Country report. Italy

Establishing the subject matter of the Regulation. National confiscation models covered by the Regulation no. 1805/2018. Types, features and safeguards.

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1. Introduction.

The Constitutional Court (No. 29/1961) and the Supreme Court[266] affirmed the "polyfunctionality" / the "protean" nature of the confiscation, as it «does not always appear of the same nature and in a single configuration, but assumes, depending on the different purposes that the law attributes to it, a different character, which can be of a penalty as well as a non-criminal measure» (n. 46 del 1964).

In the Italian legal system, art. 240 of the Criminal Code (hereinafter also C.C.) – supplemented by art. 236 C.C. – provides for the general discipline of criminal confiscation, applicable in each case for which there is no special discipline and, in any case, unless otherwise expressly provided. Nevertheless, the introduction of new forms of special confiscation demonstrates the inadequacy of the discipline provided for in art. 240 C.C. with respect to the modern needs of fighting against crime. In fact, it continues to provide for the optional nature of the confiscation of profit - which no longer finds a rational justification in the realm of modern criminal law, where the fight against the accumulation of illicit capital has become a primary target; it also maintains the difference, which has nowadays become obsolete, between price (for which the confiscation is mandatory) and profit of crime.

The problem of modern lawmakers is the need to recover the assets accumulated over time by criminal organisations, which represent an instrument of infiltration in the legitimate businesses and in the vital nerve centres of politics; it is difficult to ascertain the connection between a specific asset and the source offence. Consequently, there is the need to provide for forms of lightening the burden of proof of illicit origin, or to introduce the reversal of the burden of proof, and even the need to guarantee the subtraction of illicit profits also in lack of a conviction. In this direction, the first tool to facilitate the confiscation of the illicit

[266] No. 46 of 1964; see also United Chambers, 2 July 2008, No. 26654, *Fisia Italimpianti s.p.a.*, CED No. 239923.

profit is represented by the confiscation of the equivalent value (also known as confiscation by equivalent). However, in art. 240 Criminal Code, a general regulation of this form of confiscation has not been introduced yet, and special forms of confiscation by equivalent continue to be provided for by Italian lawmakers.

In fact, the awareness of the Italian lawmakers of the importance of confiscation as a tool in the fight against crime, especially organised crime (mafia-type association), already emerged in 1982 with the Rognoni La Torre law, which introduced the crime of "*mafia-type association*." This law not only established the mandatory confiscation of the instruments, products and profits of the crime, as well as of the assets that constitute the use of the profit (reinvestment) (see art. 416 bis, § 7 criminal code[267]), but also one of the first forms of "extended" and non-conviction based confiscation in the international panorama. The latter was introduced outside the constraints of the penal system as a preventive measure pursuant to art. 2-ter, Law No. 575/1965, today art. 24 of the "preventive measures code" introduced by the Legislative Decree No. 159/2011. For the rest, the enhancement of the role of confiscation in the fight against the crime of "profit" was achieved with the introduction of more and more special forms of mandatory confiscation of profit, and sometimes also of the instruments of the crime, as well as with the confiscation by equivalent, in addition to providing for a form of extended confiscation with art. 12-sexies Legislative Decree No. 306/1992, now art. 240-bis of the criminal code (pursuant to Legislative Decree No. 21/2018).

2. Traditional confiscation: art. 240 Criminal Code

[267] In some judgements the 'wealth' of the member of the criminal organisation is considered an instrument of the crime for its destination.

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

Art. 240 Criminal Code, Confiscation

"1. In case of a conviction, the court may order the confiscation of the things that were used or meant to be used to commit the offence, or the things that constitute their product or profit.

2. Confiscation shall always be ordered: 1) of the things that constitute the price of the offence, 1-bis) of computer or electronic assets and tools that were used, in whole or in part, to commit the offences under Articles 615-ter, 615-quater, 615-quinquies, 617-bis, 617-ter, 617 quater, 617-quinquies, 617-sexies, 635-bis, 635-ter, 635-quater, 635-quinquies, 640-ter and 640-quinquies; 2) of the things whose manufacturing, use, carrying, possession or disposition amount to an offence even though no judgment of conviction has been passed.

3. The provisions of Part I and sub-paragraphs 1 and 1-bis of the preceding paragraph shall not apply if the things or assets or computer or electronic tools are owned by a person who is not involved in the offence. The provisions of sub-paragraph 1-bis of the preceding paragraph shall also apply when the penalty is applied upon request by the parties to the proceedings under Article 444 of the Code of Criminal Procedure.

4. The provisions of sub-paragraph 2° shall not apply if the things are owned by a person who is not involved in the offence and their manufacturing, use, carrying, possession or disposition may be allowed by means of an administrative authorisation".

This rule was recently reformed because of the implementation of Directive 2014/42/EU (entry into force of the provision on the 24th of November 2016 with Legislative Decree No. 202/2016), which – with a arguable choice – has introduced a specific form of compulsory confiscation in the general discipline, including confiscation by equivalent of the price, products, and of the items and of the IT or telematic tools used for the commission

of the crimes listed; this new rule represents the umpteenth missed opportunity for an overall rationalisation and modernisation of the law of confiscation.

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

In particular:

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

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

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

and, finally, the mandatory confiscation is also ordered (in this case regardless of a verdict of conviction) for the assets whose manufacture, use, carrying, possession, or disposal constitutes a crime (article 240 § 2), No. *2)* Criminal Code), unless they belong to a person unrelated to the crime and their manufacture, use, carrying, possession, or disposal are permitted by administrative authorisation.

This distinction between mandatory and optional confiscation dates perpetuates the choice made by the Italian lawmakers in the Zanardelli criminal code, which was in effect until the entry into force of the 1930 Rocco criminal code. Indeed, the Zanardelli code envisaged avoiding excessive rigour.

Paragraph 3 and 4 introduce protections for the third parties.

At the basis of a security measure is the concept of dangerousness, in relation to which the scholars' opinions oscillate from considering the dangerousness of the *res* to that of the person (social dangerousness), with positions that, however, tend to approach: *i.e.*, where we speak of «dangerousness also of the person, but in a relative sense because it rests in an osmosis with the thing: it will be enough to interrupt this for the dangerous situation to cease»; the items, left at the disposal of the offender, would constitute an incentive for her/him to commit further offences.

3. Legal nature of the confiscation.

Notwithstanding the legislative definition of a security measure, in line with the Report on the Criminal Code draft which states that confiscation «consists in the elimination of items which, deriving from criminal offences or in any way connected to their commission, keep alive the idea or the attraction of the crime», some scholars deny the preventive purpose of the measure in question, to attribute it a punitive or expropriative nature.

Hence, despite its definition in the code as a «security measure», the confiscation reveals, pursuant to art. 236 Criminal Code, a strongly differentiated statute with respect to personal security measures; and since «the nature of an institution is function of the discipline that characterises it», the identity of nature between confiscation and security measures can be questioned[268].

In art. 240 Criminal Code and in the special forms of mandatory confiscation we can distinguish: hypotheses with a more marked preventive purpose, such as the confiscation of items that served or were intended to commit the crime, which are not alien, however, to repressive connotations; hypotheses to which «the very concept of criminal liability is

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

extraneous» and which constitute «a projection of the legal regime of a thing (the confiscation of items whose use, possession, etc., is absolutely forbidden)»; confiscation of the product or profit with the purpose of compensation or rebalancing of the violated economic order, restoring the patrimonial situation of the offender to the conditions in which it was before the commission of the crime and thus preventing the offender from enjoying the result of his activity on the basis of the fundamental principle that crime does not represent a legitimate right to purchase items in rule of law. The removal of the ascertained profit of the crime does not, therefore, perform a repressive function, because it does not involve a patrimonial sacrifice or a limitation of the property right for the offender. It would be a sort of criminal law equivalent to the civil law institution of unjust enrichment pursuant to art. 2041 Civil Code.

In addition to the general provision under article 240 Criminal Code, there are several provisions about special cases of confiscation of assets. They are provided for in the Criminal Code, in other codes, as well as in special laws. In particular specialty can be related to: · specific offences which can trigger specific forms of confiscation; · different categories of assets which can be objects of the confiscation; · mandatory hypothesis of confiscation.

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

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

the «economic advantage obtained directly and immediately way from the crime»;

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

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

On the basis of the prevailing case law, the «profit of the crime» must be identified with an «added benefit of a patrimonial type», «pertaining to the crime» according to a «cause-effect» relationship, in the sense that the profit must be «an immediate economic consequence derived from the crime»: «an advantage can be identified; it must represent a result achieved (and not a mere expectation, as this can only ground the interest or motive for committing the crime but not the adoption of a real measure); also, it must be a positive result, *i.e.*, a further benefit compared to those that the entity did have prior to the offence» [269].

Recently, the Supreme Court has highlighted the need for an «aetiological link» between the asset to be confiscated and the crime; the confiscation «cannot affect the assets of the offender to a greater extent than the economic advantage deriving from the commission of a specific crime» [270].

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

The United Chambers of the Supreme Court established, in the *Caruso* judgement, that the assumption that the profit from the crime presupposes the ascertainment of its direct causal derivation from the agent's conduct constitutes a «consolidated principle in legitimacy jurisprudence. The parameter of pertinence to the crime of profit represents the effective selection criterion of what can be confiscated for this reason». With this definition, the Court now undoubtedly includes the surrogates in the notion of confiscable profit: *i.e.*, they are

[269] Court of Cassation U.C. 2.7.2008, No. 26654, *Fisia Italimpianti*; F. BONELLI, *D. lgs. 231/2001: tre sentenze in materia di "profitto" confiscabile/sequestrabile,* in *DPenCont* (1) 2012, 133.

[270] Court of Cassation 12.4.2022 (dep. 18/05/2022) No. 19561; Court of Cassation 15.7.2020, *Ambrosini*, No. 30899, *CEDCass,* 280029; Chamber. II, 26.11.2021, No. 2879, *CEDCass,* 282519. *Contra* Court of Cassation 7.12.2021, No. 7503.

assets in which the original profit, of direct causal derivation from the crime, has been invested, substantially excluding further utilities, that is, the resulting amounts from subsequent investments of the sums in other lawful activities or the proceeds of further activities extraneous to the essential structure of the crime[271]. Such an opinion has recently been confirmed in the *Lucci* case[272].

On the basis of another jurisprudential opinion, which proves to be more compliant with the broad notion of income accepted in Directive 42/2014 and in Directive 2024/1260 (see in this regard the *Miragliotta* judgement[273], just prior to the *Caruso* case), the Italian Supreme Court seems to include utilities in the notion of confiscable profit provided that the prosecution offers circumstantial proof of the pertinence link that connect, even through subsequent passages, the assets to be confiscated to the crime, thus putting a stop to an excessive expansion of the notion of indirect profit. The Court affirms that «the asset constituting a profit can be confiscated pursuant to articles 240 and 322-*ter*, paragraph I, first part of the Criminal Code whenever it can be causally linked in a precise way to the criminal activity carried out by the agent. Therefore, it is necessary to clearly indicate the circumstantial elements on the basis of which to determine how the seized assets can be considered in whole or in part the immediate product of a criminally relevant conduct or the indirect profit thereof, as the result of reuse by the offender of the money or other utilities directly obtained from the accused».

271 Court of Cassation U.C. 27.3.2008, No. 26654, *Fisia Italimpianti*; Court of Cassation 12.3.2014, No. 14600; Court of Cassation 14.11.2013, No. 11918; Court of Cassation 4.11.2003, No. 46780, *Falci*, *CEDCass,* 227326; T. EPIDENDIO, *La nozione di profitto oggetto di confisca a carico degli enti*, in *DPC* 2008, No. 10, 1272.

272 Court of Cassation U.C. 26.06.2015, *Lucci*, No. 31617, Rv. 264436.

273 Court of Cassation U.C. 6.3.2008, No. 10280, *Miragliotta*, rv. 23870. See A.M. MAUGERI, *La confisca per equivalente - ex art. 322 ter - tra obblighi di interpretazione conforme ed esigenze di razionalizzazione*, in *Riv. it. dir. proc. pen.* 2011, 794 ss.

Then, the interpretation provided by the *Miragliotta* decision should prevail today in the light of the Directive. This is compliant with the obligations of conforming interpretation pursuant to articles 11 and 117 of the Constitution[274].

This interpretation was subsequently confirmed by the judgement of the United Chambers *Gubert*[275] and by the judgement of the United Chambers *Thyssen*[276]. This position is taken up verbatim by subsequent jurisprudence[277].

The Supreme Court has specified that the notion of profit does not include what is only the subject of compensation claims[278] or a merely financial and not patrimonial advantage[279]. Credits can be confiscated directly (and not by equivalent) provided they are certain, liquid and collectable[280].

4.1. Gross or net profit.

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

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274 Court of Cassation 6.11.2008 No. 45389, Perino, in *CP* 2010, 2714; Court of Cassation 19.3.2013 No. 13061, in http://pluris-cedam.utetgiuridica.it. parla di profitto dinamico.

275 Court of Cassation U.C. 5.3.2014 No. 10561, *Gubert*.

276 Court of Cassation U.C. 24.4.2014, *Thyssen*, No. 38343, *CEDCass,* 261117.

277 For all see Court of Cassation 12.6.2018 No. 38917, in *FI* 2018, II, 715.

278 Court of Cassation 17.6.2010, No. 35748.

279 App. Milano 25.1.2012, *Banca Italease S.p.A.*, in *DPC* 11.4.2012, with note of M. SCOLETTA; Court of Cassation 29.11.2013 (4.3.2014), No. 10265; così F. BONELLI, *op. cit.*, 136; C.E. PALIERO, *False comunicazioni e profitto confiscabile: connessione problematica o correlazione impossibile?*, in *Le Società* 2012, 80.

280 Court of Cassation U.C. 2.7.2008 No. 26654, *Fisia Italimpianti*, § 7; in the same direction Court of Cassation 16.11.2012 No. 8740 and 2016, No. 23013. Cfr. S. BELTRANI, *Profitto degli enti e diritti di credito nella giurisprudenza di legittimità*, in *Resp. ammin. delle società e degli enti (La)*, 2015, v. 10. No. 2, 185 ss.

• In reality, as it will be clarified below, the two positions tend to approach as the former does not take into account the illicit expenses (for committing the crime) and the latter takes into account the legal expenses for performances on behalf of the victim. In fact, the problem concretely arises for those forms of economic crime, connected to a lawful business activity in which conduct fulfilling a crime creeps in, such as fraud or corruption aimed at awarding a contract or obtaining payment from the public official of a higher consideration than that due in the context of a synallagmatic relationship stipulated between private company and public body[281]. In the event that the illegal activity does not involve the performance of any lawful counter-performance, the confiscable profit can only be identified with the entire value of the business, as it is wholly the result of an illegal activity, lacking any separable cost, because it is intrinsically illicit or in any case concerning instrumental and/or correlative activities with respect to the predicate offence.

The United Chambers of the Supreme Court intervened in the famous *Fisia* case by accepting the gross principle, but then stating that, where a synallagmatic activity is carried out on the basis of a contract that remains valid ('crimes in contract', as opposed to structurally illicit contract crimes), the profit cannot be subtracted *tout court*, as it constitutes the «consideration for a service regularly performed by the obligated», not distinguishing between gross or net profit, but between illicit profit and lawful profit. However, this drastic solution, which would even lead to the non-confiscation *tout court* of the profit of the 'crime in the contract', is mitigated by the affirmation of the enigmatic principle on the basis of which the confiscable profit is «concretely determined net of the effective benefit possibly achieved by the injured party, in the ambit of the synallagmatic relationship with the entity»[282].

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[281] A. SCARCELLA, *Il profitto sequestrabile all'Ente nei reati a prestazioni corrispettive (commento a Court of Cassation pen., No. 23013, 31 maggio 2016)*, in *Responsabilità amministrativa delle società e degli enti* (La), 2016, v. 11, No. 4, 253 ss.; R. BORSARI, *Percorsi interpretativi in tema di profitto del reato nella confisca*, in *LP* 8-9-2019, 16 ff.

