judicial commissioner and the tax police each economic act. Under the supervision of a delegated judge, the judicial commissioner has to report periodically on the outcomes of the monitored activity to the delegated judge and the public prosecutor. Managers must take any appropriate initiative aimed at specifically preventing the risk of attempts of Mafia infiltration or influence. A procedure is provided for verifying the proper fulfilment of the obligations and, in the case of a violation of one or more of the requirements, the court may impose legal administration (Art. 34 Anti-Mafia Code).

This measure is a monitoring tool for the firm which, after the failure to issue anti-mafia certification, wants to undergo verification of its path of emancipation from the risks arising from "criminal contiguity" and thereby to recover legality.

This judicial control might be seen as representing an expression of public leadership in the economy, but it is true that, if adopted intelligently, it could be a way out for those companies who want to try to fully comply with legality against the risk of being wholly absorbed into the chains of criminal organisations.

Judicial control pursuant to Article 34 bis of L.d. 159/2011 - introduced by Law 161/2017[829] - is a measure that must be applied, in place of the administration referred to in Article 34 of L.d. no. 159/2011, in cases where the facilitation of mafia interests by a company is occasional and there exist factual circumstances from which the concrete danger of mafia infiltration capable of conditioning its activity may be inferred. This measure does not entail any direct interference in the management of the company, as there is no provision for the

[829] On this measure see A.M. Maugeri, *Prevenire il condizionamento criminale dell'economia: dal modello ablatorio al controllo terapeutico delle aziende*, in Diritto penale contemporaneo Rivista trimestrale, 1, 2022, pp. 106 ss. - 134 ss.

temporary replacement of the management by a court-appointed administrator, but takes the form of the imposition of a series of prescriptions and obligations on the entity, ranging from the obligation to communicate with the judicial and police authorities to the more invasive appointment of a sort of tutor (improperly defined "court-appointed administrator") who, under the guidance of the delegated judge, implements a prescriptive supervision within a period of no less than one year and no more than three. The tutor has the task of monitoring from within the company the fulfilment of a series of compliance obligations imposed by the judicial authorities in order to provide the business activity with the necessary safeguards to keep it free from mafia influence. It is provided that the director may impose: "to adopt and effectively implement organisational measures, also pursuant to Articles 6, 7 and 24-ter of L.d. No. 231 of 8 June 2001" and thus to equip himself with organisational models aimed at preventing the risk of offences and the risk of mafia infiltration or conditioning attempts. In practice, virtuous cases have already emerged in which the Court has considered the adoption of a suitable organisational model – "designed precisely to prevent "*mafia* intrusions" in the company sectors that has proved to be most exposed, i.e. the selection of suppliers of sorting and distribution services" - as an index from which to deduce that the company had been reclaimed and that the procedure had achieved its purpose[830]. These need not necessarily be entrepreneurial realities in the strict sense, as they may be mere economic activities.

This instrument finds its rationale, according to the final report of the Fiandaca Commission, in the aim of "promoting the recovery of companies infiltrated by organisations, within the framework of a modernised discipline tending to balance the different expectations and needs at stake in this field today (and is) destined to find application in place of judicial administration (and also of seizure pursuant to Art. 20 and confiscation pursuant to Art. 24

[830] Tribunal of Milano, Chamber specialised in preventative measures, 15 Apriò 2011, Tecnis, No. 48.

of the *Anti-Mafia* Code) in cases where the facilitation proves to be occasional" (...) "in compliance with the principle of proportionality. This instrument presents an identity of ratio with the judicial administration ex Art. 34, except for the distinction on a merely quantitative level, the prerequisite is still a form of facilitation of the activity of a suspect or defendant, when the relationship between business and criminality is only occasional; judicial administration will be applied in the case in which the entrepreneurial and criminal interests are more permanently convergent[831]. The recent Uber case[832] also highlights the difference between the two measures, specifying that judicial control intervenes in a milder manner but more adherent to the specific needs of company reclamation and is to be adopted in application of the principle of proportionality, when the infiltration has not contaminated the company in a widespread manner and is easily sterilised. The occasional nature of the measure provided for by Article 34-bis of the L.d. requires the prevention court, which may also act ex officio, to carefully assess the level of impairment of the corporate structure in order to choose, always according to a criterion of proportionality and adequacy, the most suitable and effective preventive instrument to solve the problem.

The Supreme Court, most recently, has specified that in choosing between the two measures the judge must balance and assess the various conflicting interests: the freedom to exercise the right to conduct business and the public interest in preventing infiltrated circuits of illegality from feeding on the resources of partially healthy productive activities and the need for the business activity to continue, following an effective path of (re)legalisation, in order to achieve productive objectives and safeguard employment potential[833]. Business continuity correctly becomes not only a private interest of the company, but a public interest insofar as it guarantees the safeguarding of jobs and the economic stability of a territory. As specified

831 Tribunal of Milano, 27.05.2020, No. 9, Uber Italy S.r.L., cit.

832 Tribunal of Milano, 27.05.2020, No. 9, Uber Italy S.r.L., cit.

833 Supreme Court, United Chambers, 26.09.2019, No.46898.

by the Supreme Court, judicial control is "ontologically characterised by the occasional nature of mafia contagion", occasional but still mafia contagion[834]. The Supreme Court specifies that "on the subject of judicial control pursuant to Article 34-bis of the so-called anti-mafia code, what excludes the occasional nature of the facilitation is the "tendency to persist" of the relationship of conditioning that has been created between the criminal entity and the enterprise, with stability of the underlying structures of interests. Among the indicators revealing a willingness to realign the company's activities to parameters of managerial legality, such as to influence the assessment of the occasionality or otherwise of the link of facilitation, are the attitudes of (re)legalisation put in place before the application of the anti-mafia information notice "[835].

According to the case law the assessment of occasionality and, therefore, the choice of whether to apply judicial control or the more intrusive measure of judicial administration depends on a prognostic assessment on the entity's ability to recover. As highlighted by the Supreme Court, "the verification of the occasional nature of the mafia infiltration: must not be aimed at acquiring a static datum, consisting in the crystallisation of the pre-existing reality, but must be functional to a prognostic judgement as to the amendability of the situation detected, by means of the control instruments provided for in Article 34-bis, paragraphs 2 and 3, of L.d. no. 159 of 2011"[836]; the ascertainment of the state of conditioning and infiltration "is not of a purely static nature, a photograph of the current state of objective dangerousness in which the company's situation finds itself as a result of the pathological external relations, but is dynamic, being intended to formulate a prognostic assessment as to the amendability of the situation through the procedure that each measure entails"[837], aimed

[834] Supreme Court, Chamber 5, 02.07.2018, No. 34526.

[835] Supreme Court, Chamber 1, 28.01.2021, No. 24678.

[836] Supreme Court, Chamber 6, 14.10.2020, No. 1590.

[837] Supreme Court, Chamber 6, 07.07.2021, No. 30168.

at "understanding and foreseeing the potentialities that that situation has of freeing itself from them by following the procedure that the alternative measure entails"[838].

The same company may apply to the Court for judicial control if it has been subjected to an anti-mafia interdiction order (s.c. disqualification) pursuant to Article 84, para. 4 of L.d. 159/2011, and has, however, challenged it before the competent Regional Administrative Court: if the judicial authority apply the measure, the effects of the prefectorial order of disqualification are suspended (Art. 34 bis, paragraphs 6 and 7) and, therefore, the company can resume relations with the public administration thanks to this instrument, which is one of the unprecedented forms of collaboration between the public and private sectors in defence of business freedom. The importance of judicial control following a request is determined by the problematic nature of the application of the anti-mafia interdiction (disqualification), which inhibits the establishment or continuation of contractual relations with the public administration and determines the forfeiture of authorisations and concessions essential for the continuation of activities[839]; by precluding the awarding of tenders or interrupting the awarding of subcontracts or suspending the activity of construction sites, they paralyse the business activity, so much so as to be likened to a sort of "entrepreneurial life sentence".

As to the requirements which must be ascertained by the judge in order to recognise the application of this measure to the applicant, it should first of all be clarified that, although the Supreme Court has ruled that "admission to judicial control, for a company reached by a "prefectorial anti-mafia interdiction", cannot accept any automatism"[840] (the Court accepts the request only "where the conditions are met"), it is nevertheless considered that the judge's assessment of the existence of the danger of mafia infiltration "must take into account the

[838] Supreme Court, United Chambers, 26.09.2019, No.46898.

[839] Supreme Court, Chamber 5, 18.06.2021, No. 35048.

[840] Supreme Court, Chamber 5, 02.07.2018, No. 34526.

assessment of that same prerequisite carried out by the administrative body with the anti-mafia interdiction/disqualification, which represents, therefore, the substratum of the decision of the ordinary judge in order to guarantee the balance between the constitutionally guaranteed rights of the protection of public order and the freedom of economic initiative through the exercise of the business"[841]; "the judge considers as ascertained that element on the basis of the ascertainment already carried out in the administrative proceeding ".

The Supreme Court considers that by reason of the heterogeneity of the two types of control, it would be improper to subordinate the application of the voluntary judicial control measure to the judge's ascertainment of the danger of infiltration and, consequently, to recognise, even in this circumstance, an autonomy of review by the ordinary judge as to its existence, the danger of infiltration having already been assessed (or to be assessed) by the administrative judge. It being understood, however, that the reconstruction of the "possible dangers of mafia infiltration" (Article 84, para. 3 of L.d. no. 159/2011) in the administrative court is carried out on the basis of the circumstantial elements set out in Articles 84, para. 4, and 91, para. 6 and of the further "circumstantial situations which develop and complete the legislative indications, building a system of substantial precision", as recently affirmed by the Constitutional Court[842], nevertheless such dangerousness is based on "conditions which do not constitute a closed number and do not consist only in circumstances inferable from convictions for particular crimes and anti-mafia prevention measures", but also "grounds that illuminate situations of mafia infiltration from judicial measures that are not yet definitive", or "relations of kinship, friendship and collaboration with counter-indicated subjects and that indicate a probable danger of criminal conditioning due to intensity and duration", or even "anomalous aspects in the composition and management of the company symptomatic of co-interest of the company and of the partners with the mafia phenomenon"

[841] Supreme Court, Chamber 2, 28.01.2021, No. 9122.

[842] Constitutional Court, 26 March 2020, No. 57.

can be relevant. What emerges is the problematic nature of this assessment of the danger of infiltration at the administrative level where it does not necessarily have to be based on certain elements such as judicial precedents or applications of prevention measures at the judicial level, but non-secure elements are considered sufficient, such as those that emerge from non-final measures, or in any case, not unequivocal, such as family relationships, or even mere frequentations, an element the assessment of which is largely entrusted to the discretion of the administrative authority, as admitted by the Council of State, which has held that mere acquaintanceship with persons belonging to organised crime is sufficient and suitable to form the basis of a judgement of dangerousness of mafia infiltration in the company and in the economic activity carried out by the latter, from which it would in all probability result in an alteration of the dynamics of the free market and competition. This problematic nature in the ascertainment of the danger of infiltration at the administrative level is denounced by the Court of Santa Maria Capua Vetere, which has highlighted how "in the case of corporate groups traceable to the same family, the same factual data are systematically used to issue interdiction measures that are then recalled to justify a new interdiction: this has resulted in a vicious circle in which the same, outdated, evidence is reused several times in a stereotyped manner against several subjects and, from time to time, the sole fact of the issuance of an anti-mafia interdiction/disqualification is used - as in a game of mirrors in which the same object is replicated out of all proportion, ending up being distorted in its original contours - to justify others without any new cognitive element being attached". On the contrary, in the case in point, the Court considers that "these are factual circumstances that, from a prevention point of view, would have little value either for the purposes of the existence of serious evidence of membership (including even mere contiguity

and/or availability to a mafia criminal group) or, above all, for the purposes of the actuality of said elements in the sense of the concreteness of the danger of camorristic infiltration"[843].