[282] Court of Cassation U.C. 2.7.2008 No. 26654, *Fisia Italimpianti*, § 7; conf. 2016, n. 23013; Chamber. VI, 8 April 2013, No. 24277; Chamber. 6, No. 33226 of 14/07/2015, *Azienda Agraria Geenfarm di Guido Leopardi*, in the same proceeding and

This orientation is criticised by the scholars because this notion of 'effective utility' is difficult to calculate[283], to the point of risking making it impossible to confiscate the profit deriving from the 'crime in contract' with synallagmatic services or in any case to make the interpretation of the notion of confiscable profit absolutely obscure [284]; moreover, this emerges in practice, where the jurisprudence renounces calculating the profit [285]. On the other hand, according to other scholars, on the basis of a structural concept of profit (by components) [286], only of the costs realised for lawful services should be deductible: not only does this seem juridically founded and easily applicable, since costs for lawful services are accounted costs, but ends up by agreeing the opposing positions, *i.e.*, both those who, starting from the gross principle, admit the deductibility of only lawful expenses [287], and of those who, even if they accept the principle of the net withdrawal, deny the deductibility of the so-called expenses illicit [288].

Chamber. 2, No. 20506 del 16/04/2009, Società Impregilo Spa, Rv. 243198; Chamber. U, No. 31617 del 26/06/2015, Lucci, Rv. 264436; 2008, No. 42300; Chamber. 2, del 16/04/2009, No. 20506 ; Chamber. 02, del 12/11/2013, No. 8339.

283 E. LORENZETTO, *Sequestro preventivo* contra societatem *per un valore equivalente al profitto del reato*, in *Riv. it. dir. proc. pen.* 2008, 1795; T. TRINCHERA, *Confiscare senza punire? Uno studio sullo statuto di garanzia della confisca della ricchezza illecita*, Giappichelli, 2020, 398; V. MONGILLO, voce *Profitto confiscabile*, in EG Treccani, 2018; S. FINOCCHIARO, *Riflessioni sulla quantificazione del profitto illecito e sulla natura giuridica della confisca diretta e per equivalente*, in *DPC Riv. trim.* 2020, No. 3, 333.

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

285 Court of Cassation, Chamber. VI, 8 aprile 2013, No. 24277,

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

287 BOTTALICO, *Confisca del profitto e responsabilità degli enti tra diritto ed economia: paradigmi a confronto*, in *Riv. it. dir. e proc. pen.*, 2009, p. 1760; MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano 2001, 564 ss.; EPIDENDIO, *La nozione di profitto*, cit., 1267 ss.; AMATO, *Precisati i requisiti e le condizioni per sostenere la responsabilità degli enti*, in *Guida al dir.* 2006, No. 42, 69; FUSCO, *La sanzione della confisca in applicazione del d.lgs. 231/2001*, in *Resp. amm. soc. enti*, 2007, I, p. 65; STICCHI, *Strumenti di contrasto alla criminalità d'impresa e nozione di profitto confiscabile*, in *Resp. amm. soc. enti* 2008, 112.

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

However, some judgements return to the net profit criterion, at least where it concerns a lawful business activity in which a contractual offence is committed [289], while maintaining the distinction, introduced by the Supreme Court, between 'contract crimes' and 'crimes in contract' for the purpose of determining the notion of confiscable profit[290]. This distinction is acceptable to the extent that the term 'contract crimes' refers to cases in which the very stipulation of the contract fulfils the crime from which the illicit profit follows, in the absence of lawful services in favour of the community or the victim, for example fraud against the State aimed at obtaining undue financing; for the rest, this distinction seems to be questionable, as in any case the person who commits the offence performs lawful services, apart from the ambiguity of the same distinction in question, which is the subject of conflicting jurisprudence.

Lastly, the opinion is interesting which clearly specifies that in calculating the victim's utility, the 'out-of-pocket costs' must be considered [291] and recent case law highlights, beyond the issue of the notion of gross or net profit, that the lawful services performed by the offender must be correctly compensated[292].

5. Third party ownership

[289] Supreme Court of Cassation, Sixth Chamber, 19 March 2013, 13061; Supreme Court of Cassation, Second Chamber, December 20, 2011, *Angelucci*, No. 11808; Supreme Court of Cassation, Third Chamber, April 4, 2012, No. 17451, *Mastro Birraio and other*.

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

[291] Court of Cassation, Chamber. VI, 27/01/2015, No. 9988: the confiscable profit must be calculated by excluding - within the limits of the so-called out-of-pocket costs - any income obtained as a result of lawful services actually performed in favour of the contractor in the context of the synallagmatic relationship, equal to the *'utilitas'* of which benefited the other party

[292] Court of Cassation 21.10.2020 No. 6607.

In the Italian legal system, the confiscation of assets belonging to persons unrelated to the commission of a crime is generally excluded, both for confiscation pursuant to art. 240 Criminal Code, as well as for special hypotheses relating to particular types of offences [293].

The confiscation referred to under Article 240 § 1 Criminal Code does not apply if it would affect items that belong to a person unrelated to the crime (art. 240 § 3 Criminal Code). This limitation does not apply, however, for 'intrinsically dangerous' assets (art. 240 § 2 No. 2 Criminal Code), such as those whose manufacture, use, carrying, etc., constitutes a crime[294].

The general principle (with a few exemptions) is that confiscation does not take place when the ownership of the items subject to potential confiscation is of a «person extraneous to the crime» (a third party in good faith). In this case, the items should be handed over to the third party. However, case law is consolidated in adopting a strict notion of a 'person extraneous to the crime', according to which any subject who – although not being criminally liable – has, through his or her conduct, made the commission of the crime easier, cannot be considered extraneous to the crime, and therefore is not entitled to prevent confiscation and to obtain the restitution of the relevant items. In particular, according to case law, the only subject who can be considered extraneous to the crime is the subject who does not have any kind of – either direct or indirect, owing to a lack of vigilance or other causes – negligent link with the commission of the crime[295].

Also the beneficiary of the crime is not considered extraneous to the crime in case law, with the exception of cases in which the third party has innocently benefited from the crime in good faith[296]. «The third party shall have the burden of proving the facts constituting

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293 L.CAPRARO, *Disponibilità della res e tutela del terzo estraneo*, in M.MONTAGNA, *Sequestro e confisca*, Torino, Giappichelli 2017, 335 f.

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

295 Court of Cassation, No. 16405 of 21 April 2008

296 Court of Cassation pen., Chamber. V, Sent. 21 giugno 2021 (ud. 14 maggio 2021), No. 24248; Trib. del riesame di Milano, Unicredit, resulted in Court of Cassation, 10.1.2013, No. 1256; contra Court of Cassation, 19.9.2012, No. 1256, P.a. e altro,

his/her claim to the asset, providing all the elements constituting the conditions of 'ownership' and 'unrelatedness to the crime', regarding the absence of a link between his/her claim and the criminal conduct of others, or, in the event that the third party has in any way benefited from the latter, regarding the fact that this was done innocently and in good faith»[297].

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

6. Value-based confiscation

In the Italian system of law there is not a general discipline or provision for the confiscation by equivalent, but only special forms. Confiscation by equivalent is allowed by special provisions only concerning a compulsory list of crimes (e.g., corruption[298], money laundering, tax fraud, market manipulation, insider trading, usury, etc.), where recovery of the direct profit or price of crime is impossible. There are several hypotheses where the confiscated assets do not correspond to the actual product or profit of the crime and they need to be substituted by some assets which have an equal value. This rule is provided for in

in *DPC* 2013, 464, with note of D'AVIRRO; T.E.EPIDENDIO, *La confisca nel diritto penale e nel sistema delle responsabilità degli enti*, Padua, Cedam, 164 s. On the protection of thirds' rights Court of Justice EU, 21 October 2021 (C-845/19 e C-863/19)

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

298 Art. 322 ter Criminal Code Confiscation of profit and price is mandatory for crimes provided under articles 314 (embezzlement), 315 (embezzlement against a private person), 316 (embezzlement taking advantage of others error), 316-bis (embezzlement against the State), 316-ter (misappropriation of funds against the State), 317 (concussion 7), 318 (corruption to exercise the function), 319 (corruption for an activity against the function), 319-ter (corruption in judicial acts), 319-quarter (improper induction to give or promise utility), 320 (corruption of a person in charge of public service). «In the case of a conviction, or application of the penalty at the request of the parties pursuant to Article 444 of the Code of Criminal Procedure, for the crimes… the confiscation of the assets constituting the profit or the price is always ordered, unless they belong to a person unrelated to the crime,or, when this is not possible, the confiscation of assets, of which the offender has the availability, for a value corresponding to this price or profit

articles 322ter, 600septies, 640 quarter, 644, 648 quarter of the Criminal Code, article 2641 of the Civil Code, article 187sexies of Consolidated Act on Financial Intermediation, article 11 of Law to ratify and implement the Convention and the Protocols of the United Nations Convention against Transnational Organised Crime.

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

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

In the opinion of the Constitutional Court[299] and the Supreme Court, the confiscation of the value is a punitive sanction; the lack of dangerousness of the assets that are the subject of it, together with the absence of a 'pertinent relationship' (meaning a direct, current and instrumental link) between the crime and the assets reveals a predominantly afflictive connotation and has, therefore, an 'eminently sanctioning' nature, such as to prevent the applicability of the general principle of retroactivity of security measures, referred to as in art. 200 Criminal Code.

Considering the confiscation of the value as a punishment, the Supreme Court applied it as a real penalty, for example: against each abetter (accessory, partner in the crime), transforming the confiscation into a real pecuniary penalty in blatant disregard for the

[299] Constitutional Court 02/04/2009, No. 97 and 20 November 2009 No. 30.

principles of legality, guilt and proportionality[300]; establishing that the confiscation by equivalent relating to the crime of corruption (art. 322 ter, § 2 Criminal Code) does not necessarily presuppose the achievement, by the briber, of a profit, given the sanctioning nature of the measure"[301].

In the prevalent case law, the confiscation of money is always direct; this means that it is possible to apply the confiscation by equivalent only in relation to non-fungible items. «If the price or the so-called profit accretive deriving from the crime consists of money, the confiscation of the sums deposited on a bank current account, of which the subject has the availability, must be qualified as direct confiscation and, in consideration of the nature of the asset, does not require proof of the connection of derivation direct between the sum materially subject to ablation and the crime»[302]. This opinion is criticised by the scholars because it does not consider the necessity to ascertain the 'pertinent relationship' between the profit and the crime in order to apply the direct confiscation.

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

The Article 240 § 2, No. 2 Criminal Code allows for the confiscation of 'intrinsically dangerous' assets whose manufacture, use, carrying, possession, or disposal constitutes a crime, even in the case of acquittal.

According to the most recent ruling of the Supreme Court, also United Chambers (26 June 2015, No. 31617, *Lucci*), in case of extinction of the crime due to amnesty or statute of

[300] Supreme Court of Cassation, July 28, 2009, No. 33409, *Alloum*; 2010/21027), *contra* Supreme Court of Cassation, Chamber. VI, 20 January 2021, No. 4727.

[301] Supreme Court of Cassation, May 13, 2010, No. 21027; *contra* Sixth Chamber, 21/01/2016, No. 8044.

[302] Supreme Court of Cassation, No. 10561 of 2014, *Gubert*; Supreme Court of Cassation No. 15/31617 *Lucci*; Sixth Chamber, 18 February 2016, No. 10708; 4 February 2021, No. 6391.

limitations intervened in the appeal or in the trial of cassation, the judge may order the compulsory confiscation of the price or profit (in particular pursuant to art. 240, § 2, No. 1 Criminal Code, the confiscation of the price and, pursuant to art. 322-ter Criminal Code, the direct confiscation of the price or profit of the crime) «provided that there has been a previous conviction and that the assessment relating to the existence of the crime, the criminal liability of the defendant and the classification of the asset to be confiscate as a price or profit, remains unchanged on the merits in the subsequent levels of judgement» (*contra* see Supreme Court No. 08/38834; 93/5; cfr. C 11/39756) .

The law 161/2017 has introduced Article 12-septies § 4-septies of Legislative Decree 306/92, subsequently incorporated in art. 578 bis criminal procedural code (hereinafter also C.P.C.), introduced by Legislative Decree 18/2021, to allow for the application of the extended confiscation (art. 240 bis Criminal Code) also when the crime is statute barred or amnestied. The rule establishes that, when the confiscation in particular cases provided for by the first paragraph of Article 240- bis of the Criminal Code and other provisions of the law has been ordered, «the Court of Appeal or Supreme Court, in declaring the crime extinguished by prescription or amnesty, decide on the appeal solely for the effects of the confiscation, after ascertaining the accused's responsibility». In order to apply this rule, the judge must have already ordered the confiscation before the offence is extinguished; in the end, if the confiscation has not already been ordered, it will still be possible to initiate the preventive proceedings for the purposes of applying confiscation as a patrimonial preventive measure[303].

According to some precedents, this rule has to be applied also to each form of mandatory confiscation, even if the rule is clearly applicable only to the extended confiscation *ex* art. 240 bis Criminal Code and to the forms of extended confiscation provided for in other laws (*e.g.*,

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

in Consolidated Customs Act art. 301, in Consolidated law on narcotic drugs art. 85-bis, as well as in art. 12-*ter* Legislative Decree No. 74/2000 for tax crimes); this is an analogical and *in malam partem* application of the law against the principle of legality.

Although the jurisprudence did not allow for the application of the confiscation of the value when the crime was time barred because the confiscation of the value is considered a punishment, the Law No. 3/2019 has extended this rule (art. 578 bis C.P.C.) to the mandatory confiscation of art. 322 ter Criminal Code («or the confiscation provided for by Article 322-ter of the Criminal Code»), also in the form by equivalent.

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

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

8. The principle of non-retroactivity.

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

With particular reference to confiscation, it can be recalled that the Constitutional Court did not recognise the punitive nature of security measures and the consequent applicability of the principle of non-retroactivity to all security measures. However, in a specific case, considering the substantive notion of the criminal matter referred to as in the case law of the ECtHR, the Constitutional Court declared the unconstitutionality of the regulation about the confiscation of the vehicle in relation to the crime of driving while intoxicated (art. 186, § 2 letter *c)* of Legislative Decree 285/1992, as amended by art. 4, § 1, letter b), Decree Law – hereinafter also D.L. – No. 92/2008), to the extent that its retroactive application was permitted pursuant to art. 200 Criminal Code, for violation of the principle of non-retroactivity of criminal sanctions pursuant to art. 7 of the ECHR and, therefore, of the art. 117 of the Constitution[304] .

Overcoming a contrary opinion[305], the Supreme Court has instead applied the principle of non-retroactivity, pursuant to art. 25, § 2 of the Constitution, to the confiscation by

[304] Constitutional Court, 4 giugno 2010, No. 196, P.T., in *Foro it.* 2010, 9, I, 2306; MAUGERI, *La confisca per equivalente*, cit., 794.

[305] Already the art. 15 of law 300/2000 had expressly provided for the non-retroactivity of art. 322 ter criminal code; but the Cassation had established that the prohibition of retroactive application was valid only for the new crimes envisaged by art. 322 bis (introduced by the first paragraph of law 300), Court of Cassation 3.6.2001, Curtò, in *Cassation pen.* 2002, 581; cfr. Constitutional Court 27.7.2002, No. 394 e 24.6.2004, 186.

equivalent introduced by art. 1, §. 143, of Law No. 244/2007, which extends the discipline of art. 322 ter Criminal Code to the tax crimes contemplated by Legislative Decree No. 74 of 2000, deeming inapplicable to this case the art. 200 Criminal Code, in consideration of «the eminently sanctioning nature of the exceptional institution under examination»[306]. This opinion was then solemnly sanctioned by the Constitutional Court which rejected the question of constitutional legitimacy of art. 200, 322 ter Criminal Code and art. 1, § 143 of Law No. 244/2007, for violation of the art. 117 of the Constitution due to the contrast with the art. 7 of the ECHR, as it held that by virtue of the punitive nature of confiscation by equivalent, the prohibition of retroactive application derives from art. 25 § 2 of the Constitution and the jurisprudence of the ECHR in relation to art. 7[307]. Despite the perplexities that the affirmation of the punitive nature of confiscation by equivalent arouses, this opinion appears absolutely acceptable in terms of guarantees. The Supreme Court, in the *Barilari* case, consequently applied this principle also to the confiscation by equivalent of the preventive measure confiscation, art. 2-ter, § 10, l. No. 575/65, as amended by D.L. No. 92/2008 (now art. 24 Anti-Mafia Code)[308].

It follows that the confiscation security measure can also be ordered with reference to crimes committed at a time when it was not provided for by law or was provided for in different ways in terms of type, quality and duration. Some scholars and a part of case law, having recognised such potentially unconstitutional, lean towards a restrictive reading of Article 200 of the Criminal Code, such as not to harm the fundamental guarantees of the citizen. They demand that the security measure has to be provided for a specific crime before the perpetration and it is only possible to modify the executive aspects. This is intended to

306 Court of Cassation 8.5.2008, No. 21566, Pulzella, in *Dejure*; in the same direction Court of Cassation, 5.6.2008, n. 28685, *ivi*; Court of Cassation 24.9.2008, No. 39172, Canisto; Court of Cassation, United Chambers, 31.1.2013, No. 18374, Adami, Rv. 255037.

307 Constitutional Court, 2.4.2009, No. 97, S.B., in *Giur. cost.* 2009, 2, 984; Constitutional Court, 20.11.2009, No. 301.

308 Court of Cassation, Chamber. I, 28.2.2012, Barilari, No. 11768, Rv 252297.

comply with the principle of legality referred to as in art. 25 § 2 Constitution or, at least, art. 7 ECHR, considering the confiscation as being included in the notion of criminal matter[309].

9. Procedural aspects

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

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

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

Confiscation (art. 240 Criminal Code and special forms of confiscations) can or must be ordered by the trial judge who pronounced the sentence of conviction, or by the enforcement judge (the judge responsible for deciding on issues relating to the effective enforcement of the sentence and coincides with the judge who has ruled on the relative provision), if mandatory. In this case, the enforcement judge has the duty to order the confiscation during the enforcement phase, if the jurisdictional judge hasn't ruled on it (Court of Cassation, Third Chamber, 10 September 2015, No. 43397, *Lombardo*, CED No. 265093)»[310].

As examined, case law is consolidated in the sense that confiscation applies not only to the proceeds directly and immediately derived from crime, but also to any other property

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

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

acquired by the offender through the investment of such unlawful proceeds; however, the burden to strictly prove all the transfers and modifications deriving from the original proceeds of crime lies with the public prosecutor.

The confiscation can be ordered even after a plea bargain. In the Italian legal system, the so-called plea bargain, referred to in the code as the «Application of the penalty at the request» of the parties (Article 444 et seq. of the Italian Code of Criminal Procedure), is a special proceeding that consists of an agreement between the accused and the prosecutor, not on the indictment, but on the sentence, which can be reduced by up to one third, as the main, but not the only, reward arising from the choice of this proceeding[311]. The sentence issued at the end of the plea bargain is treated – in the opinion of most authors – as a conviction verdict.

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

Since confiscations are applied following a conviction, the accused will have the right to cross-examination during the trial, and, in particular, the possibility of challenging the confiscation in his/her own legitimate interests. An appeal against the rulings of the enforcement judge may be filed with the Court of Cassation[312].

All the costs of a criminal proceeding (with some exceptions) in the case of conviction are attributed to and enforced against the defendant, including the costs relating to the tracing and confiscating of the assets (see Presidential Decree No. 115/2002). At a pretrial stage, the

311 F. DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 323.

312 A.M. MAUGERI, *La riforma della confisca*, cit., 22.

credits of the state against the defendant (including all the costs of the criminal proceeding and the potential fines) can be secured by the *interim* measure of the conservative seizure (article 316 et seq of the Criminal Procedure Code), which is ordered by the competent court on the application of the public prosecutor, to prevent the dissipation of the defendant's assets.

9.1. Seizures in the Italian penal system.

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

The first of these scenarios consists of conservative seizure (Articles 316-320 of the Italian Code of Criminal Procedure), which protects the patrimonial guarantees of the State and the civil party (the person to whom the offence has caused damage, who may present him/herself during the criminal trial in order to claim compensation or repayment)[313]. In this regard, it should be noted that, in 1988, Italian lawmakers drew a distinction between the concepts of 'procedure' and 'trial' within the code. The term 'trial' is to be understood as the judicial phase following the issuance of the indictment. This therefore includes (with the exception of the multiple special proceedings envisaged by the system: *e.g.*, summary trial, plea bargain/application of the penalty at the request of the parties, which will be described

[313] F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 315 ss.: "Conservative seizure is ordered by the judge at the request of the public prosecutor whenever there are „reasonable grounds to believe that the guarantees for the payment of the pecuniary penalties, court costs, or any other sums owed to the Treasury of the State are lacking or will be dispersed" (Article 316 of the Italian Code of Criminal Procedure). In the presence of these conditions, the public prosecutor is obliged to ask the judge to apply this precautionary measure. A civil party may also request the judge to order a conservative seizure in order to guarantee the civil obligations arising from a crime. Whatever the case, the conservative seizure ordered at the request of the public prosecutor also benefits the civil party".

further ahead) the preliminary hearing, the trial, and any appellate remedies. 'Procedure', on the other hand, originates from a *notitia criminis* and concludes with the final judgement. It therefore also includes the phase of the preliminary investigations: the initial phase where, generally, no evidence is formed, but sources of evidence are sought that will sustain the prosecution in court[314].

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

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

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

The scenarios mentioned, however, do not provide a comprehensive overview of the cases of seizure envisaged by the system. In fact, there are additional seizure scenarios falling outside the code. For example, with regard to the administrative liability of legal entities (introduced, as mentioned above, with Italian Legislative Decree No. 231 of 2001), there is the possibility of imposing the preventive seizure of the same items that the decree allows to

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

be confiscated (Art. 53 of Italian Legislative Decree No. 231 of 2001), as well as the seizure of the organisation's assets, as collateral on the amounts owed to the State (Art. 54 of Italian Legislative Decree No. 231 of 2001).

Furthemore, the 'Anti-Mafia Code' allows for preventive seizure, which is instrumental for subsequent confiscation (Art. 20 of Italian Legislative Decree No. 159 of 2011). As mentioned above, the preventive measures are ordered (regardless of whether a crime has been committed) with a procedure that does not have the same guarantees as the criminal trial. In fact, the relative legal action can be taken before the Court even independently of the criminal prosecution. This procedure is characterised by the fact that the evidence, which can be used in the trial, is collected by the police and the public prosecutor in secret and without hearing the parties, with fewer defensive guarantees[315].

[315] In this regard, see L.FILIPPI, *Il procedimento di prevenzione*, in Various Authors, *Procedura penale*, Torino, Giappichelli, 2017, 1029. F.DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy, cit.*, 312 ss. "Evidentiary seizure.
Evidentiary seizure, otherwise known as criminal seizure, is a means of seeking evidence that's envisaged and regulated by BOOK III of the Code. Like inspections and searches, criminal seizures are „surprise" acts, for which the suspect's defender has the right to witness the execution of the act, but not to be notified in advance.
The relative provision is taken in the form of a reasoned decree ordered by the „judicial authority": this means that it can be ordered by both judicial magistrates and investigating magistrates (public prosecutors). During the preliminary investigation phase – which extends from the registration of the notitia criminis in the criminal records registry (Article 335 of the Italian Code of Criminal Procedure) to the issuance of the indictment -, the seizure in question is usually arranged by the public prosecutor, or else by the judge overseeing the preliminary investigations themselves. During the preliminary investigation phase, the judicial police can only proceed with the seizure of evidence in cases of urgency, if a delay poses a hazard and the public prosecutor can not promptly intervene, or if the public prosecutor has not yet taken over the investigation (Article 354(2) of the Italian Code of Criminal Procedure).
In these cases, the judicial police carry out the seizure and, within forty-eight hours, either return the seized items or else transmit the report to the prosecutor of the place where the seizure was carried out for validation (Article 355 of the Italian Code of Criminal Procedure). During the trial stage, on the other hand, the trial judge is responsible for ordering the seizure at the prosecutor's request.
Evidentiary seizure deals with the „body of the crime", the items upon which or via which the crime was committed and those that constitute the price, the product, or the profit, or the „items pertinent to the crime" and necessary to ascertain the facts of the case (Article 253 of the Italian Code of Criminal Procedure). Unlike the term „body of the crime", the code does not provide a definition of „items pertinent to the crime"; this notion must therefore be inferred from the jurisprudence. According to the latter, all movable or immovable items that serve to ascertain (even indirectly) how the crime was committed, the perpetrator, and any other circumstances relevant to the case, must be considered Court of Cassation, sec. III, 22 April 2009, Bortoli, in CED No. 243721. The items to be seized, which fall under the aforementioned categories, must be indicated in the decree, unless the seizure is ordered within the context of a search".

9.1.1. Preventive seizure.

Preventive seizure is ordered with a motivated decree by the judge, who, at the request (*ne procedat iudex ex officio*) of the public prosecutor, proceeds when there is a risk that the free availability of an asset pertinent to the crime could aggravate or prolong the consequences of the crime itself, or facilitate the commission of other crimes (so-called impeditive preventive seizure, pursuant to Article 321(1) of the Italian Code of Criminal Procedure). If the conditions envisaged by law have been met, the seizure is mandatory[316].

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

The judge can also order the seizure of assets that are allowed to be confiscated, even by equivalent (in this latter case, the seizure is optional) (Article 321(2) of the Italian Code of Criminal Procedure). The request for the preventive seizure of assets for which confiscation is permitted is, on the other hand, mandatory in proceedings concerning certain crimes against the public administration by public officials[317].

Unlike conservative seizure, preventive seizure can also be ordered during preliminary investigations. If it is not possible to wait for the judge's preliminary ruling due to particular urgency, the seizure is ordered with a motivated decree by the public prosecutor. In the same emergency situations, the seizure can also be carried out by judicial police officers and agents,

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

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

who must transmit the seizure report to the public prosecutor of the place where the provision was taken within the subsequent forty-eight hours. After having verified that the asset does not have to be returned to the owner, the public prosecutor asks the judge to validate the seizure and to issue a motivated decree of preventive seizure within forty-eight hours, starting from the time of the seizure, if ordered by the public prosecutor, or from the time at which the report was received, if carried out by the judicial police.

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

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

With regard to the former, *fumus commissi delicti* and *periculum in mora* are necessary to order a preventive seizure. In terms of the *fumus,* there is no need for serious evidence of guilt (which is required to apply a personal precautionary measure, such as custody in prison). For the purposes of preventive seizure, however, the jurisprudence is satisfied with the

consistency between the hypothesised legal situation and the actual situation, and does not require that the case be proven at this stage of the proceedings, nor does it require the elements from which the commission of the crime is deduced to be indicated. The *periculum in mora* consists of the concrete and actual possibility (deduced from the nature of the asset and all the circumstances of the case) that the asset could be instrumental to aggravating or prolonging the consequences of the crime, or to facilitating the commission of other crimes. In fact, the pertinence must be excluded if there is only a casual relationship between the asset and the crime[318].

With regard to preventive seizure aimed at confiscation (Article 321(2) of the Italian Code of Criminal Procedure), the possibility of confiscating the asset was considered sufficient. Within this context, however, the United Chambers of the Court of Cassation clarified that, while the evidence does not necessarily concern the responsibility of the suspect, it must always refer to the existence of a concrete crime[319]. In the case at hand, according to the jurisprudence, the *fumus commissi delicti* would consist of the abstract possibility of the deed being subsumed within the commission of a crime, that is the possibility of framing the concrete deed within a hypothetical criminal offence envisaged by the law. From the standpoint of *periculum in mora*, seizure for confiscation purposes would require an assessment of the asset's dangerousness and its association with the crime, in the sense that the asset must have an instrumental link to the crime, and not merely a fortuitous association[320]. The asset can be considered 'instrumental', for example, if it has undergone any structural changes in order to render it useful for the commission of the crime (*e.g.*, a car that has been modified in order to conceal drug trafficking).

[318] Court of Cassation, Fifth Chamber, 30 October 2014, no 52251, Bianchi, in *C.e.d.*, No. 262164

[319] Court of Cassation, UC, 31 March 2016, Capasso, in *Cassation Pen.*, 2016, 3149-3150.

[320] Court of Cassation, Fifth Chamber, 28 February 2014, Policarp, No. 21882, in *C.e.d.*, No. 260001.

Otherwise, in the case of seizure for the purposes of confiscation by equivalent or extended confiscation, in which there is no link between the assets to be seized and the crime itself, the prerequisite for applying the measure is the presence of serious clues as to the existence of the conditions required for the application of confiscation[321], in addition to the abstract possibility that a crime has been committed in relation to which the measure is permitted.

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

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

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

9.3 Using confiscated property to settle claims

[321] Court of Cassation, United Chambers, 17 December 2003, No. 920, Montella, in *C.e.d.*, No. 226492.

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

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

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

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

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

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

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

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

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

10. Destination of the criminal confiscated assets.

Article 86 of the Criminal Procedure Code implementing provisions provides for the sale of confiscated assets, with procedures expressed in the Consolidated Law on Justice Expenses at articles 149 and subsequent. The sale is made through the institutes for judicial sales with incomes deposited in the Fine Deposit; article 149 specifies that sell is the general rule, unless it is differently provided under special provisions: under articles 100 and 101 of Decree of President of Republic 309/1990, concerning drugs, law provides that crafts, boats, planes seized can be entrusted to police forces for the fight against drugs-trafficking.

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

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

For smuggling crimes: articles 301 and 301 bis of Decree of President of Republic 43/1973 provide that if the sale of vehicles used for these crimes is unsuccessful, these enter the State property. Seized recorded movable assets can be assigned in judicial custody to

police forces for anti-smuggling activities. The same rules are applicable to crimes related to illegal immigration[322].

11. The confiscation pursuant to art. 416 bis, § 7, Criminal Code

A particularly interesting hypothesis of special confiscation envisaged in the Italian legal system is that pursuant to art. 416 bis § 7 of the Criminal Code, which provides for the compulsory confiscation of the items that served or were intended to commit the crime and of the assets that are its price, profit or which constitute its reuse, representing one of the first forms of compulsory special confiscation introduced by the Italian lawmakers, innovative where it provides for the confiscation of re-employment[323]; it is a security measure (which also assumes a punitive connotation) as a consequence of the conviction for mafia association, pursuant to art. 416-bis Criminal Code.

This form of confiscation requires the prosecution to demonstrate either a relationship of instrumentality with respect to the activity of the criminal association (the items that served or were intended to it) or a causal link with this activity (product, price, profit or reuse)[324]; "does not disregard the classic derivative and instrumental links between the thing and the crime considered in the general rule of art. 240 criminal code" [325]. As stated by the Supreme Court, the confiscation in question «does not concern all the items purchased by

322 As provided under Legislative Decree July 25th, 1998, No.286, Consolidated Law on immigration and provisions on the status of foreign people.

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

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

325 PICCIRILLO, *Art. 416 bis - Ipotesi speciali di confisca,* in *Codice delle confische e dei sequestri. Illeciti penali e amministrativi*, a cura di TARTAGLIA, Roma 2012, 686; PISA, *Art. 416 bis*, in *Commentario breve al codice penale*, edited by CRESPI-FORTI-ZUCCALÀ, Cedam 2011, 1437; Court of Cassation United Chambers, 26.10.1985, Piromalli, in *Giur. it.* 1986, II, c. 209; Court of Cassation, 26.10.1985, Avignone, in *Ced Court of Cassation* 00007, rv. 171063; Court of Cassation, 6.6.1992, in *Ced Court of Cassation No.* 06784., rv. 190545.

the individual associates in a given period, but must refer exclusively to the items that served .. or which constitute their use»[326]; the provision of «obligatory nature of the confiscation does not imply any presumption in terms of the instrumentality of the items to be seized», but requires the ascertainment of «a specific and stable relationship» between the good and the offence, «which testifies to the existence of a structural and instrumental relationship»[327].

Even if doubts are overcome about the possibility of applying the mandatory confiscation pursuant to art. 416 bis to items deriving from the association's purpose-crimes, for which the mandatory character of the confiscation is not sanctioned[328], because art. 416 bis § 3 represents a special rule which sanctions the mandatory confiscation of what has been achieved through the commission of crimes within a mafia associative structure (what thus achieved becomes, in fact, the profit of the crime referred to in art. 416 bis) [329], one cannot disregard the proof of the link of pertinence in question [330]. The prosecution must ascertain that the assets to be confiscated represent the result of the specific crime of mafia association, and not of any illegal activity as occurs, however, at least on the basis of a certain interpretation, in relation to the confiscation pursuant to art. 24 Anti-Mafia Code [331].