It emerges how the prefectural anti-mafia interdictions/disqualification, whose task is to determine the concrete danger of mafia infiltration, violate the principle of legality understood in the light of the case law of the European Court of Human Rights, as a guarantee of the "predictability" of the intervention of the authority that limits fundamental rights such as the right to property (Art. I, Protocol I of the European Convention on Human Rights) and freedom of economic initiative; even the Constitutional Court with sentence no. 24/2019, while denying their punitive nature, highlighted how the patrimonial prevention measures - first and foremost confiscation, but the same evaluations can be extended to the draconian interdiction measures – "severely affect the rights of property and economic initiative, protected at constitutional level (Articles 41 and 42 Const.) and at conventional level (Art. 1 Prot. add. ECHR)" and, therefore, they must be subject to "the combined provisions of the guarantees to which the Constitution and the ECHR itself subordinate the legitimacy of any restriction to the rights in question", i.e. the provision through a legal basis (Articles 41 and 42 of the Constitution) so as to guarantee their predictability (Article 1 Additional Protocol ECHR) and the respect of the principle of proportionality (Article 1 Additional Protocol ECHR and Article 3 of the Constitution). Not only that, but the anti-mafia interdiction order may also be applied in the event of failure to report acts of extortion or extortion committed by a person subject to a preventive measure, so that being a victim becomes tout court an indication of contamination and cause for the application of the draconian interdiction order/disqualification. In conclusion, without prejudice to the examined criticality of the ascertainment of the danger of infiltration at the administrative level, in any case, in the hypothesis of judicial control at the request of the interested party

[843] Tribunal of Santa Maria Capua Vetere, Chamber 4, 27 January 2021.

pursuant to Article 34 bis, paragraph 6, the judge would not be required to autonomously assess the "danger of infiltration". This interpretative approach in itself may seem questionable considering that the interdiction order is applied according to the civil law standard of the more likely than not/preponderance of evidence[844] and before the recent reforms without cross-examination (see below). In reality, this jurisprudence guarantees the pursuit of the ratio of the measure, which is to protect the company by allowing it to voluntarily undergo a sort of probationary trial to free itself from the *fumus* of illegality with its paralysing effects determined by the interdiction; the opposite interpretation would have the paradoxical effect of denying the application of the judicial control with its suspending effects of the interdiction to less compromised entities, to the point of not considering the danger of mafia infiltration to exist. It is precisely in this logic that the Supreme Court has expressly affirmed that "the request for judicial control advanced by the company affected by anti-mafia interdiction/disqualification cannot be rejected due to the non-existence of the prerequisite of the danger of mafia infiltration, already ascertained by the administrative body, having to preserve, pending the appeal against the prefectorial measure, the interest of the private party to the continuity of the business activity through the suspension of the effectiveness of the prohibitions in the relations with the public administration and between private parties that derive from the *anti-mafia* interdiction"[845].

And, therefore, although the judge must assess the existence of the occasionality of the facilitation, judicial control is permitted even in the presence of something less than the occasionality of the infiltration, as established by the Supreme Court[846] in a logical manner and in accordance with the principle of proportionality, changing the original restrictive and irrational orientation of the jurisprudence, on the basis of an interpretation *in bonam partem*:

[844] Constitutional Court, No. 758/2019, in www.giustizia-amministrativa.it.

[845] Supreme Court, Chamber 6, 09.06.2021, No. 27704.

[846] Supreme Court, Chamber 2, 28.01.2021, No. 9122; Chamber 6, 05.05.2021, No. 33264.

"a systematic and constitutionally oriented interpretation, possible insofar as it falls within the meaning of Art. 34 bis of the *Anti-Mafia* Code, would impose, instead, to adopt a solution consistent with the principle of reasonableness, which could not admit that a company, for which the Court of Prevention does not even recognise the threshold of the occasional nature of the danger of mafia influence, ends up being subject to a regime that is more prejudicial than other companies for which such influence, at least in the form of occasionality, is instead recognised". This solution "appears to be the only interpretation of the provision that is constitutionally oriented and capable of avoiding the production of manifestly unreasonable situations, which would be difficult to reconcile with the principle of equality and reasonableness under Article 3 of the Constitution".

Precisely in the logic of the *favor rei*, whereby the measure in question must be granted to the disqualified applicant even in the presence of something less than occasionality, in practice the assessment of occasionality in a prognostic key aimed at the future is even more accentuated in the application of judicial control on request, making the need to safeguard the company with a positive prognosis prevail. The preventive, if not re-educational, rationale of judicial control is thus once again emphasised, highlighting the importance of the "prognostic assessment of the reclamability of the infected company through the adoption of procedures of so-called company self-cleaning similar to a probationary trial of the defendant", to the point, as examined, that "it can also be applied when the ordinary judge does not recognise the danger of infiltration […], but finds that, in a perspective looking to the future, there is a serious likelihood of restoring the company to legality without significant prejudice to its directors, stakeholders and subordinate workers who are totally extraneous to the affair". If the purpose of the measure is to recover companies from episodic infiltration by organised crime, its application must depend above all on predictive and dynamic evaluations of the possible favourable outcome of the "company trial". The judicial control, in fact, is correctly considered a sort of forerunner of the hoped-for "*messa alla prova*"

(probation) for corporations, the introduction of which in the system of L.d. no. 231/2001 has recently been discussed.

Another profile closely linked to the previous one concerns the possibility of the court not applying judicial control, but rather imposing judicial administration where it finds the non-occasionality of the facilitation to organized crime. In this regard, it should be noted that the Supreme Court stated that "the verifications that the Court of Prevention is required to make concern - essentially - the correspondence or not of the requested measure to the finality which inspires the discipline of the Law", while "it does not appear strictly necessary to qualify, in this phase, the existing nexus between the subjects of external dangerousness and the company activity, given that such nexus can and must be the object of in-depth examination during the course of the measure, with eventual a) revocation of the measure, where the company is kept free from the danger of contamination; b) aggravation of the measure, where it is considered that there is not a merely occasional facilitation but a stable facilitation, with transit, in that case, in the different measure of judicial administration[847]. The Supreme Court thus seems to substantially admit that automatism in the recognition of the measure to the interdict, except that in the light of the findings made through judicial control it then decides to revoke the control or to apply the more severe and invasive judicial administration; an interpretation inspired by the principle of proportionality and, therefore, of gradualness and strict necessity of state intervention, corresponding to the ratio pursued by of the measure.

In the case law, in fact, a different approach has been affirmed on the basis of which, without prejudice to the interpretation in *bonam partem* whereby judicial control is applicable even in the absence of danger, the judge should not order the measure if he verifies the non-occasionality of the facilitation, but rather directly apply the judicial administration in lieu of

[847] Supreme Court, Chamber 1, 07.05.2019, Tif Solar s.r.l.

judicial control, a measure which in any event guarantees the suspension of the *anti-mafia* interdiction: "the ascertainment of the non-existence of this requirement [occasionality] and possibly of a more compromised situation may result in the rejection of the application and perhaps the acceptance of that, by the opposite party, relating to the more onerous measure of judicial administration or other ablative measure (no. 46898 of 26/09/2019, Ricchiuto, Rv. 277156)". The provision could endorse the first interpretation where it establishes in paragraph 6 that the Court "accepts the request, where the conditions are met" and only "subsequently, also on the basis of the report of the judicial administrator, may revoke the judicial control and, where the conditions are met, order other measures of patrimonial prevention", seeming to subordinate the application of the judicial administration only to the subsequent verification - within the same control - of its more serious conditions, i.e. the non-occasionality of the facilitation. On the other hand, however, this is the interpretation that tends to prevail in the practice, although recognizing the possibility of applying the judicial control also in the absence of the danger or something less than occasionality, as examined, nevertheless, nothing excludes that the judge can verify the presence of a more serious situation and decide, therefore, to apply the judicial administration directly, perhaps at the request of the Public Prosecutor who must be heard; the expression "subsequently" used by the rule is only intended to make it clear that following the application in the first instance of judicial control on request when it is considered sufficient, at the end of the period provided for and on the basis of its results, the judge may revoke it or transform it into judicial administration if necessary.

A different set of problems arises with regard to the relationship between judicial control and anti-mafia interdiction/disqualification, as well as between administrative and judicial proceeding. In this regard, it should be recalled that the doctrine immediately criticised the legislative choice to make the request for judicial control pursuant to Article 34 bis, para. 6, dependent on the appeal of the anti-mafia interdiction/disqualification order before the

Regional Administrative Court, pointing out that even in the event that the legitimacy of the anti-mafia interdiction is definitively confirmed at the outcome of the administrative trial, the judicial control measure is bound to continue; similarly, in the event of the annulment of the anti-mafia interdiction, the revocation of the judicial control, also requested by the company through the procedure set out in paragraph five of Art. 34 bis, should not be automatic, but result from an assessment of all the elements collected. Making the duration of the judicial control conditional on the duration of the administrative judgement on the anti-mafia interdiction, attributing to it a sort of "super-precautionary function with respect to the administrative judge's suspension, inasmuch as it would allow the economic entity to resume its activity - in time and under control - until there is a final ruling on the validity of the anti-mafia interdiction by the administrative judge", is unacceptable because it ends up frustrating the autonomous purpose of judicial control as a measure aimed at reclaiming the entity, and even the letter of the law does not allow such an interpretation to be accepted, providing for a duration of judicial control that is entirely independent of that of the administrative measure (Art. 34-bis, c. 2 provides for a duration from one to three years, with the possibility of renewal).

Judicial control is based on an autonomous assessment by the judge, who should benefit from a broader and more complete investigative framework than the authority (Prefect) and the administrative judge and pursues not only the purpose of countering mafia infiltration in the economy, like the anti-mafia interdiction order, but rather of purifying the entity from criminal infiltration and allowing it to operate legitimately in the market. Unfortunately, however, as pointed out by the *Anti-Mafia* Commission (Report 2021), which stresses the need to clarify the relationships between judicial control, anti-mafia interdiction and administrative proceedings - different and opposing orientations emerge in the practice of the regional administrative courts: "for example, the Regional Administrative Court of Reggio Calabria rules that judicial control is not a reason to suspend the proceedings, while

the Regional Administrative Court of Bari postpones the decision on the interdiction until the outcome of the judicial control. The section president Franco Frattini reported that the Council of State, having been informed that the company had obtained this benefit (judicial control), given that the judicial control aims to clean up the company, waits for the period to end favourably. There is also a disturbing jurisprudence of the Council of State according to which the judicial control is attributed a mere precautionary character with respect to the administrative measure (*anti-mafia* interdiction), which is suspended because it has been challenged, and, in a mere formalistic perspective, despite the positive outcome of the judicial control, the legitimacy of the anti-mafia interdiction assessed with respect to the time of its application has been confirmed. The mutual dependence of the processes determines contradictory results, since the confirmation of the anti-mafia interdiction order would nullify the suspensive effects of Article 34-bis, paragraph seven, and would compromise its therapeutic function aimed at bringing the reclaimed entity back into the free market under conditions of full legality. The recent orientation of the Court of Santa Maria Capua Vetere[848] seems to be preferable, which not only attributes "total autonomy" to the "prevention judgement with respect to the administrative judgement" "insofar as it is consistent with the system, and not for partisan or other positions", but considers "that the same cannot be said of the contrary" inasmuch as "it cannot be overlooked how only the judgement of prevention invests historical and merit questions which, certainly more than the formal ones, limited only to the legitimacy, can justify such a wide limitation of constitutional rights such as the freedom of movement and, more specifically, of the exercise of enterprise". It is underlined that it is not at all true that the effects of the interdiction are formally less serious for the enterprise compared to those of the judicial control, considering that the first "limits, if not even eliminates, the operativeness of the enterprise, precluding it from participating not only in public contracts, but also in orders from concessionary companies and/or public

[848] Tribunal of Santa Maria Capua Vetere, Chamber 4, 27 January 2021.

participation, legally of a private nature, when its business object is extremely sectorial"; not only that, but 'what is worse, it reduces, to the point of nullifying, its very operational and legal capacity. One thinks, in fact, of the long catalogue of effects, immediately operational, of the anti-mafia interdiction measure represented by the first paragraph, letter a) to h), of Article 67 of L.d. no. 159/2011". The problem remains that in a democratic system that constitutionally recognises the freedom of economic initiative, the application of such an incisive measure as the anti-mafia interdiction/disqualification order is allowed at the administrative level in the absence of a prior jurisdictional control of its requirements, which would instead be desirable with respect to a measure that has been defined as probably the most afflictive, including confiscation, affecting all the company's activities in the public procurement sector and not individual assets. Or it should be allowed, at least, in consideration of the peculiarity of the matter and considering that the interdiction is still a measure provided for by the code of prevention measures, overcoming the distinction between jurisdictional prevention and administrative prevention with the annexed division of competence between administrative judge and ordinary judge, that the ordinary judge has the power to revoke the interdiction in denying the application of the control for the lack of the requirements, starting with the absence of the danger of infiltration, as would also be logical in the presence of a broader and more supported jurisdictional assessment on the basis of which it is considered that the conditions justifying the application of the interdiction and the consequent paralysis of the relations with the public administration of the entity in question. This solution would have the advantage of preserving the administrative instrument and the timeliness of its intervention, but at the same time would provide greater protection for the company subjected to the measure, avoiding this chaotic mechanism of the dual jurisdictional path. The other solution put forward, while appreciable *de iure condito*, whereby the Court should reject "the application due to the lack of possible criminal contamination of the company" and the irrationality of the consequent outcomes should