As specified by the Supreme Court (United Chambers) in the *Montella* case[332], the form of confiscation in question, therefore, does not extend to all the assets of the association members, whose origin cannot be demonstrated, as instead provided for by the discipline of the extended confiscation (see art. 240 bis Criminal Code and art. 24 Anti-Mafia Code); Indeed, it is believed that the confiscation pursuant to art. 416 bis § 7th «has now assumed a

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326 Court of Cassation, Chamber. I, 1.4.1992, Bruno e altro, Cassation *pen.* 1993, 1987.

327 Court of Cassation, Chamber. II, 4.3.2005, No. 9954, De Gregorio, Cassation *pen.* 2006, 2, 607, C.E.D. 231029.

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

329 TURONE, *Problematiche giuridiche*, *cit.,* p. 479 nota 18.

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

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

332 Court of Cassation, United Chambers , 17.12.2003 (19.1.2004), Montella, in Cassation *pen.* 2004, 1187,

residual intervention space within the plurality of patrimonial prevention measures that stand out in the current»[333].

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

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

12. Urban confiscation.

Among the special forms of confiscation, urban confiscation deserves a particular examination. This form of confiscation is provided for by art. 44 § 2 of the Decree of the President of the Republic No. 380/2001 (The consolidated Law on Construction Industry), against the crime of unlawful site development. In the Italian case law it was considered an administrative measure which is applicable regardless of the outcome of the criminal trial and also against third parties (who have become owners of the property) [334].

In the *Sud Fondi* case, the European Court of Human Rights has recognised the punitive nature of this form of confiscation, as it is included in the 'criminal matter' pursuant to *Engel*

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

[334] Court of Cassation, Chamber. III 12.11.1990, Licastro, in Cassation *pen.* 1992, p. 1307; ex pluris Court of Cassation, Chamber. I, 4.12.2008, No. 2453 ; Court of Cassation, Chamber. III, 3.3.2005, No. 10916. Constitutional Court, ordnance No. 187/1998.

criteria; Italian case law reacts demanding the culpability of the perpetrator, but in any case, in the opinion of the Constitutional Court, it is possible to apply this form of confiscation when the crime is statute barred, without the definitive conviction[335]. Such a solution has been criticised by the European Court in the *Varvara* case, which considered the application of the confiscation in statute barred crimes as a violation of the principle of legality sanctioned by art. 7 ECHR. This principle is not limited to requiring a legal basis for crimes and penalties, but also implies the illegitimacy of the application of criminal sanctions for facts…not «legitimised by a guilty verdict».

After *Varvara* judgement, the Italian case law (with the support of the Constitutional Court [336]) carried on applying urban confiscation after the crime is time-barred[337].

In the *G.I.E.M.* case the Grand Chamber of the ECHR (appeal No. 1828/06) has recognised the punitive nature of the urban confiscation, which demands the ascertainment of the guilty, but – accepting the arguments of the Italian government – the Court admits that the declaration of criminal liability can be contained within a judgement that declares the crime time-barred.

13. Mutual recognition of the Italian direct and value-based confiscation.

The traditional model of confiscation pursuant to Article 240 of the Criminal Code, as well as the special forms of mandatory confiscation provided for in the Criminal Code or in special laws, and the special form of value-based confiscation in the Italian legal system, can certainly be subject to mutual recognition. This is because they are included in the definition of Article 2 of Regulation No. 1805/2018 ('confiscation order' means a final penalty or

335 Court of Cassation, Chamber. III, 17 novembre 2008, No. 42741, Salvioli ; Court of Cassation, Chamber. III, 29 aprile 2009, No. 17865; Court of Cassation, Chamber. III, 20 maggio 2009, No. 21188; Court of Cassation, Chamber. III, 8 ottobre 2009, No. 39078.

336 Constitutional Court, 14 gennaio 2015, No. 49.

337 Cfr. European Court of Human Rights (ECtHR), *Varvara c. Italia*, cit., §§ 71 e 64 ss.

measure imposed by a court following proceedings in relation to a criminal offense, resulting in the final deprivation of property of a natural or legal person) and are applied in a 'proceeding in criminal matters' (Article 1 of the Regulation), indeed criminal in the strict sense. However, the application of the safeguards of criminal matters, pursuant to Recital No. 18 of the Regulation, demands respect for the principle of non-retroactivity, as stressed above, which does not apply to direct confiscation, considered a security measure (Article 200 of the Criminal Code).

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

Index: 1. The Extended Confiscation (art. 240 bis Criminal Code): origins and requirements. - 2. The presumption of the illegal origin of the assets. - 3. The scope (Constitutional Court 33/2018). – 4. Ownership or Availability of the assets. – 5. Disproportionality. – 6. "Temporal reasonableness". – 7 The lack of justification of the origin of the assets; the reversal of the burden of the proof and the standard of the proof. – 8. The nature of the extended confiscation (art. 240 bis Criminal Code). – 9. Application after the prescription and without the conviction. – 10. The extended confiscation after the convicted *death*. – 11. Extended confiscation against third parties. – 12. The confiscation by equivalent of the extended confiscation. – 13. Procedural aspects. The application by the enforcement judge: the extended confiscation becomes a Damocles' sword. - 14. Issues of constitutionality. - 15. Mutual recognition of the Italian extended confiscation order.

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

In the years 1992-1993 the Sicilian Mafia organisation called «cosa nostra» (literally meaning «our thing») strongly reacted to the sentences inflicted by the Court of appeal of Palermo and upheld by the Supreme Court of Cassation. In the Capaci massacre of 23 May 1992, judge Giovanni Falcone, his wife judge Francesca Morvillo and their bodyguards (police agents Vito Schifani, Rocco Dicillo, and Antonio Montinaro) were killed. After only 57 days, on 19 July 1992, in the massacre of Via D'Amelio in Palermo, judge Paolo Borsellino and his bodyguards (police agents Emanuela Loi, Vincenzo Li Muli, Walter Eddie Cosina, and Claudio Traina) lost their lives; such grave massacres, which constituted an attack to the

heart of the democratic institutions, pushed the Government to approve Legislative Decree 8 June 1992 No. 306, converted into Law of 7 August 1992, No. 356 (published in Official Journal on 7 August 1992) about «Urgent reforms to the new criminal procedure code and measures to combat mafia crimes» (*«Modifiche urgenti al nuovo codice di procedura penale e provvedimenti di contrasto alla criminalità mafiosa»*). These laws strengthened the repressive system of organised crime[338].

In particular, art. 12-quinquies D.L. No. 306/1992 provided for two different criminal offences: 'Fraudulent transfer of valuables', punishable by imprisonment from two to six years (fully transfused in art. 512-bis Criminal Code), and 'Unjustified possession of valuables', sanctioned by imprisonment from two to four years. Following the intervention of the Constitutional Court, which declared unconstitutional art. 12-quinquies § 2 D.L. No. 306/1992 for contrast with articles 3, 24 and 27 § 2 of the Constitution, art. 12-sexies (entitled 'Particular hypothesis of confiscation') was introduced in the D.L. No. 306/1992 via D.L. No. 399 of 20-06-1994, converted by Law No. 501 of 08-09-1994.

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

Art. 240-bis Criminal Code establishes that, for many specific offences indicated within the text of the provision, in cases of conviction (or plea bargain) it is always ordered to confiscate the money, assets, or other utilities whose origin the convicted person is unable

[338] The conversion law includes a number of provisions: the tightening of the prison regime with the prohibition of granting benefits to members of organised crime (article 15 D.L. 306/1992 converted to Law 356/1992), the introduction of new measures to protect those who collaborate with justice, the introduction of changes in the measures on financial prevention. Other changes were introduced by the legislative decree of 20 June 1994 No. 399 converted, with amendments, into the Law 8 August 1994 No. 501

to justify, and of which, even through a natural or legal person, he/she appears to be the owner or have the availability thereof in any capacity, for a value that is disproportionate to his/her income declared for tax purposes or his/her economic activity.

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

Art. 5 Legislative Decree No. 202/2016, implementing Directive 2014/42/EU, introduces several amendments to the legal framework for this type of confiscation, as laid out by art. 12-sexies Decree Law 306/1992, to extend the scope to the crimes envisaged in articles: 453, 454, 455, 460, 461 and 648-ter.1 of the Criminal Code, 2635 Civil Code, for the crime of improper use of credit or payment cards by art. 55 § 9 Legislative Decree No. 231/2007, computer crimes (617-quinquies, 617-sexies, 635 bis, 635 ter, 635 quarter, 635-quinquies).

The objective and subjective requirements are:

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

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

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

(d) there must be a *disproportion* between the person's declared income or economic activity and the value of the assets – with the reform introduced by Law No. 161/2017, a jurisprudential principle (consolidated only for the preventive confiscation) was introduced into positive law, according to which the defendant cannot justify the origins of the assets by indicating them as the reinvestment of income generated through tax evasion (without the possibility of demonstrating the proportionate value of the purchases through the proceeds of tax evasion, or – in some judgements - even through the taxable income subtracted from taxation);

(e) the owner does not demonstrate the proportionate value of his assets (does not justify the legal origin); the *onus* of refuting the presumption lies on the convicted who can adduce evidence showing the lawful origin of the property in question [339].

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

The Italian case law about extended confiscation is rich. The most important cases are examined below.

The Constitutional Court and the Supreme Court have established that the presumption *iuris tantum* about the illegal origin of the assets is reasonable because it is based on the conviction for serious organised crime offences (such as mafia-type association, major drug-trafficking, money laundering, kidnapping for purposes of extortion, trafficking in persons, and a few others), which are perpetrated to pursue the acquisition of undue benefits. This

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

criminal activity is suitable to accumulate illegal proceeds which can be reinvested to commit other crimes [340].

The confiscation referred to as in art. 12-sexies is based on «a fundamental choice of criminal policy, via the identification of particularly alarming crimes, suitable for creating an economic accumulation, in turn a possible instrument for further crimes, and therefore by drawing from it a *iuris tantum* presumption of illicit origin of the 'disproportionate' patrimony available to the offender for such crimes».

The Constitutional Court (No. 33/2018) has established that «this figure is based on the presumption that the disproportionate and unjustified economic resources in the availability of the convicted person derive from the accumulation of illicit wealth that certain categories of crimes are ordinarily capable of producing»; and that this presumption has already been held by the Constitutional Court as not unreasonable and consistent with the principle of equality and the right of defence, also with reference to art. 42 of the Constitution (the protection of the right to property) (Constitutional Court, Order No. 18/1996; see also No. 88/2000). The reasonableness of the presumption in question would remain linked to the circumstance that it is based on the conviction for crimes usually perpetrated «in an almost professional form» and which arise as an ordinary source of an unlawful accumulation of wealth (Supreme Court, Sixth Chamber, No. 1600/1996, *Berti*)[341].

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340 Court of Cassation United Chambers , 17 December 2003, Montella, No. 920, 1182; Court of Cassation, 26 April 2007, No. 21250, in *Juris data online*, 4, § 4; Court of Cassation, 28 November 2006, No. 92, *ivi*, 4, § 2; Constitutional Court No. 18/'96 and 33/2018; A.M.MAUGERI, *Art. 240 bis c.p.*, in *Codice penale*, a cura di T.PADOVANI, Giuffrè Francis Lefebvre, Tomo I, 2019, 1624 ss.; Court of Cassation, Chamber. II, 9.1.2018, No. 5378. See S.MILONE, *La confisca allargata al banco di prova della ragionevolezza e della presunzione di innocenza*, in *LP*, 2018. p. 15 ss.; S.FINOCCHIARO, *La Corte Costituzionale sulla ragionevolezza della confisca allargata. verso una rivalutazione del concetto di sproporzione*?, in *DPC* 2, 2018, p. 135 ss.; M.PICCARDI, *Legittima la confisca* allargata nel caso di "condanna" per ricettazione, in CP, No. 9, 2018, p. 2834.

341 Constitutional Court No. 33/2018; No. 24/2019, about this judgement A.M.MAUGERI- P.PINTO DE ALBUQUERQUE, *La confisca di prevenzione nella tutela costituzionale multilivello*, in *Dir. Pen. Cont. Riv. Trim.* 2019, 107 ss.; F.BASILE-E.MARIANI, *La dichiarazione di incostituzionalità della fattispecie preventiva*, in *GP* 2019, 151 – 160; G.AMARELLI, *Misure di prevenzione e principio di determinatezza*, in *Treccani - Libro dell'anno*, 2019, 104 – 108; M.CERFEDA, *La prevedibilità ai confini della materia penale: la sentenza n. 24/2019 della Corte costituzionale e la sorte delle "misure di polizia",* in *AP* 2019; S.FINOCCHIARO, *Due pronunce della corte*

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

The scope of this form of extended confiscation, originally introduced as an instrument to combat the infiltration of organised crime into the economy, has increasingly extended in a manner inconsistent with the original intentions of the lawmakers, as recently highlighted by the Constitutional Court in case No. 33/2018; for example, also in relation to the crimes of public officials against the public administration[342].

The Court (33/2018), while rejecting the question of constitutionality, acknowledges that although the objective of the 'extended' confiscation was expressly identified in the *contrast to the accumulation of the assets of organised crime, and mafia* in particular, and their massive infiltration into the economic circuit, the choice of 'matrix offences' was not rigorously consistent from the beginning with this declaration of intent. Alongside criminal figures, they postulate an organisation and a 'structure', aimed at the achievement of illicit profits, in fact, such as mafia-type associations or associations aimed at illicit drug trafficking. The questioned rule from the outset recalled, in fact, a series of other crimes - such as extortion,

costituzionale in tema di principio di legalità e misure di prevenzione a seguito della sentenza de Tommaso della Corte Edu, in *DPC* 2019; F.MAZZACUVA, *L'uno-due dalla Consulta alla disciplina delle misure di prevenzione: punto di arrivo o principio di un ricollocamento sui binari costituzionali?*, in *RIDPP* 2019, 987 – 993; M.PICCHI, *Principio di legalità e misure di prevenzione nella ricostruzione dialogica fra Corte EDU, Corte costituzionale e Corte di cassazione. Gli sforzi "tassativizzanti" della giurisprudenza di legittimità possono sopperire alla cattiva qualità della legge*, in *Osservatorio sulle fonti*, No. 1/2019, http://www.osservatoriosullefonti.it; F.PALAZZO, *Per un ripensamento radicale del sistema di prevenzione*, in *Criminalia* e in *disCrimen* dal 12.09.2018, 9; E.APRILE, *La Corte Costituzionale "riscrive" la disciplina delle misure di prevenzione "generiche" per garantirne maggiore determinatezza nei loro presupposti applicativi e negli effetti penalistici della violazione delle relative prescrizioni - C. Cost., 27 febbraio 2019*, No. 24, in *CP* 2019, 1864 ss.; V.MAIELLO, *La prevenzione ante delictum da pericolosità generica al bivio tra legalità costituzionale e interpretazione tassativizzante (Osservazione a Constitutional Court, 27 febbraio 2019 n. 24)*, in *GCost* 2019, 322 – 344; A.MANNA, *Misure di prevenzione e diritto penale: una relazione difficile,* Pisa, Pisa University Press, 2019, 182 ss

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

kidnapping for the purpose of extortion, usury, laundering, reuse, fictitious registration of assets, illicit drug trafficking, aggravated smuggling (over, 648 c. 2 of the Criminal Code) - which, despite being considered typical of organised crime (and mafia in particular), can in fact be perpetrated in contexts completely free of this and without implying, in an absolute and indefectible way, the quality of 'habitual offender' of their author.

Having affirmed this, the Court points out, above all, that «in the course of time, moreover, the catalogue of predicate offences has been enriched, in progressive and 'alluvial' way, from a series of novelistic interventions» and this process of implementation «has been inspired, in more than one case, by logics clearly extraneous to the primitive one of the figure at hand», as in relation to the «wide range of crimes against the public administration« » established by art. 1 § 220 Law No. 296/2006 (which «is completely devoid of direct connection with organised crime, and which does not even denote, in the perpetrator of the single fact, a necessary 'professionalism' or dedication to the offence»).