then be remedied "with a virtuous use of the instrument of the Prefecture's updating of the interdiction order" - recognising a sort of external relevance in the administrative sphere to the negative rulings of the criminal court pursuant to Art. 34 bis, c. 6, either in terms of moral suasion or as the cause of the excess of power of the refusal to update - subjects the citizen to the uncertainty and the length of the rebound between administrative and judicial authorities. All the more so as in practice there emerges the tendency of administrative jurisprudence to maintain a timid and cautious decisional approach, which in fact continues to be inspired by the traditional approach, centred on the extrinsic control of technical discretion and the tendency, therefore, to confirm the anti-mafia interdiction/disqualification; the orientation prevailing by far in jurisprudence emerges, in fact, not only "the impossibility of a substitutive control by the administrative judge as well as, above all, a vague and unequivocal control of the administrative authorities", but also "the impossibility of a substitutive control by the judicial authorities" as much as, above all, a merely extrinsic and formal judicial scrutiny of the technical assessments, which stops at the threshold of the identification of the symptomatic elements of excess of power, detectable *ictu oculi*". The *Anti-mafia* Commission has put forward interesting reform proposals on the subject, starting from the elimination, as a prerequisite for the request for judicial control, of the appeal to the TAR (Regional Administrative Tribunal) of the anti-mafia interdiction, and then proposing the issuance by the Court, at the outcome of the judicial control and of a final hearing - in which the Prefect should participate - of a conclusive decree which declares, where the conditions exist, the "reclamation" *rebus sic stantibus*: proposals that would allow the ordinary judge to finally decide the fate of the company, avoiding the double judicial track. Lastly, Law Decree no. 152/2021 (converted with amendments by Law no. 233 of 29 December 2021) intervened on the matter, whose Article 47 reformulated paragraph 7 of Article 34 bis of L.d. no. 159/2011 and, in particular, established that the application of the judicial administration and judicial control institutions must be evaluated for the purpose of

ordering, in the following five years, the application of the administrative measures of collaborative prevention pursuant to Article 94-bis of the Italian *Anti-Mafia Code*, of new introduction which will be examined below; this clarification seems to call the administrative authority to evaluate the opportunity/necessity to intervene with the administrative measure where the jurisdictional preventive measure is already applied or has been applied and, therefore, in light of the principle of necessity to limit the administrative intervention in favour of the jurisdictional preventive measure. In the light of a systematic interpretation, it should be considered that, although not expressly referred to, the preventive measures pursuant to Articles 34 and 34 bis of L.d. no. 159/2011 should also be taken into account when deciding whether to apply the more incisive anti-mafia interdiction measure/disqualification; after all, the assessment process is the same since it is then a matter of deciding the most appropriate measure on the basis of the seriousness of the danger of infiltration. This reform, however, does not in any way affect the mechanism of dual prevention that is triggered in the event that first the interdiction/disqualification order and then the subsequent judicial control on request are applied. With the reform of paragraph 7, introduced by Law Decree no. 152/2021, in acceptance of a reform proposal already put forward by the *Anti-Mafia* Commission in the 2021 Report and in the direction of a greater synergy between the judicial and administrative authorities, the involvement of the Prefect in the procedure for the application of the judicial control on request is also provided for; in the new wording of the provision, the list of subjects to be heard by the Court in order to decide whether to grant judicial control to the company is expanded, providing that, in addition to the competent district prosecutor and the other subjects concerned, the Prefect who issued the anti-mafia prohibition order must also be heard. This would allow the court to better understand the reasons behind the anti-mafia interdiction and the elements underlying the prefectural assessment concerning the concrete danger of infiltration in order to determine whether the facilitation is occasional. The *Anti-Mafia* Commission proposes not

only the summoning of the prefect, under penalty of nullity, at the initial chamber hearing, but also information flows to him so that he can follow the company's progress.

As examined, the case law by the united sections of the Supreme Court has admitted the appeal of the order rejecting the request of judicial control[849], specifying that the action that can be taken is the "appeal also on the merits ", which postulates the attribution to the Court of Appeal of the task of re-evaluating - through the examination of the grounds and reasons for the refusal - the profiles in fact and in law that have determined the rejection measure, with confirmation of the same or admission of the private party to the control denied by the court of first instance. In this last case the measure of prevention will have to be applied by the Judge of first instance ("to whom - in such hypothesis - the acts must be referred, "given that the legislative construction of the particular measure of prevention in question is inspired by a principle of flexibility and constant evaluation of the results of the activity of "prescriptive vigilance", as emerges from the contents of Art. 34 bis, para. 6), inasmuch as the system attributes to the Court a sort of functional competence to the management of the dynamic profiles of such measure, also in terms of its possible worsening variation (judicial administration).

As has been examined, the importance of the instrument of judicial control following a request by the entity subjected to *anti-mafia* interdiction/disqualification is directly proportional to the incisiveness on constitutional rights, such as the liberty of economic initiative, of the prefectorial interdiction and to the lack of guarantees which distinguishes it. In fact, the application of the interdiction order, which, as stated in the aforementioned DIA report, represents the utmost anticipation of the State's preventive protection against organised crime, is based in the light of the jurisprudence of the Council of State on the evidentiary standard of the more probable than not/preponderance of evidence, and was

[849] Supreme Court, United Chambers, Ricchiuto no. 46898 of 2019.

applied in the absence of cross-examination (only possible under Article 93, paragraph 7, L.d. no. 159 of 2011), as an exception to the already weaker - with respect to criminal matters - guarantees of the administrative procedure (according to the Council of State, the need to protect public order, underlying the anti-mafia legislation, justified the derogatory scope of the institutions of the administrative anti-mafia legislation with respect to the general rules on administrative procedure, enshrined in Law no. 241 of 1990).

Most recently, however, Law Decree 152/2021 introduced cross-examination in the procedure for the issuance of *anti-mafia* interdiction, in response to the *Anti-Mafia* Commission's urging in this direction and the appeal to the "legislator's wisdom" made by the Council of State which, hoping for a "balancing of the values at stake" aimed at avoiding "a disproportionate sacrifice of the right of defence", affirmed the importance of the hearing of the person concerned, when this does not compromise the very *ratio* of the *anti-mafia* interdiction as the maximum preventive measure; in the opinion of the Council of State, cross-examination is necessary because it would guarantee administrative intervention only if the elements underlying the preventive measure were unequivocal and in any case not otherwise justifiable, in application of the principle whereby cross-examination guarantees good administration under Art. 97 Const., as pointed out by the Puglia Regional Administrative Court which had asked the Court of Justice of the European Union to give a preliminary ruling on the compatibility of Articles 91, 92 and 93 of L.d. no. 159/2011 with the principle of cross-examination, understood as a "principle of Union law" (but the Court of Justice of the European Union had declared the application manifestly inadmissible, considering that the legislation censured was outside the scope of European Union law).

The new paragraph 2-ter, introduced by Law Decree no. 152/2021, provides that upon the outcome of the procedure set forth in paragraph 2-bis, the Prefect may adopt: (i) exonerating *Anti-Mafia* information, if he ascertains the absence of *mafia* infiltration attempts; (ii) interdictory *Anti-Mafia* information, in the case of the existence of *mafia* infiltration attempts,

verifying, moreover, the existence of the conditions for the application of the measures set forth in Article 32, paragraph 10 of Decree-Law no. 90 of 24 June 2014 (converted, with amendments, by Law no. 114 of 11 August 2014) and, if positive, promptly informing the President of the National Anti-Corruption Authority; (iii) administrative measures of collaborative prevention, if it ascertains attempts of mafia infiltration attributable to situations of occasional facilitation. Article 48 of Law Decree no. 152/2021 introduced the latter instrument in Article 94-bis of the *Anti-Mafia* Code, entitled "Administrative measures of collaborative prevention applicable in cases of occasional facilitation". It was precisely the awareness of the extremely incisive, if not punitive, nature for the company of the anti-mafia interdiction order, applied outside the guarantees of the jurisdiction, that led the legislator to introduce an administrative instrument substantially corresponding to the judicial control, but still applicable by the administrative authority (Prefect). The first paragraph of Article 94-bis provides that the Prefect, when he ascertains that the attempts of mafia infiltration are attributable to situations of occasional facilitation, prescribes to the company, corporation or association concerned, by reasoned order, the observance, for a period of not less than six months and not more than twelve months, of one or more measures. The first measure that Art. 94-bis, para. 1, lett. a) makes available to the Prefect to shield the company from the risks of *mafia* contagion, albeit occasional, consists in the possibility of prescribing to the company 'under investigation' to adopt and effectively implement organisational measures, also pursuant to Arts. 6, 7 and 24-ter of L.d. No. 231/2001, in order to remove and prevent the causes of occasional facilitation; once again, the adoption of suitable and effective organisational models represents the fundamental tool for reclaiming the entity from criminal infiltration and preventing the risk of crime in the future. Article 94-bis(1)(b) to (e) also provides that the Prefect may impose a whole series of requirements and, in particular, reporting obligations on the person concerned. Paragraph 2 of the new Article 94-bis provides, finally, that the Prefect, in addition to the measures described above, may

appoint, also ex officio, one or more experts, in any case no more than three in number, identified in the register of judicial administrators referred to in Article 35, paragraph 2-bis, of L.d. no. 159/2011 with the task of carrying out support functions aimed at implementing the collaborative prevention measures. Paragraphs 4 and 5 of Article 94-bis establish that at the expiry of the duration of the measures, the Prefect, if he ascertains on the basis of the analyses formulated by the inter-force group that the occasional facilitation and the absence of other attempts of mafia infiltration have ceased, issues an exonerating *Anti-Mafia* information and makes the consequent entries in the single national database of the anti-mafia documentation

This is an important tool because it will allow the administrative authority not to intervene drastically by relying on a measure, such as the anti-mafia interdiction, which is instantaneous and potentially "destructive" for the recipient company operating in the public procurement sector, with the consequent negative effects also for extraneous third parties such as creditors or employees, especially where it is a case of mere failure to report the official misconduct or extortion suffered, or of forms or attempts of mafia infiltration. In this regard the Council of State has established that "subjugating complicity refers to the hypothesis in which an economic operator allows himself to be conditioned by the mafia threat and allows the conditions (and/or persons, companies and/or logics) desired by the mafia, while the second form, that of complicity, refers to the hypothesis in which he decides to knowingly enter into pacts with the mafia with a view to obtaining any advantage for his business "[850]. Article 47 of Law Decree 152/2021 also reformed the first paragraph of Article 34 bis, coordinating the new measure of collaborative prevention with the judicial control pursuant to Article 34 bis of L.d. 159/2011, establishing that the Court may order the judicial control also in substitution of the new measures pursuant to Article 94-bis of the *Anti-Mafia* Code, the

[850] Council of State, Chamber 3, September 2019, No. 6105.

termination of the measures of collaborative prevention, the period of execution of which may, however, "be taken into account for the purposes of determining the duration of judicial control". This profile of the reform seems positive, recognising the prevalence of the more guaranteeing jurisdictional measure over the administrative one and preventing further and complex questions of interference between the two measures and relative judicial procedures in the administrative and ordinary courts. The same type of coordination in favour of judicial control would be desirable in relations with the interdiction order.

15. **Do you have statistical data on the application of confiscation measures against legal persons at national level? And could you compare them with those against natural persons?**

As of February 2017, according to the database of the Italian A.N.B.S.C. "National Agency for the Management and Destination of the Properties", seized and confiscated goods from organised crime comprise 16.696 properties (buildings and land): 7,800 financial assets; 2,078 movable assets; 7,588 registered movable goods and 2,492 corporate assets. The analysis of the types of recovered assets across the available databases in Italy shows that real estate is the macrotype with the highest number of confiscations and seizures. However, we should also note the significant weight of companies (between 5% and 15% across all the databases), which confirms that Italy is one of the few European countries seizing business. This phenomenon of sequestered and confiscated business is steadily growing. The "report on the consistency, destination and use of the frozen and confiscated goods" by the Italian House of Representative of February 2016, takes into account the data for the previous 5 years (2011-2015). The companies seized and confiscated totalled: 912 in 2011; 1.054 in 2012; 1.549 in 2013; 1.874 in 2014 and 2.514 in 2015. The trend is growing. In 2019, the total number of companies for which the management process has been completed is 1416 and

2.587 enterprises have been subjected to seizure. According to the more recent A.N.B.S.C. report 2022, during the reporting year, the A.N.S.B.C. addressed the management of seized and confiscated business complexes with a specialized and uniform approach to issues arising from the application of real ablative measures. The data show that activities mainly involved the administration of more than 3.000 companies and business affected by criminal and preventive ablative measures under the *Anti-Mafia* code, divided between companies administered at the judicial stage by the A.N.S.B.C. after second-degree confiscation and those definitively confiscated. The collected data during 2022 demonstrate the strong acceleration in the management of seized and confiscated business compendiums and the consolidation of the work carried out in recent years. It should be noted that during 2022: more than 4.700 management measures were taken by the Directorate of companies, compared to 2.770 in 2021 and 1.550 in 2020, with a percentage growth of 90% over 2021 and 180% over 2020. Further initiatives to make the institutional mission assigned to the A.N.S.B.C. more effective and efficient included: - The issuance of a specific circular on November 28, 2022, with the subject "instructions on the manner of administration of seized and confiscated companies"

SECTION II. The application of the Regulation 1805/2018 for the mutual recognition of freezing and confiscation orders against the legal persons.