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

In any case the Constitutional Court demands, from a *de iure condendo* perspective, that «the selection of the 'matrix crimes' by the lawmakers takes place, as long as the figure retains its current physiognomy, according to criteria strictly cohesive with it and, therefore, reasonably restrictive. In fact, in order to avoid obvious tensions in terms of guarantees which must assist such invasive measures for the assets, the choice of the predicate offences must be based on types and modalities of facts in themselves symptomatic of an illicit enrichment of their author, which transcends the ascertained offence, so as to be actually able to annex the 'disproportionate' and 'unjustified' assets that the agent has due to a further criminal activity that has remained 'submerged'».

4. Ownership or Availability of the assets.

In order to have the asset 'availability', the prevailing Italian case law deems it sufficient to prove the subject's ability to determine its allocation or use, or, in any case, that he/she is the actual *dominus*. For this objective type of investigation, the *iuris tantum* presumption hold true, almost as a general rule[343].

The scholars demand, with a stricter interpretation, that the availability would be a mere surrogate for the right to property, so as to include in the patrimonial measure the assets that the defendant has illegally obtained and that he, in order to evade the confiscation - «but without divesting himself of them in economic-substantial terms» -, has made appear in the ownership of third parties via formal legal schemes, even if only fictitiously [344].

For the purposes of confiscation, the items that were fictitiously registered in the name of third parties or which have been possessed by intermediary natural or legal persons shall

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

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

also be considered as being at the disposal of the convicted offender [345]; the burden of proving the existence of circumstances that reveal the divergence between the formal ownership and the actual availability of the asset lies with the prosecutor [346].

5. Disproportionality.

Another important element of this form of confiscation is the disproportionality, in compliance with Art. 14 (2) of Directive 2024/1260 (Art. 5 of Directive 42/2014), which demands that «the value of the property is disproportionate to the lawful income of the convicted person». Recital No. 29 (No. 21 of Directive 2014/42) also suggests as follows: «the fact that the property of the person is disproportionate to that person's lawful income could be among the facts giving rise to a conclusion by the court that the property derives from criminal conduct». This element is requested by art. 240-bis Criminal Code and also for the confiscation-preventive measure, and by the Art. 127-bis Spanish Código Penal (*L.O. 1/2015), 'comiso ampliado'*, and in the German legal system in Art. 437 StPO (special rules for the independent recovery procedure) as gross disproportion (2017 reform).

While in art. 240-bis Criminal Code the disproportionality is the only fact on which the presumption of the assets' illicit origin is grounded, together with the conviction for a specific crime; in the Directive it is only one fact, among others, «giving rise to a conclusion of the court that the property derives from criminal conduct»; so, as stressed by the Constitutional Court (No. 33/2018), the Italian model is more severe. Besides, it has authoritatively established that the disproportion is a founding element, together with the condemnation

[345] Court of Cassation, Chamber. II, 23 March 2011, No. 17287, T., in *www.dejuregiuffrè.it*; Court of Cassation 3 May 2011, No. 22860, P., ivi; Court of Cassation, 3 December 2008, No. 4479, L.B., ivi.; Court of Cassation 26 November 2008, No. 1178, ivi.

[346] Court of Cassation, 24 October 2012, No. 44534, Ced No. 254699.

(which no longer has to be definitive), of the presumption «that the assets themselves derive from criminal activities that it was not possible to ascertain». The Constitutional Court clearly reiterates that the assets are confiscated not because they are of disproportionate value, but because they are of illicit origin, of which the disproportion is a symptom.

The Supreme Court requires the prosecutor to demonstrate that the value of each good is disproportionate to the lawful income of the convicted person at the moment of the acquisition [347]. The generic proof of the disproportionate character of the estate is not enough; instead, the prosecutor must provide specific evidence about the disproportionate character of each acquisition. In this way, the defendant is burdened only to prove the legal origin of the assets whose disproportionate character was established and limited to the moment of the acquisition.

6. "**Temporal reasonableness**".

The Directive's recital No. 29 contains another important element to limit the application of the extended confiscation: «Member States could also determine a requirement for a certain period of time during which it is possible for the property to be deemed to have originated from criminal conduct».

Accordingly, the Italian Supreme Court and the Constitutional Court expressly request the 'temporal reasonableness', meaning that the presumption of illicit origin of the items could not in any case «operate in an unlimited and indiscriminate manner, but must necessarily be limited to a reasonable temporal scope that allows for a connection to be

[347] Supreme Court, United Chambers , 17 December 2003, *Montella*, No. 920, 1187; Supreme Court, 13 May 2008, No. 213572, *Ced* Rv. 240091; Supreme Court, 13 May 2008, No. 213572, *Ced* Rv. 240091; Supreme Court, 30 October 2008, No. 44940; Supreme Court, 13 May 2008, No. 21357, *E.*, in *www.dejure.giuffrè.it*.

made between the assets and the criminal act» (Supreme Court, First Chamber, No. 41100/2014).

This means that the Tribunal can confiscate only the items obtained by the convicted person in a period of time reasonably connected with the crime's time[348]. The Constitutional Court (No. 33/2018) affirmed: «The moment of acquisition of the assets should not be so far from the time of the 'spy crime' that the presumption of derivation of the assets from an illegal activity seems to be *ictu oculi* unreasonable; this, even if conduct is different and complementary to that for which there was a conviction».

In any case money, commodities or other assets - acquired or developed before the start of criminal activity by the convicted offender - should not have been confiscated, unless the judge had factual evidence justifying a reasonable connection with the same criminal activity, or factual evidence of illegal origin. Additionally, as the Supreme Court *Crostella* case clarified in 2021[349], if, by virtue of a rule, the judge (either of cognition or of execution) can order the extended confiscation of assets acquired by the convicted person up to the date of first instance verdict (or the appeal verdict in case reform of previous acquittal), it is however possible that the judge herself/himself, by applying the criterion of 'temporal reasonableness', deems to identify an earlier limit with respect to the conviction, in particular when the latter occurs a long time after the commission of the crime.

[348] Constitutional Court, sent. 21.2.2018, No. 33, Pres. Grossi, Est. Modugno, annotata su *Dir. Pen. cont.*; Court of Cassation, United Chambers, sent. 25.2.2021 (dep. 15.7.2021), No. 27421, Crostella e al.; Court of Cassation, Chamber. VI, 17 January 2023, No. 10684, Del Gaudio; Court of Cassation, Chamber. I, 12.4.2019, No. 22820; Court of Cassation, Chamber. I, 17.5.2019, No. 35856; Court of Cassation, Chamber. I, 6.6.2018, No. 36499; Court of Cassation, Chamber. VI, No. 54447/2018; Court of Cassation, Chamber. I, No. 41100/2014; Court of Cassation, Chamber. VI, No. 246083/2010, Fidelbo; Court of Cassation, I, No. 34136/2014; Court of Cassation, VI, No. 5452/2010; Court of Cassation, I, No. 2634/2012; C. IV, No. 35707/2013; C. I, No. 41100/2014; C. I, No. 34136/2014; C. I, No. 12047/2015; C. I, No. 9984/2018; C. II, No. 52626/2018; contra C. II, No. 18951/2017; C. I, No. 2634/2012; C. I, No. 12047/2015; C. I, No. 53625/2017; C. I, No. 9984/2018; C. V, No. 21711/2018; C. I, No. 19470/2018; C. I, No. 41100/2014.

[349] Court of Cassation, United Chambers, 25.2.2021 (dep. 15.7.2021), No. 27421, Crostella e al.

In an apparently derogatory sense with respect to these limits, moreover, the confiscation is admitted for property received even after the conviction verdict or after what can be inferred by virtue of the requirement of 'temporal reasonableness'; this is possible when there is adequate probative evidence that the assets result from the reuse of financial resources acquired at a time prior to the conviction, or that the money or other movable investment instruments existed before the time of the verdict and were only subsequently discovered or found, *i.e.*, assets that could have been confiscate in cognition trial.

The Constitutional Court (No. 24/2019) has specified that the aforementioned thesis of temporal reasonableness «responds, in effect, to the need to avoid an abnormal expansion of the scope of the 'extended' confiscation, which would otherwise legitimise - even in case of a conviction for a single offence included in the list - an asset monitoring extended to the entire life of the offender. A result that would make particularly problematic, for the interested party, to justify the origin of the assets (even if such a burden were interpreted as a simple allegation); in fact, the more the purchase of the property to be confiscated is backdated, the more the burden in question is complicated» [350]. This temporal delimitation, *mutatis mutandis*, corresponds with the one that the Supreme Court (United Chambers, *Spinelli*, 2014) considered effective with reference to the similar measure of the preventive confiscation, pursuant to art. 24 Legislative Decree No. 159/2011.

This requirement makes the form of confiscation in question more compatible with the presumption of innocence and the right of defence, since its ascertainment makes the prosecutor's burden of proof more pregnant and the interested party's counter-proof of the lawful origin of assets less onerous. This criterion avoids a sort of '*probatio diabolica*' on the

[350] See Supreme Court, United Chambers, 25.1.2021, No. 2742; Supreme Court, First Chamber, No. 19470/2018; Supreme Court, First Chamber, No. 41100/2014; L.CAPRIELLO, *La confisca allargata e il limite temporale di operatività della misura in executivis*, in *Arch. pen.* 2020, 20.12.

interested party about the lawful origin of all assets at any time acquired[351]: «the identification of a precise chronological context, within which the power of ablation can be exercised, makes the exercise of the right of defence much easier» [352].

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

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

Whether the burden of proof about the illicit origin must be satisfied by the assets' owner is argued, as the law requires that the owner was unable to demonstrate legal origin.

Some scholars denounce an unacceptable reversal of the burden of proof, whereby it is up to the concerned person to prove the legitimate origin of property affected by the extended confiscation. In Supreme Court's opinion (also for the preventive confiscation), the burden of proving the illicit origin of property lies primarily on the prosecution, while the concerned person has the burden of 'allegation', whose objective is to counter the evidentiary situation against her/him[353].

According to authoritative scholarship, «the burden of allegation upon the interested person does not greatly differ from the rules of a normal procedural dialectics, being perfectly natural that the defence should strive to counter the evidences given by the prosecution»[354].

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

352 Court of Cassation, United Chambers, 26 June 2014, Spinelli, No. 4880 for the preventive measure.

353 Court of Cassation, United Chambers, 17 December 2003, Montella, No. 920, 1187; Court of Cassation, Chamber. VI, 3 aprile 2003, Prudentino, rv. 226492; for preventive confiscation Court of Cassation 21 April 1987 No. 1486; 22 February 1993 No. 746; 5 May 1995 No. 2755

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

The Supreme Court maintained that this form of confiscation complies with the presumption of innocence because art. 12 *sexies* (now art. 240 bis Criminal Code) does not 'presume' the accused's guilt, but only the unlawful source of the assets [355]; the right to silence regards only the demonstration of the accused's liability, and after the conviction it is no longer relevant [356].

The Court admits the mitigation of the constitutional safeguards in respect of property rights, but it stresses that the presumption of innocence only concerns the protection of personal freedom. The right to defence is respected because the owner can demonstrate the lawful source of his assets [357].

However, as explained above, the Court requires the prosecutor to demonstrate that the value of each good is disproportionate with respect to the lawful income of the convicted person at the moment of the acquisition [358]; the generic proof of the disproportionate character of the estate is not enough; instead the prosecutor must provide specific evidence about the disproportionate character of each acquisition. In this way, the defendant is burdened only to prove the legal origin of the assets whose disproportionate character was established and limited to the moment of the acquisition.

The Supreme Court established that it is only a 'burden of allegation', but it reuires, in order to refute the presumption, that the owner fully demonstrates how she/he has economically accumulated the assets. It is a substantial burden: *i.e.*, explaining how the suspect has economically accumulated his wealth (Supreme Court 2004 *Montellla*). The

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355 Court of Cassation, United Chambers, 17 December 2003, Montella, No. 920, 1187; Court of Cassation, United Chambers, 30 May 2001, Derouach, in *Foro it.* 2001, II, 502 - 504.

356 Court of Cassation, United Chambers, 30 May 2001, Derouach, cit., 502.

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

358 Court of Cassation, United Chambers, 17 December 2003, Montella, No. 920, 1187; Court of Cassation, 13 May 2008, No. 213572, *Ced* Rv. 240091; Court of Cassation, 13 May 2008, No. 213572, *Ced* Rv. 240091; Court of Cassation 30 October 2008, No. 44940; Court of Cassation 13 May 2008, No. 21357, E., in *www.dejure.giuffrè.it*.

problem is, therefore, that the silence of the accused becomes evidence supporting the presumption of the illicit origin of the assets [359], in contrast with the right to silence also affirmed by Directive 2016/242 (recital 24).

8. The nature of the extended confiscation (art. 240 bis Criminal Code).

The Directive allows the MS to choose the nature of confiscation. According to recital No. 21 (No. 13 in the old Directive): «Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures» (recital No. 10 of the old Directive: «Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court»).

The legal nature of the extended confiscation is not clear. It could be assumed that the lawmakers, in defining this figure as «particular cases of confiscation», refers to the general figure of confiscation provided for in the Italian legal system, namely the confiscation-security measure referred to as in art. 240 Criminal Code, and therefore it should be of a preventive nature. In the opinion of the Supreme Court and the Constitutional Court, it is a security measure with preventive nature (Constitutional Court, order No. 18/1996, *Basco*; Supreme Court, Sixth Chamber, No. 1600/1996): «atypical asset security measure, replicating

[359] Court of Cassation, United Chambers, 17 December 2003, Montella, No. 920, 1187; Court of Cassation, 26 April 2007, No. 21250, § 4; Court of Cassation, 2 June 1994, Malasisi, in Cassation *pen.* 1995, 907; Cfr. Court of Cassation, 30 October 2008, No. 44940; Court of Cassation, Chamber. 1, 5 june 2008, No. 25728; Cc. - dep. 25 june 2008 - Rv. 240471; Court of Cassation, 5 June 2008, No. 25728, C.; Court of Cassation, 13 May 2008, No. 21357, E., in *www.dejure.giuffre.it*.; see also POTETTI, *Riflessioni in tema di confisca di cui alla legge 501/1994*, in Cassation *pen.* 1995, 1690; L.FERRAJOLI, *La normativa antiriciclaggio*, Milano 1994, 33; G.FIANDACA -E.MUSCO, *Diritto penale – Parte generale*, VI ed., Bologna 2010, 848; G.NANULA, *Le nuove norme sul possesso ingiustificato di valori*, in *Il Fisco* 1995, 10137.

the characteristics of the anti-mafia preventive measure … and the same preventive purpose»[360].

Lastly, it is noted that the preventive function has undergone a significant enhancement by Law 17 October 2017 No. 161, which, in art. 31, introduced multiple changes to the rules on 'extended' confiscation «and, in particular, the application even in the event of prescription or amnesty» [361].

The scholars criticise this judicial interpretation because the mandatory nature of the confiscation in question excludes, however, the possibility of subordinating the application of the measure to the assessment of the social dangerousness of the offender, which would be the prerequisite for the security measure, apart from the fact that the dangerousness of the interested parties (and of the assets) has never figured among the requisites of this form of confiscation [362] and, in a purely preventive approach, it would not make sense to confiscate in relation to the heirs[363], as allowed by the latest reforms.

Furthermore, as highlighted by scholars in relation to the confiscation-preventive anti-mafia measure, to pursue purely preventive purposes, the requirement of the illicit origin of the assets (detected by the disproportionate character) would not be necessary, since the

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360 Court of Cassation, United Chambers, No. 29022/2001, Derouach; Court of Cassation, United Chambers No. 33451/2014; C. V, No. 1012/2017; Court of Cassation, Chamber I, No. 19470/2018; Court of Cassation, Chamber II, No. 5378/2018; Court of Cassation, Chamber VI, No. 54447/2018.

361 Court of Cassation, Chamber V, No. 1012/2017.

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

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

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

asset, however, is not in itself dangerous, but becomes so in relation to a dangerous subject, who could in the future use it to commit crimes [364].