1. Can You give some statistical data about the application of the Regulation in case of freezing or confiscation orders in regard to legal persons (e.g.: how many cases, which models of confiscation)?

2. Which are the problems encountered in applying the Regulation (both in executing requests from foreign authorities in Your country and in obtaining the

execution of Your requests abroad) in cases of freezing orders and confiscation orders related to legal persons? And which are the grounds for refusal applied in the praxis in this sector?

As always, generally talking, difficulties can arise as regards the identification and location of assets. At this aim, however, European Investigation Orders can be issued.
Other criticalities are likely to come up due to the different national legislations concerning legal persons with particular regard to the regime of their involvement in crime.

3. **Do you have any proposals of harmonization of MS legislation, also in consideration of the new Directive 2024/1260 on freezing and confiscation orders involving legal persons?**

The fight against the infiltration by organised and economic crime in the legal economy is extremely important in order to protect the economy, the free competition and the *par condicio* of investors, preventing, above all, the infiltrated companies from enjoying an unfair competitive advantage (Sciarrone, 2011; UNICRI report, 2016). Attacking the mafia or criminal-business is, moreover, fundamental in undermining the basis of their power and expansion, in part by dismantling their "social capital", *i.e.* the systemic network of relationships, based on reciprocity of favours, with the world of politics, institutions and public administration.
In order to fight this polluting of the legal economy, the confiscation of companies is an important instrument, largely used in the Italian system of law through forms of extended and non-conviction-based confiscation, as examined. In addition, the use of confiscation against companies is also encouraged in the supranational legislative instruments.

The Transcrime report, quoted previously, emphasised that in order to improve the confiscation of enterprises there is the need to intervene at three levels.

First, the tracing/tracking of criminal assets should be improved by strengthening the financial investigation skills of European LEAs and FIUs. This can be achieved, for example, through courses and workshops, but there is also the need to equip Eurojust and Europol, with better access to registries and more effective IT tools, and in this direction the new Directive 2024/1260 contains important rules.

The report of the "Stati generali della lotta alla mafia", emphasises this necessity to ease access to the registries of Eurojust and Europol (Report "Mafie e Europa", 2018).

Secondly, the regulations should be enhanced, *e.g.* by widening the use of *extended confiscation* or *third-party confiscation* which in some countries (*e.g.* Italy) has greatly facilitated the confiscation of enterprises.

Finally, the *management of confiscated companies* should be improved in order to guarantee the continuity of the economic activity: in some European countries, prosecutors may avoid the seizure of companies because they prove difficult to manage once confiscated. This calls for the effective development of management policies which, when possible, keep companies and jobs alive.

In relation to the proposal to improve the use of *extended confiscation* or *third-party* confiscation, however, it is important to stress that, according to the principle of proportionality, the analysed instruments, and in particular confiscation, must be applied with almost surgical precision, in consideration of the dramatic consequence that they can have. These measures can have an impact, first of all, on the owner involved in criminal activities (affecting his reputation, his economic freedom and his property rights) but also on third party innocents, such as the creditors and, above all, the workers. Additionally, the economy and society in general may well be affected, while the risk to the long-term survival of businesses once they

are subjected to a confiscation application is clearly demonstrated in the Italian statistics regarding company closures following the imposition of such measures.

Another important aspect that should be highlighted is the need to improve the safeguards of the rule of law in this legislation on extended confiscation in order to guarantee first of all the respect of the principles of the rule of law (and the connected citizens' freedoms) and to encourage the cooperation and mutual recognition in this sector. Mutual recognition must be built on the harmonisation of confiscation laws but also, most importantly, on mutual trust, which demands respect for the rule of law.

Furthermore, the Members States legislations should be implementing a wider system of efficient measures to prevent the or react against the involvement of corporations in crime and, in particular, in organised crime, providing for alternatives to freezing and confiscation, such as the judicial administration or judicial control of the legal person, provided for by the Italian domestic law, with a view to targeting their illegal assets.

In fact, such a system, while enhancing the efficiency of the overall action against this criminal phenomenon – setting up measures tailored on the specific needs which occur in the different cases – at the same time, better complies with the rule-of-law principle, with particular regard to the proportionality-related issues, as it allows to adopt measures increasingly severe according to the increasing seriousness of the said involvement.

See also the reform proposal for the seizure and confiscation against natural persons, WP 2.

4. Could you give your inputs about possible guidelines on the practical implementation of the Regulation in relation to legal persons?

5. Do you have any further reform proposals, at a national or international level, in this sector?

See answer 3.

In Italy the whole sanctioning system is aimed to induce the corporation to adopt adequate organizational models in order to prevent the risk of commission of criminal offences in the future, pursuing the re-educational function. In this perspective confiscation also represents a sort of essential prerequisite in order to realize the re-educational and special-preventive purposes with reference to the corporation (as well as to the individual offender). As a matter of fact to prevent the offender/corporation from taking advantages from the crime is a *condicio sine qua non* in order to assure the preventive effectiveness also of the other afflictive sanctions; otherwise, if the corporation could take advantage from the crime, it would be convenient for it to assume the risk of the other sanctions in light of a cost-benefit analysis[851].

Indeed in a re-educational logic, in the Italian legal system, the initiative of the corporation in this direction is fostered through the restitution of profit, by which according to Art. 17 the disqualification sanctions can be avoided. On the basis of this approach, then, in which the overall special-preventive logic of the sanctioning system of L.d. no. 231/2001 prevails, confiscation correctly gives way to the restitution of the price or profit to the injured party and to the protection of the rights of the third parties in good faith (according to Art. 19, co. 1: "except for the part that can be returned to the injured party. This is without prejudice to rights acquired by third parties in good faith"); in particular the restitution to the injured party will allow the corporation to face and solve the consequences of the caused

[851] S. Moccia, *La confisca come mezzo di contrasto al crimine organizzato*, in V. Patalano (ed.), *Nuove strategie per la lotta al crimine organizzato trasnazionale*, Torino, Giappichelli, 2003, p. 381.

offense, trying first of all to remedy them in this minimum form[852] (however it should be specified that, as affirmed by the Supreme Court and expressly provided for in foreign jurisdictions, not only the existence of the injured party's claim but also its actual exercise are necessary in order to exclude the application of confiscation[853]).