The authors who do not believe that the extended confiscation is a security measure, have qualified it as an 'ancillary patrimonial penalty' with consequent retroactive inapplicability [365]; or, 'penalty of suspicion' or '*sui generis* penalty' [366]; or in any case a sanction in the broad sense 'released from a fact of crime' [367]. This measure constitutes a 'patrimonial sanction of a purely punitive nature' [368], whose real function is, however, that of an instrument of wealth control aimed at the purposes of procedural efficiency: «the measure assumes a serving role with respect to the purposes of the process, or rather of the investigations»; the aim would be «bringing out, at least in their patrimonial dimension, what by definition remains hidden: crimes intended to integrate the dark figure» [369]. Or, again, it has been observed that the extended confiscation, despite being connected for repressive reasons to the definitive verdict for an exhaustive class of criminal offences with economic connotation, represents an instrument of neutralisation and recovery of wealth of presumed illicit origin on the basis of the assumption, for the past, of the derivation of assets from similar crimes not subject to procedural assessment, and, for the future, of their possible subsequent reuse both for

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

365 MAZZA, 33; FURFARO, 210; LUNGHINI-MUSSO, 43; L.FORNARI, *op. cit.*, 66, criticizes the definition of accessory penalty because the latter is essentially intended to prohibit legitimate activities or prerogatives that the offender has abused, while the confiscation in question tends to prevent a management activity inserted in an illegitimate system of reproduction of wealth.

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

367 F.SGUBBI, *L'art. 12 quinquies della legge n. 356 del 1992 come ipotesi tipica di anticipazione: dalla Corte Costituzionale all'art. 12 sexies,* Torino 1996, 30; G.SQUILLACI, *La confisca "allargata" quale fronte avanzato di neutralizzazione dell'allarme criminalità*, in *Dir. Pen. Proc.* 2009, 1531, No. 38

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

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

financing further illegal activities, and for supporting legal economic activities with distorting effects on the market and competition [370].

The Constitutional Court, in a recent ruling (No. 24/2019), denies any punitive nature («the relative presumption of illicit origin of items, which justifies their ablation in favour of the community, does not necessarily lead - as sometimes it is argued - to recognise the substantially sanctioning-punitive nature of the measures in question»), but attributes both the extended confiscation and the preventive confiscation - to which the same *ratio* is recognised – a mere 'compensatory - restorative function'. Similarly, the *Gogitidze* case of the ECtHR: from the point of view of the system, the ablation of these assets is not a sanction, but rather the natural consequence of their illicit acquisition, which determines - as well highlighted by the recent ruling, already mentioned, of the United Chambers of the Court of Cassation – a genetic defect in the constitution of the same property right of those who have acquired the material availability, resulting «all too obvious that the social function of private property can only be fulfilled on the indeclinable condition that its purchase complies with the rules of the legal system. Therefore, the acquisition of assets *contra legem* cannot be considered compatible with that function, so that a purchase affected by illegal methods can never be opposed to the state system (Court of Cassation, First Chamber, No. 4880 of 2015)». Recently, this has been the opinion of some authors[371].

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

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

On the other hand, some authors maintain that such an opinion cannot be shared, although it fully recognises this restorative-compensatory function to the direct confiscation of ascertained profits (as the offence is not a legitimate right to purchase items and it would be a question of returning something that one has no right to hold). However, there is compensation in the strict sense only in relation to the profit of which it is possible to ascertain the causal link with the crime and, therefore, the illicit nature. Confiscation pursuant to art. 240-bis, instead, affects all the assets of the offender whose legitimate origin cannot be demonstrated, and, therefore, also the assets with respect to which the causal link with a specific crime has not been ascertained. Clearly, the more binding will be the verification of the illicit origin of the assets to be confiscated by the prosecution (at least through proof of the disproportionate nature of the individual asset at the time of purchase), the more the confiscation in question will assume a compensatory and not a punitive nature [372]. Furthermore, it must not be forgotten that this form of confiscation also assumes an undoubted 'stigmatising' character of a criminal nature, where it is based on the presumption of illicit origin of assets of disproportionate value and therefore on the presumption that the recipient is responsible for other crimes, in addition to the one subject to conviction, from which he made a profit; the extended confiscation is based on (and ends up attributing to the recipient of the measure) an alleged criminal career, a criminal activity of a professional and habitual nature, source of the illegal accumulation of assets. In this form of confiscation, a punitive nature emerges, both for its significant impact (*afflittività*), being able to involve the subtraction of the entire patrimony, and for the aim pursued, which is above all general and not only special prevention, in particular the prevention of illicit use of wealth or economic

[372] A.M.MAUGERI, *Le moderne sanzioni*, 517 ff.

incapacitation [373]. This form of confiscation pursues a general and special prevention purpose because «on the one hand it threatens the subtraction of the illicit profit that represents the purpose of the crime and, on the other, it subtracts that same profit by preventing the offender from enjoying the benefits of crime and, as the true preventive purpose emerges, from reinvesting the proceeds in crime or in any activity, even lawful, to the detriment of free competition and the laws of the market. This is a measure that was created, from a macro-criminal point of view, as an instrument of economic incapacitation of organised crime and of preventing its infiltration into the legitimate business, but which has taken on the aim of guaranteeing, *sine die*, the subtraction of profit ... and ... ends to also assume a punitive impact»[374].

In consideration of the intrusive nature of this form of confiscation, as also recognised by the Constitutional Court in ruling No. 33/2018, which can affect the entire patrimony and forces the holder to justify his lawful origin, stigmatising her/him as a professional offender, should, then, be recognised as being punitive, at least in the broad meaning accepted by the ECtHR in relation to the concept of criminal matter. This, in order to recognise the criminal safeguards (from the principle of non-retroactivity, to the presumption of innocence up to ne bis in idem). What is at stake, in fact, is not the definition of figure's nature in itself, but the determination of the system of guarantees (the 'statute of guarantees') that is to be attributed to this model of confiscation - as highlighted by the Constitutional Court itself in judgement No. 24/2019 [375].

9. Application after the prescription and without the conviction.

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

[374] A.M.MAUGERI, *Una parola definitiva*, cit., 955

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

Normally, the application of confiscation ex art. 240 bis Criminal Code presupposes a conviction and the proof of guilt, even if this form of confiscation can be also applied in cases of statute-barred or amnestied crimes, pursuant to art. 578 bis C.P.C. introduced by Law No. 161/2017 and amended by Law No. 3/2019[376]. This rule states that when confiscation has been ordered in special cases pursuant to Article 240 bis Criminal Code and other legal provisions, or pursuant to art. 322 ter Criminal Code, the appeal judge or the Court of Cassation, in declaring the offence expired either by a cause of extinguishment of the offence or by amnesty, shall deliberate on the appeal only with regard to the effects of the confiscation, after determining the liability of the accused.

It follows that, in order to apply the provision in question, the judge must have already ordered the confiscation before the crime is extinguished; in the end, if the confiscation has not already been ordered, it will still be possible to initiate the preventive proceedings for the purposes of applying confiscation as a patrimonial preventive measure[377].

The European Court of Human Rights has supported this approach, the possibility to apply the confiscation – even if punitive – after the crime is statute-barred (in the *G.i.e.m.* case; *contra Varvara* case), in relation to the so-called 'urban confiscation' which, in case of unlawful site development (art. 44 Decree of the President of the Republic No. 380/2001), as examined above, allows for the confiscation of the land and all structures built on it. The ECtHR, in the *Sud Fondi* case, considered this form of confiscation as punitive and to be included in the criminal matter. The ECtHR has affirmed that art. 7 ECHR excludes the possibility of imposing a criminal sanction against a person without the verification and prior

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

[377] A.M.MAUGERI, *La riforma della confisca*, cit., 31.

declaration (even incidental) of his/her criminal liability, which can be contained within a verdict that, nevertheless, declares the crime to be extinct by statute of limitations[378].

The scholars criticised the possibility to apply a form of extended confiscation without the final conviction, required by the law (art. 240 bis Criminal Code), in violation of the principle of legality; and the possibility to carry on the proceeding after the crime is statute-barred only to apply the confiscation is considered a violation of the substantive nature of the figure of statute-barred crimes. Such a substantive nature has been affirmed by the Constitutional Court (No. 24 del 2017) to guarantee the right to 'be forgotten' and the presumption of innocence (the application of a punitive sanction in the course of a criminal trial, in the absence of the measure that 'institutionally' crystallises the ascertainment of criminal responsibility, infringes, in defiance of art. 6, paragraph 2, of the ECHR, the right of the accused acquitted not to be 'stained', socially stigmatised, by an afflictive sanction, however qualified[379]). In his dissenting opinion in the *G.I.E.M.* case, Judge Albuquerque has stressed the violation of the principle of legality and of the presumption of innocence. The content of the principle of legality includes the principle *nulla poena sine culpa*, which must be established (both the *culpa* and the *poena*) within the timeframe set by the relevant statute of limitations. In a State governed by the rule of law and the principle of legality, the power of the State to prosecute and punish offences, even complex offences, is limited by time constraints, or to use the elegant formulation of the Constitutional Court, «with the passage of time after the commission of the fact, the need for punishment is attenuated and a right to be forgotten matures for its author. Otherwise, the values of legal certainty and

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

[379] V.MONGILLO, *La confisca senza condanna nella travagliata dialettica tra Corte costituzionale e Corte europea dei diritti dell'uomo. Lo "stigma penale" e la presunzione di innocenza*, in *Giur. cost.*, 2015, No. 2, 431; on this topic V.MANES, *Confisca urbanistica e prescrizione del reato*, in Cassation *Pen.*, 2015, 2195.

predictability inherent in the principle of legality, and therefore the principle itself, would be sacrificed on the altar of the efficiency of the justice system» (§ 23).

In any case, the situation has changed after the recent reform of the criminal trial (Law No. 3/2019 and Law No. 134/2020) which has modified the rules regarding statute limitation period, which is now definitely interrupted after the verdict of first instance (Law No. 3/2019), and the introduction of the 'unproceedability' examined above (that is, the expiration of the statute limitation period during the appeal judgement will be no longer possible, but there will be a bar to prosecution after a certain period - from 2 to 3 years for the second instance judgement). There were two possible solutions: either the same mechanisms of art. 578 bis C.P.C. could have been adopted, so that even after the expiry of the bar prosecution period, the Court would have the power to order confiscation after assessing the defendant's criminal liability (confirmed by new art. 115 bis C.P.C.); or transferring the decision regarding confiscation after bar prosecution period in the proceeding of prevention, as it is now already provided for the decision on civil compensation after the quashing of the acquittal verdict by the Court of cassation for civil liability (art. 622 C.P.C.).

This second solution has been adopted with the introduction of the art. 578 ter § 2 C.P.C., by virtue of Legislative Decree 10 October 2022 No. 150 (so called Cartabia Reform): «2. Except for the cases referred to in paragraph 1, if there are assets in seizure for which confiscation has been ordered, the judge of appeal or the Court of Cassation, in declaring the criminal action as inadmissible pursuant to article 344-bis, order the transmission of the documents to the public prosecutor at the court of the district capital or to the national anti-mafia and anti-terrorism prosecutor competent to propose the patrimonial measures referred to in title II of Book I of Legislative Decree 6 September 2011, No. 159".

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

After the reform introduced by Law No. 161/2017, extended confiscation, after the final conviction, can also be applied in the event of the death of the person concerned, and can therefore remain in effect in relation to the person's heirs or assignees (art. 183 quarter Criminal Procedure Code implementing provisions). Accepting the most recent jurisprudential opinion[380], the application of the confiscation against the successors in the case of death of the offender is allowed, where it would no longer be possible to apply the confiscation belatedly, through the 'execution incident' (art. 666 C.P.C.)[381] for the supervening death of the convict. While the possibility of proceeding against the heirs with the prevention procedure aimed at applying the confiscation (pursuant to art. 24 Legislative Decree No. 159/2011) is possible only within five years of the death, in this case there is no deadline.

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

380 Supreme Court, Forth Chamber, 4 July 2008, *Ciancimino*, No. 27343, in *Mass. Uff.* No. 240585.

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

A similar issue was addressed by the Constitutional Court in case No. 21 and 216 of 2012, on the subject of preventive confiscation, and it was resolved by declaring inadmissible the question of constitutional legitimacy of Law No. 575/1965, art. 2-ter § 11 (now art. 24 Legislative Decree No. 159/2011), posed in relation to the articles 24 and 111 of the Constitution, and highlighting the peculiarity of both the preventive procedure and the procedure aimed at applying a security measure, which cannot be superimposed on the criminal one: «the preventive procedure, the criminal trial and the procedure for the application of the security measures have their own peculiarities, both in the procedural field and in the substantive assumptions»; «the forms of exercise of the right of defence [may] be differently modulated in relation to the characteristics of each proceeding, when the purpose and function of this right are in any case ensured» (judgement No. 321 of 2004).

Despite these affirmations of the Constitutional Court, a problem still concerns the heirs, third parties by definition: «the right to defend themselves by trying is only guaranteed on paper but not in substance, with all the consequences in terms of the effectiveness of the hearing and due process» [382].

11. Extended confiscation against third parties.

As analysed above, Article 240-bis Criminal Code also concerns the assets owned by or available to the convicted party in any capacity, even through a natural or legal entity (see above § 4. Ownership or Availability of the assets); also, the extended confiscation can be applied in the event of the death of the person concerned and, therefore, it can remain in

[382] MANGIONE, *La 'situazione spirituale' della confisca di prevenzione*, in *Riv. it. dir. proc. pen.* 2017, 625. See in relation to preventive confiscation Court of Cassation, Chamber. VI, 26.6.2017, De Marco, No. 31504, in Mass. Uff. No. 270854. See MENDITTO, *Verso la riforma del d.lgs. n. 159/2011*, cit., 71, who quoted *Silickienė c. Lituania*, 10 Aprile 2012, No. 20496/02.

effect in relation to the person's heirs or assignees (Article 183-quarter Criminal Procedure Code implementing provisions; see § 10).

The system for the protection of third parties, provided for in Legislative Decree No. 159/2011 for the preventive confiscation (art. 24 Legislative Decree No. 159/2011, without conviction), has been extended to confiscation *ex* Article 240-bis Criminal Code and to any form of seizure or confiscation with regards to crimes mentioned in Article 51 § 3-bis of the Italian Code of Criminal Procedure (Article 104- bis § 1-quarter of Criminal Procedure Code implementing provisions). In particular, Article 104-bis § 1-quinquies of the Criminal Procedure Code implementing provisions, introduced via Legislative Decree No. 21 of 2018, states that «third parties vested with property interests or personal rights of enjoyment on seized assets, available to the accused in any capacity, must be summoned».

Article 104-bis § 1-sexies Criminal Procedure Code implementing provisions is also applicable in the event that, in declaring the offence extinguished, the appeal judge or the Court of Cassation deliberate on the appeal only with regards to the extended confiscation' effects, after determining the liability of the accused (article 578-bis of the C.C.P.).

12. The confiscation by equivalent of the extended confiscation

The confiscation by equivalent of the extended confiscation was introduced by art. 10 Decree Law No. 92/2008 into art. 12-sexies § 2-ter Decree Law No. 92/2008 and then immediately reformed; now it provided for in § 2 of art. 240 bis Criminal Code.

It is a form of confiscation by equivalent of the items that are the object of the extended confiscation, *i.e.*, of assets of disproportionate value that can no longer be directly confiscated (because they are dispersed, hidden, alienated, ...). This form of confiscation of value has a particularly pronounced punitive *ratio*, because it distorts the original criminal political function of the confiscation of value. The confiscation by equivalent arises as a tool to

combat the attempts of the offender to frustrate the application of the direct confiscation of specific assets, assuming that it has been ascertained that a specific profit or well-identified product has derived from the crime, connected by a causal link to the crime, and it is not possible to confiscate it because it is dispersed, alienated, hidden.

Confiscation by equivalent is the first fundamental tool to overcome the limit of traditional forms of profit confiscation which require the ascertainment of the causal link between the crime and the profit or product; the same limit which, as highlighted by the Constitutional Court No. 33/2018, posed the need to introduce forms of extended confiscation.

On the other hand, in relation to the forms of extended confiscation which do not require the establishment of the causal link in question, but extend to all profits of disproportionate value (or of suspected origin) on the basis of the presumption that the disproportion is an indication of illicit origin, the application of confiscation (also) by equivalent pursues a punitive efficiency aim with an 'omnivorous and draconian' character, as it represents a degeneration of the nature of confiscation by equivalent and a punitive abuse without a clear criminal political purpose.