In doctrine the strictly reparative logic of the confiscation of profit (in particular the confiscation by equivalent of the profit with primary restitution to the injured person) is also highlighted as the idea that "the crime does not pay" is part of a reparative program which is not vindictive, but restorative[854]; this sanction could be particularly significant and virtuous if it were conceived as a reparative instrument in favor of the victim, and not against the author simply when the related amount is ungenerously collected by the State[855].

Therefore, the affirmation of the re-educational function also with respect to corporations would also be appropriate at the EU level as the best strategy to guarantee the area of freedom, security and justice, which the EU should represent. So far the jurisprudence of the Court of Justice has always sought to establish the principle of proportionality in the matter of penalties, which is a fundamental prerequisite in order to aim this function, in affirming the administrative-punitive liability of corporations[856].

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852 A.M. Maugeri, *La responsabilità da reato degli enti: il ruolo del profitto e della sua ablazione nella prassi giurisprudenziale,* in Rivista Trimestrale di Diritto Penale dell'economia*,* 2013, p. 702 ss.

853 Supreme Court, Chamber 2, 16.12.2010, No. 6459, M. et al.; Supreme Court, Chamber 2, 16.11.2011, No. 45054, B. et al.; Supreme Court., 09.10.2012, No. 39840. For a study of the issue see A.M. Maugeri, *La responsabilità da reato degli enti*, *op. cit.,* p. 702 ss.

854 M. Donini, *Compliance, Negozialità E Riparazione Dell'offesa Nei Reati Economici. Il Delitto Riparato Oltre La Restorative Justice*, in F. Basile, G.L. Gatta, C.E. Paliero, F. Viganò (eds.), *La Pena, Ancora Fra Attualità E Tradizione Studi In Onore Di Emilio Dolcini*, Milano, Giuffrè, p. 44.

855M. Donini, *Pena agìta e pena subìta. Il modello del delitto riparato*, in AA.VV., Studi in onore di Lucio Monaco, Urbino, 2020, and in Questione Giustizia, 29 ottobre 2020, p. 9; Id., *Compliance, op. cit*., p. 46

856 See A.M. Maugeri, *Il principio di proporzione nelle scelte punitive del legislatore europeo: l'alternativa delle sanzioni amministrative comunitarie,* in G. Grasso, L. Picotti, R. Sicurella (eds), *L'evoluzione del diritto penale nei settori di interesse europeo alla luce del Trattato di Lisbona*, Milano, Giuffrè, 2011, p. 67 ss.

The supranational instruments, while largely imposing the responsibility of corporations, provide for the mandatory nature only of the pecuniary sanction and merely optional of the listed disqualifying measures on the model of the previous Regulation (88) 83[857]; furthermore, they impose that in any case these sanctions must be effective, dissuasive and proportionate sanctions, but without indicating the function to be pursued.

It would therefore be appropriate, on one side, a greater harmonization to avoid the so-called forum shopping and, in particular, the harmonization of remedial conducts and organizational models, of compliance in a re-educational key[858]. On the other side, there is a need for harmonization and implementation of the guarantees of "criminal matters" provided for by the ECHR when, regardless of the formal qualification, a punitive regime is applied with regard to corporations (principles of legality, principle of culpability – in the form of corporate culpability – , principle of proportionality of punishment and its rehabilitative function, presumption of innocence, the rights of the defence on the basis of the principle *nemo tenetur se ipsum accusare*, *ne bis in idem*, as well as the right to legal assistance), even if of course there is the need to adapt these principles to the particular nature of the corporation[859].

6. Do you have any further policy recommendations, at a national or international level, in this sector?

In this context, the discovery of new types of intervention is gradually getting well-accepted following an approach entailing a 'therapeutic' management of enterprises that are

[857] Ibidem.

[858] Idem, p. 588.

[859] V. Mongillo, *The nature of corporate liability for Criminal Offences: Theoretical Models and EU Member State Laws*, in A. Fiorella (ed.), *Corporate Criminal Liability and Compliance Programs, II, Towards a Common Model in the European Union*, Napoli, Jovene, 2012, p. 104 ss.

temporarily afflicted by criminal viruses/elements. The analysed judicial (compulsory) administration could be an interesting alternative (Art. 34 L.d. no. 159/2011) to confiscation, as could the new instrument of judicial control of enterprise (Art. 34 bis L.d. no. 159/2011). They are less invasive instruments that can sever a company's ties with crime while, at the same time, maximising the chances of that business's continued survival.

The mechanism of judicial administration (Art. 34 L.d. no. 159/2011) provides an alternative to traditional ablating measures against enterprises, as a method of intervention against forms of mafia penetration within fundamentally sound and legal. It can be applied for purposes of combating illegality that has not yet reached a level of risk requiring the use of the seizure aimed at confiscation, but that nonetheless satisfies the appetites of organised crime. In the praxis, the adoption of an organisational, management and control model (compliance program) by the company subjected to judicial administration, is particularly interesting and increases the value of this measure as a robust safeguard against the reiteration of unlawful conduct that need to be reined in.

The new mechanism of Judicial control (Art. 34 bis L.d. no. 159/2011) is inspired by an approach that enhances a company's prospects through an intervention from outside the enterprise aimed at facilitating its reinstatement into economic legality, inspired in turn by flexible decision-making models that honour the principle of proportionality and impose the least possible invasion. The judicial intervention pursuant to Art. 34, does not give rise to the 'freezing' of the entire governance, but it guarantees the continuity of the management.

In a wider European perspective, the proposal of these alternative instruments to confiscation should be considered as a tool to combat the traditional mafias, which are increasingly 'looking outside' their physical borders. Also, in general, they tackle the infiltration of organised and economic crime in the legal economy. This proposal is inspired, on the one hand, by the principle of proportionality, with a view to ensuring balance between sanctioning response against the weight of the individual action. On the other hand, there is

the need to ensure that the entire sanctioning system is rational and flexible, in that it provides a range of measures with appropriate degrees of severity. Ultimately, these instruments are designed to strike the fine balance between the need to repress illegality and the need to safeguard the "social value" of the enterprise.

A further policy recommendation is the following one: As far as it is not expressly forbidden by their national legislations, the Member States, when acting as Executing State – even if it is not expressly allowed by the said legislations – in view of a full compliance with the principle of mutual recognition and mutual trust, should grant the requested freezing/confiscation of legal persons' illicit assets, when such a measure is provided for by the domestic law of the Issuing State.