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

In the case of seizure for the purposes of confiscation by equivalent or extended confiscation (art. 240 bis Criminal Code), in which there is no link between the assets to be seized and the crime itself, the prerequisite for applying the measure is the presence of serious clues as to the existence of the conditions required for the application of confiscation[383], in

[383] Court of Cassation, United Chambers, 17 December 2003, No. 920, Montella, in C.e.d., No. 226492

addition to the abstract possibility that a crime has been committed in relation to which the measure is permitted.

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

The criminal trial characteristics of orality, immediacy, and brevity are not very conducive to the documentary checks required for confiscation to be applied, and for this reason the practice of postponing the confiscation until the enforcement phase has been adopted (see Article 676 Code of Criminal Procedure; this is a praxis recognised by the Supreme Court's United Chambers in the *Deourach* (C s.u. 01/29022) case and by the Constitutional Court in judgement No. 33 /2018).

This solution was embraced by the lawmakers, first via Law No. 161/2017 (art. 12 sexies, § 4 sexies) and subsequently via Legislative Decree No. 21/2018, which transposed the contents of the Criminal Procedure Code implementing provisions (art. 183 quarter entitled 'Execution of confiscation in special case').

This law states that, once the final ruling has been issued, the power to order extended confiscation lies with the enforcement judge. In this case, upon receiving the request for seizure and confiscation from the public prosecutor, the enforcement judge orders them in compliance with formalities referred to as in Article 667 § 4 Criminal Procedure Code, *i.e.*, the enforcement judge orders the measure to be adopted, meaning that, above all, without hearing the parties (*inaudita altera parte*; the judge can decide *de plano* either on the basis of the request and the elements proposed by the public prosecutor, or *ex officio*). The deadline for the parties to challenge such a decision is the thirtieth day after the decree has been

transmitted or notified. Should the decree be challenged, a chamber hearing can be scheduled for cross examination, and the discipline provided for in article 666 Criminal Procedure Code applies. Afterwards, the adopted decision can be appealed to the Supreme Court of Cassation[384].

This procedure, which allows for the application of the extended confiscation without hearing the concerned person, is in violation of the principle of legality, because art. 240 bis Criminal Code requires that the convicted person does not justify the proportionality and legitim origin of her/his assets; clearly, this means that she/he must be entitled to do it during a hearing. So, this procedure limits the right to defence, also because it does not provide the possibility to appeal the decision to the Court of Appeal, being possible only to challange it before the Court of Cassation[385].

The Constitutional Court has considered this limitation of appeal consistent with the right to defence, enshrined in art. 24 Italian Constitution[386]. However, in the *Paraponiaris v. Greece*, the European Court even considered as incompatible with the presumption of innocence the application of an ablative measure which is adopted in procedural stages which does not allow for a proper exercise of the right to defence[387].

14. Issues of constitutionality.

The modern types of extended confiscation, intended to fight criminal organisations, appear in themselves to be symptomatic of the change in paradigms that characterises, more

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

385 See A.M.MAUGERI, *Art. 240 bis c.p.*, in *Codice penale*, a cura di T.PADOVANI, cit., 1624 ss.

386 Constitutional Court, 9.6.2015, No. 106; cfr. Court of Cassation, Chamber. VI, 4.6.2014, No. 39911; Court of Cassation, Chamber. I, 10.6.2014, No. 52058.

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

generally, contemporary criminal law in the passage from a 'classic' model to a 'modern' or 'post-modern' one [388].

In this perspective one can understand the difficulties in reconciling these modern sanctions with the principles of the liberal tradition of criminal law and the guaranteeing of the citizens' rights.

According to some scholars, the type of 'extended' confiscation included in art. 240 bis Criminal Code violates some constitutional principles [389].

These legislative forms of confiscation are criticised by academic authors at the national level, particularly with regards to the compatibility of such forms of confiscation with the principle of non-retroactivity, the presumption of innocence, the principle of proportionality, and the protection of property rights.

As examined above, the principle of non-retroactivity is not applied to the confiscation-security measure (art. 200 Criminal Code), such as – in the lawmakers' opinion – the extended confiscation pursuant to art. 240 bis Criminal Code.

In relation to the British confiscation – which is a form of extended confiscation after conviction – the decision adopted by the ECtHR in the *Welch v. The United Kingdom* case has specified that confiscation, considered as a 'penalty' in this judgement, does not violate art. 7 of the Convention, where it allows for the confiscation of profits deriving from crimes committed before the entry into force of the Drug Trafficking Offences Act 1986 (which entered into force on 12 January 1987), provided that the confiscation order is pronounced in relation to a crime committed after the entry into force of the Act. In order to not violate art. 7, the offender must have «his eyes open in relation to the possible consequences» that may derive from the perpetration of the crime, including, in this case, the confiscation of the

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

[389] A.M.MAUGERI, *Le moderne sanzioni, cit.*, 668 ss., 736 ss., 754 ss., 831 ss.

profits deriving from previous crimes[390]. The prohibition enshrined in art. 7 – the EctHR specifies – «concerns only the retroactive application of the relevant legislation and is not in question in relation to the power of confiscation conferred on the courts as a weapon in the battle against the scourge of drug trafficking» [391].

The Italian Supreme Court has denied that an argument can be drawn from *Welch* to support the non-retroactivity of the extended confiscation pursuant to art. 12 sexies Law No. 356/1992 (now art. 240 bis Criminal Code) – which continues to be applied retroactively as security measure *ex* art. 200 Criminal Code –, highlighting the «absolute incompatibility of the compared figures »[392].

In reality, the principle of law expressed in *Welch* should apply to all forms of extended confiscation of profits. However, the Supreme Court considered it more functional, because its efficiency needs not to take into consideration the guarantee recognised in art. 7 of the Convention.

In a way more consistent with the safeguards, the German lawmakers have also subjected the *Erweiterter Verfall* to the principle of non-retroactivity (see § 73d StGB, introduced in 1992; now – after the 2017 reform – § 73a StGB *Erweiterte Einziehung von Tatbeiträgen bei Tätern und Teilnehmern*). It is a form of extended confiscation which affects profits of suspicious origin[393] and does not constitute a *Strafe* but a *Maßnahme* pursuant to §§ 11 paragraph 1, No. 8, and 61 StGB[394].

As examined above, in the opinon of the Supreme Court (see the fundamental *Montella* case of 2004) and of the Constitutional Court (No. 18/1996, No. 33/2018, and No. 24/2019

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

391 ECourtHR, *Welch*, *cit.*.

392 Court of Cassation, 28.1.2003, Scuto e altri, in *Foro it.* 2003, II, 514.

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

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

particularly § 2 and 6), this form of confiscation means a mitigation of the constitutional safeguards with respect to the property right; however, this is acceptable if one considers the importance of the property right in the scale of the constitutional values. Indeed, the principle of non-retroactivity is not violated because it concerns only the punishment; there is no reversal of the burden of proof (only a 'burden of allegation'); also, there is no violation of the presumption of innocence, which only concerns the protection of personal freedom; finally, the right to defence is respected because the owner can demonstrate the lawful source of his assets (see § 6) [395].

Some scholars think that there is 'a price to pay' in terms of citizens' guarantees for a more effective fight against organised crime, as the strategic objective is to attack the economic basis of organised crime, including the property of the individual criminals. As a consequence, this means limiting the further spread of such a serious 'social disease' as well as preventing the 'pollution' of legitimate businesses as a result of money laundering. The property of members of organised crime is 'dangerous' because it is liable to be used for unlawful purposes including the reinvestment of the relative capital in legitimate economic activities. If it is true that organised crime posts a serious threat to democratic principles, it is necessary to counter this threat by relying on new mechanisms while, at the same time, 'updating' the classical definition of the protection of citizens' rights. Historically, the fundamental criminal law safeguards have taken, as a reference point, punitive sanctions that impinge on the value of personal liberty – a value which is still of primary importance in modern times; classical criminal law principles should be mitigated when the sanction exclusively affects property rights, only with preventative purposes. An affirmative argument assumes that in the current evolutionary stage of legal systems, property rights no longer

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

occupy a primary position in constitutional values, but certainly rank below the importance attributed to personal liberty [396].

This is true.

However, as United States Supreme Court observed in *United States vs. James Daniel Good Real Property*, freedom finds a tangible expression in property. There is an indissoluble bond between right of freedom and property right [397]. If a government has an uncontrollable power on property rights of a citizen, all other rights became without value [398] (if a government can confiscate, with no limits, the assets of citizens, there is no more freedom, because property is a guarantee for freedom).

Art. 1, I Protocol of the European Convention of Human Rights establishes: «property rights are a condition for personal and familiar independence». Property is also a tool to express the freedom of economic initiative [399].

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

The presumption of innocence is incompatible with this kind of sanctions, based on the reverse of the burden of proof, because, according to this fundamental principle of democratic societies, all the facts, on which the penalty is founded, must be proved in criminal proceedings in accordance with criminal law safeguards. Instead, in the confiscation

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

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

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

399 *United States v. James Daniel Good Real Property,* 114 Supreme Court 492 (1993); MAUGERI, *Le moderne sanzioni patrimoniali*, *cit.*, 670.

proceeding, either the 'other' crimes if the conviction is required, or the crimes in the *actio in rem*, from which the unlawful assets derive are not demonstrated.

In these procedures, the asset is confiscated only on the assumption that it comes from offences, but without the proofs of this unlawful origin. The criminal law safeguards are not respected, first of all the right to silence, because the presumptions of the illegal origin can become a proof if the owner fails to refute the assumption: this means that the silence acquires a probative value. The presumption of innocence, then, requires that the burden to establish the unlawful origin of assets is on the prosecution, that the evidence must be enough to overcome the presumption of innocence, and that the method used to obtain the evidence respects the defendant's guarantees, particularly the right to defence and the connected right to silence (as far as the presumption of innocence is deemed as as rule for the 'dignity' of the proof)[400].

Finally, in order to find a good balance between the efficiency needs in the fight against criminal organisations and the protection of the citizens' safeguards, it would be better if the prosecutor had at least the burden to demonstrate the unlawful source of the assets by circumstantial evidence. This does not mean that the prosecutor must prove the relationship between items and specific crimes, but only the illicit origin of the assets. Moreover, in the implementation of kinds of confiscation extended in such a way as to affect the whole estate, the civil standard of proof is not acceptable to respect the fundamental guarantees of the presumption of innocence, the right to silence, the property right, and the proportionality principle.

U.S. authors also criticise the discipline of the civil forfeiture and urge the adoption of a higher standard of the proof: «Increasing the evidentiary burden would prevent the

[400] A.M.MAUGERI, *Le moderne sanzioni patrimoniali*, *cit.*, 775 ss. – 831 ss.

government from seizing property based on flimsy evidence, such as the commonly used theory that possession of a large sum of cash itself indicates criminal activity» [401].

To conclude, it is important to stress, as analysed above, that the Supreme Court and the Constitutional Court require the proof of the disproportionate character in relation to each asset at the moment of the purchase and the 'temporal reasonableness'. Also, as the Constitutional Court has highlighted, it is important that the proof of the disproportionate character is interpreted as evidence of the criminal origin of assets, as these are confiscated because they derive from crime and not because the value is disproportionate.

In other legal systems, the proof of the disproportionality is only one, among the others, important typology of evidence. Also, from a *de iure condendo* perspective, this can be an element to be taken into consideration. However, in any case, this kind of proof in relation to each good at the moment of the purchase, is very demanding for the prosecutor.

For the purposes of a reform, when the extended confiscation is issued in the enforcement proceeding, it would be important to provide the defence with the right to contradictory in the context of a hearing, before the confiscation is ordered.

15. Mutual recognition of the Italian extended confiscation order.

Confiscation pursuant to Article 240 bis of the Criminal Code should fall within the scope of the Regulation, considering that it is included in the model of extended confiscation in Article 14 of Directive 2024/1260 (formerly Article 5 of Directive 2014/42). This type of confiscation is typically applied in a criminal trial by a judge of cognition.

This possibility is further confirmed even when the Italian extended confiscation is applied in the enforcement procedure (Article 676 Criminal Procedure Code) pursuant to

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

Article 183-quarter of Legislative Decree 271/1989, § 1 (introduced by Legislative Decree No. 21/2018). In any case, it constitutes a 'proceeding in criminal matters' based on the autonomous interpretation adopted by the European Union, which, as specified in Recital No. 13, refers to «proceedings in relation to a criminal offense».

In clarifying the scope of the Regulation, Recital 13 specifies that 'proceedings in criminal matters' is an autonomous concept under Union law. It clarifies that «the term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offense». This expression is reiterated in Article 2, which defines confiscation as «a final deprivation of property ordered by a court in relation to a criminal offense» (in the original proposal, «proceeding for a crime»). Thus, it is sufficient that the proceeding before a judicial authority concerns the proceeds and/or instruments of the crime. Moreover, Directive 2011/99/EU extends the concept of the 'European protection order' to any measure aimed at protecting an individual from acts with criminal relevance, even where such measures are adopted outside of criminal proceedings in the strict sense[402].

Furthermore, Article 3, letter d), of Legislative Decree 7 August 2015, No. 137 (implementing Framework Decision 2006/783/JHA), includes the procedure for the adoption of extended confiscation under Article 240 bis of the Criminal Code within the context of decisions taken in criminal proceedings: «d) confiscation order: a measure issued by a judicial authority in the context of criminal proceedings, which consists of definitively depriving a person of an asset, including confiscation orders pursuant to Article 12-sexies of the decree-law of 8 June 1992, No. 306, converted, with modifications, by law 7 August 1992, No. 356»[403].

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[402] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order, recitals No. 9 and 10. On this point, see S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders*, p. 205.

[403] (15G00152) GU Serie Generale No. 203 of the 02-09-2015).

This inclusion exists despite concerns about the compliance of this hybrid procedure with criminal law guarantees, as the powers of the execution judge are residual, and it is allowed to pronounce the confiscation *inaudita altera parte* (the chamber hearing can only take place following an objection). In any case the affected person can challenge the application of mutual recognition by proving that the fundamental guarantees of criminal matters have been violated in the concrete case and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) («the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence») and 19, h) («in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence»)[404].

Additionally, it is true that, as emphasized in the Explanatory Memorandum of the proposed regulation, the ECtHR has repeatedly deemed forms of confiscation – without conviction and based on presumptions – compliant with Article 6 of the ECHR and the right to property under Article 1 of the Additional Protocol of the ECHR, provided the presumptions are refutable and 'effective procedural safeguards are respected'. This is in line with Directive 2016/343 on the presumption of innocence, which in Recital No. 22 permits the use of presumptions. However, the same Directive 2016/343 mandates respect for the

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

right to silence as an essential aspect of the presumption of innocence (Recital No. 24). Therefore, it is not permissible to base proof of the illicit origin of assets on the silence of the defendant or to attribute probative value to it, as typically occurs in the application of extended confiscation measures, including those under Article 240 bis of the Criminal Code. In such cases, jurisprudence requires the affected party to provide the exhaustive explanation of how his wealth was economically built (Supreme Court of Cassation, United Chambers, No. 920/2004, *Montella*; C., No. 2761/1994; Supreme Court of Cassation, Second Chamber, No. 32563/2011).

Thus, to improve the mutual recognition of this form of extended confiscation, the application of the Regulation should encourage the adoption of a trial model that complies with criminal law guarantees, starting with the standard of proof required for the illicit origin of assets.

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

Index: 1. The preventive confiscation. - 2. The recipients and the principle of legality (*De Tommaso* judgement of the ECtHR and Constitutional Court No. 24/2019). - 3. The objective elements. - 4. The nature of preventive confiscation. – 4.1. The nature of the preventive confiscation in the European Court Human Rights' case law. - 4.2. The critics by the scholarship. – 5. The consistency of the preventive confiscation with the principle of criminal matter: the ECourtHR and Court Constitutional case law. - 5.1. The principle of legality. – 5.2. The property right. – 5.3. The presumption of innocence and fair trial principles. – 5.4. Ne bis in idem principle. - 6. The confiscation ex art. 34 Anti-Mafia Code. – 7. Procedural aspects. - 7.1. Chamber Hearing in the prevention proceedings. – 7.2. Other procedural guarantees. - 7.3. The appeal. - 7.4. Revocation. – 8. The protection of third parties in the preventive proceeding. – 9. Seizure „for prevention" envisaged by the "Anti-Mafia Code". - 10. The application of the Regulation No. 1805/2018 to the Italian preventive confiscation.

1. The preventive confiscation.

Law 13 September 1982 No. 646 regulating 'Mafia-type criminal association and provisions on preventive measures concerning property' (known as 'Rognoni-La Torre Act', as Pio La Torre and Virginio Rognoni were the Members of Parliament who proposed it) is considered to be a turning point in the fight against organised crime. Article 416 bis, providing for the crime of mafia-type criminal association, was introduced into the Criminal Code[405].

[405] This is a special form of criminal association whose main characteristics are: - its members use the intimidating power of the organisation and the resulting code of silence and intimidation, regardless of the commission of acts of violence or

In order to counter the economic interests of the mafia, Rognoni-La Torre Act introduced the anti-mafia seizure and confiscation (articles 2 bis, 2 ter, and 2 quarter). These additions radically changed the contrast-strategy against Mafia, which now hinges on the fight against the illicit assets. The innovations can be summarised as follows: a nexus between preventive measures against persons and preventive measures related to property has been established since then[406].

After some reforms[407], in 2011 Legislative Decree No. 159/2011 introduced the 'Code of Anti-Mafia laws, relevant preventive measures, and new Anti-Mafia provisions' (hereafter Anti-Mafia Code). The Anti-Mafia Code combined all the previous legislation into a unique normative corpus and is currently the main reference point for preventive measures.

The legislation on preventive measures provides for different forms of extended confiscation which are characterised by their applicability to specific categories of persons who have not been attributed criminal responsibility through verdict (not convicted), but only suspected (on circumstantial evidence) of criminal activities, persons considered a danger to society because suspected to be involved in crimes.

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threat. - Participants of the mafia-type association make use of such intimidating power in order to: 1. commit crimes; 2. acquire (directly or indirectly) the management, or other forms of control, of economic activities, licences, permits, public contracts or services or gain unfair advantages or profits for its members or other persons 3. prevent or hinder the free exercise of the right to vote, or secure votes for its members or other persons in elections

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

407 Inter alia, l. No. 125/2008 and l. No. 94/2009.

In preventive proceedings it is not necessary to establish criminal liability for offences committed in the past, being the decision based only on 'circumstantial evidence'. Preventive proceedings do not depend on the initiation of proper criminal proceedings, and some scholars have pointed out that the evidentiary elements that in a criminal trial have not led to conviction for participation in mafia association, can warrant the application of preventive measures[408].

For this reason, such ablative measures are differentiated from traditional confiscation and are not really considered preventive measures – *i.e.*, *ante delicti*, applied in order to prevent the commission of crimes – but *praeter probationem delicti* measures[409].

While in the past ablative measures were applied together with personal preventive measures (special surveillance by the police or the prohibition/obligation of residence in a specific location) to currently dangerous people; with reforms passed in 2008 and 2009, it is possible to apply the preventive confiscation without imposing personal preventive measures, which require the proof of current dangerousness (the principle of disjoint

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

[409] For this expression A.M.MAUGERI, *Le moderne sanzioni, cit.*, 366 – 367; C.E.PALIERO – A.TRAVI, *La sanzione amministrativa. Profili sistematici*, Milano 1988, 33 – 34; S.HEIN-C.VISCONTI, *Combating Illegal Proceeds in Italy*, in MILITELLO – HUBER (eds.), *Towards a European Criminal Law against organised crime – Proposal and summaries of the joint European project to counter organised crime*, Freiburg im Br., 2001, 9294; about the confiscation - preventive measure A.M.MAUGERI, *Le moderne sanzioni, cit.*, 348 ss.; Art. 2 *ter* l. 575/'65, before the reform of 2008 e 2009, saied: "... the District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person against whom the proceedings have been instituted, when there is sufficient circumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment.

Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized in respect of which it has not been shown that they were lawfully acquired. Where the inquiries are complex, this measure may also be taken at a later date, but not more than one year after the date of the seizure.

The District Court shall revoke the seizure order when the application for preventive measures is dismissed or when it has been shown that the property in question was lawfully acquired."

application), and even in case of death of the owner occurred during the time of proceedings, or during the five years prior to the beginning of the proceedings (art. 18 Anti-Mafia Code[410]).

It is possible to distinguish two types of preventive confiscation:

(a) confiscation of assets which a subject does have at her/his disposal, when the value of such assets is disproportionate with respect to the declared income or economic activity, or when it results that they derive from illicit activity or have been used for reinvestment, as well as, at any rate, these are assets for which the defendant is uncapable to demonstrate a legitimate origin (art. 24 Legislative Decree No. 159/2011) [411];

(b) confiscation can also be ordered with regards to assets used in the exercise of an economic activity which, based on sufficient grounds, are considered objectively useful for the activity of persons who are considered for preventive measures, or if the person is the subject of ongoing criminal proceedings for crimes linked to organised crime. Such measure grounds on the consideration that 'there is reason to believe' that these assets are the 'fruit' of illicit activity or constitute the reinvestment of assets of such a nature, and the owner is uncapable to demonstrate a legitimate origin (art. 34 Legislative Decree No. 159/2011) [412].

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410 Art.18, 2. Asset preventive measures can also be ordered in the event of the death of the subject proposed for their application. In this case *the proceeding continues against the heirs* or in any case the assignees.

3. The patrimonial preventive procedure *can also be initiated in the event of the death* of the subject against whom confiscation could be ordered; in this case, the request for the application of the preventive measure can be proposed with regard to the successors in a universal or particular capacity within the term *of five years* from the death.

The asset preventive procedure *can be initiated or continued even in the event of absence, residence or stay abroad* of the person to whom the preventive measure could apply, upon proposal by the subjects referred to in article 17 competent for the place of last abode of the interested party, in relation to goods that there are reasons to believe are the result of illegal activities or constitute their reuse.

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

412 Art. 3 *quinquies,* 1. 1423/1956, introduced by art. 24 d.l. 306/1992, now art. 34, § 7 of the Antimafia Code.

2. **The recipients and the principle of legality (*De Tommaso* judgement of the ECtHR and Constitutional Court No. 24/2019)**

Notwithstanding the separation of the patrimonial (*i.e.*, against the assets) and personal (*i.e.*, against the persons) preventive measures via the 2008/2009 reforms, the measure under scrutiny cannot be considered as a proper *actio in rem* [413], because, in any case, the law (art. 6 Anti-Mafia Code), the Constitutional Court, and the Supreme Court require that the affected is a danger to society (social dangerousness, *'pericolosità sociale'*), even if he/she is no longer dangerous (*i.e.*, he was dangerous in the past). This means that she/he is considered to have been a danger in the past on the basis of circumstantial evidence of criminal activity or some kind of involvement in criminal activities or proximity to organised crime (art. 6 Anti-Mafia Code) [414]. The Supreme Court (United Chambers *Spinelli* 2014) established that the preventive confiscation becomes an "uncivil penalty" without the ascertainment of the dangerousness of the affected person, even if in the past.

The recipients are, amongst others ('special dangerousness'):

(a) person who, according to art. 16 Anti-Mafia Code, based on objectively verifiable facts, are suspects ('under investigation') for affiliation with the Mafia, Camorra or other criminal groups (without consideration of the way they are known locally) which act according to typical methods of mafia groups (art. 1, Law No. 575/1965, as modified by Law No. 646/1982 and now art. 4 Anti-Mafia Code);

(b) persons who are suspects ('under investigation') for commission of crimes provided for in art. 51 § 3-*bis* Criminal Procedure Code (crimes connected to criminal organisations, kidnapping for profit, racketeering, etc.) or in art. 12-*quinquies* § 1 Law No. 356/1992;

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413 See Constitutional Court 9 February 2012, No. 21, in *Dir. pen. cont.*, www.penalecontemporaneo.it/.

414 Constitutional Court 9 February 2012, No. 21.

(c) persons who committed acts preparatory to terrorism conducts, or persons who are, based on objectively verifiable facts, suspects (under investigation) for terrorism acts (including foreign fighters).

Also, 'ordinary dangerousness' is considered (when it is established that the individual posed a danger to public safety), *i.e.*:

«(1) individuals who, on the basis of factual evidence, may be regarded as habitual offenders (art. 19 Law No. 152/1975, now art. 4 § 1, letter *c)* that recalls art. 1 Anti-Mafia Code) – a category that has been declared unconstitutional by Constitutional Court No. 24/2019, after ECtHR *De Tommaso* judgement[415];

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

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

Since 2008/2009, the relevant legislations have increasingly been characterised by an extension of their scopes, from only organised crime (including terrorism) to economic crime.

In fact, these measures were introduced in 1982 by the Rognoni–La Torre law in the context of the fight against mafia-type associations, but their scope has been extended to all

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

hypotheses of so-called 'generic danger' with two historic reforms, respectively introduced by Law Decree No. 92/2008 and Law No. 94/2009, specifically with the repeal of art. 14 Law No. 55/1990.

It follows that these measures are also applied to crimes that are not serious in terms of risk of 'pollution' of legitimate businesses via assets having a criminal origin (*e.g.*, theft or embezzlement).

The presumption of illicit enrichment, on which the preventive confiscation is based, was grounded, in turn, on the connection between the criminal activities and the invasive and very serious phenomenon of mafia-type associations, as a permanent crime aimed at enrichment.

With the indiscriminate extension of the scope of these measures (to the so called generic danger), the presumption in question risks being deprived of a rational foundation, as it applies to subjects suspected of any crime.

In *De Tommaso* case, the ECtHR has established that personal preventive measures violated art. 2 Prot. 4 ECHR, which provides that any measure restricting the freedom of movement must be adopted in accordance with domestic law. The Court has stressed that the application of the relevant Act was non foreseeable, with excessive discretion resulting on the part of judges when defining the category of generic dangerousness. Notwithstanding judgements of the Constitutional Court clarifying the criteria by which to assess the need for preventive measures under the Act in question, the Act was found to be couched in vague and excessively broad terms. Neither the individuals to whom the measures were applicable (for example, those «who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime») nor the content of certain measures (for example requiring one «to lead an honest and law-abiding life» and not to give «cause for suspicion») were defined by law with sufficient

precision and clarity to comply with the foreseeability requirements of article 2 Protocol No. 4 to the Convention.

«Notwithstanding the fact that the Constitutional Court has intervened on several occasions to clarify the criteria to be used for assessing whether preventive measures are necessary, the imposition of such measures remains linked to a prospective analysis by the domestic courts, seeing that neither the Act nor the Constitutional Court have clearly identified the 'factual evidence' or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures. The Court therefore considers that the Act in question did not contain sufficiently detailed provisions as to what types of behaviour were to be regarded as posing a danger to society». The law in force «was therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures»[416].

Referring also to the case law of the ECtHR and in particular the *De Tommaso* case, the Constitutional Court (No. 24/2019) declared unconstitutional the provision allowing for the first type of personal and *in rem* preventive measures, *i.e.*, art. 1 letter (a) Legislative Decree No. 159/2011.

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

The Court has declared unconstitutional art. 4, paragraph 1, letter (c) Legislative Decree No. 159 of 2011, in the part in which it establishes that the measures envisaged by Chapter II also apply to the subjects mentioned in art. 1 letter (a), as well as art. 16 of Legislative Decree No. 159 of 2011, in the part in which it establishes that the preventive measures of seizure and confiscation, governed by articles 20 and 24, also apply to the subjects mentioned in art. 1 § 1 letter (a), and that is to «those who must be considered, on the basis of elements of fact, habitually engaged in unlawful dealings» (letter (a) above).

However, it declined to make a similar ruling to measures issued on the basis of letter (b) above. Whilst the legislation was sufficiently precise in relation to letter (b), the wording of letter (a) was inherently imprecise (in particular as regards the terms «unlawful dealings» and «habitually») in a manner that could not be rectified through judicial interpretation.

«Therefore, even if considered in the light of the case law that has hitherto attempted to clarify its scope, the legislative description in question does not satisfy the requirements of precision laid down both by Article 13 of the Constitution and, with reference to Article 117(1) of the Constitution, by Article 2 of Protocol No. 4 of the ECHR as regards the personal preventive measures of special supervision, with or without an obligation to reside or a prohibition on residing in a particular location; it also fails to satisfy the requirements imposed by Article 42 of the Constitution and, with reference to Article 117(1) of the Constitution, by Article 1 of the Additional Protocol to the ECHR as regards the in rem measures of seizure and confiscation».

In relation to art. 1 letter (b) Legislative decree No. 159/2011, in order to identify the 'crime categories' that can be assumed as a precondition for the measure, the Constitutional Court demands «the triple requirement – to be proved on the basis of precise 'factual elements', which the court will have to promptly account for in the reasoning of the judgement (Article 13, second paragraph, of the Constitution) – for which it must be *a)* crimes habitually committed (and therefore over a significant period of time) by the subject,

b) which have effectively generated profits for the latter, *c)* which in turn constitute – or have constituted in a given period – the only income of the subject, or at least a significant component of this income»[417].

In any case, on the basis of a more recent case law, the Supreme Court has distinguished the cognitive phase from the prognostic phase of the judgement of social danger, and claimed that the cognitive judgement is strictly based on the verification of facts «historically appreciable and constituting in turn 'indicators' of the possibility of registering the proposed subject in one of the criminological categories provided for by the law (the ascertaining and therefore reconstructive part of the judgement)»[418].

The most recent case law[419], even prior to the *De Tommaso* sentence, in attributing to the concerned person the condition of 'dangerous', does not make «a subjective and uncontrollable brand judgement», but «requires a complex operation of preliminary 'framing' of the subject – by virtue of the appreciation of facts – in one of the 'typifying' criminological categories of legislative rank, and this with respect to both the 'generic' and the 'qualified' dangerousness».

It has been maintained, as highlighted in the *Scagliarini* case, that «no preventive measure (whether personal or patrimonial) can therefore be applied where there is a lack of an adequate reconstruction of 'facts' suitable to determine the classification (current or previous) of the subject proposed in one of the 'specific categories' of danger expressly 'typified' by the lawmakers in art. 1 and art. 4 of the current Legislative Decree No. 159 of

417 Cfr. Court of Cassation, Chamber. II, 1.1.2018, No. 30974.

418 Court of Cassation, Chamber. I, 1 febbraio 2018, No. 24707, Oliveri; Court of Cassation, Chamber. I, 15.6.2017 (dep. 9.1.2018), Bosco Mario. No. 349; Court of Cassation, Chamber. I, 14.6.2017 (dep. 30.11.2017), No. 54119, Sottile; Court of Cassation, Chamber. VI, 11.10.2017, No. 2385; Court of Cassation, Chamber. I, 1.4.2019, No. 27696, Immobiliare Peonia s.r.l.; Court of Cassation, Chamber. VI, 21.9.2017, No. 53003, D'Alessandro.

419 Court of Cassation, Chamber. I, 24.3.2015, No. 31209, *Scagliarini*; Chamber. II, 4.6.2015, No. 26235, Friolo; Chamber. I, 11.6.2015, *Pagone*, No. 43720*;* Chamber. I, 2.2.2016, *Targia*, No. 16038; Court of Cassation, Chamber. I, 14.6.2017 (dep. 21/07/2017), No. 36258.

2021»; it is specified that «the judgement of prevention (...) is structured, above all, as a 'cognitive' judgement, aimed at reconstructing, preliminarily, that certain behaviours were performed by the concerned subject»[420].

As stated in the *Bosco* ruling, «in compliance with these principles, it has been maintained that [...] the description of the 'criminological category' referred to in articles 1 and 4 of Legislative Decree No. 159 of 2011, therefore, has the same 'value' that in a criminal law system is assigned to the incriminating rule, *i.e.*, it expresses the 'previous' selection and connotation, with primary source, of the 'relevant factual parameters', which can be represented by a specific conduct (the case of 'indication of commission' of a particular crime, with qualified dangerousness) or by a 'class of conducts' (the case of generic dangerousness)»[421].

In these judgements, despite continuing to deny the sanctioning nature of the measures in question, the guarantee principles of criminal law are expressly applied to preventive measures, inasmuch as they do not limit themselves to claiming the legal provision of the measure – as expressly enshrined in art. 25 § 3 Constitution for security measures –, but in line with the *De Tommaso* judgement, full application of the principle of 'precision' (*i.e.*, strict legality) is expected, as a guarantee of the predictability of the authority's intervention.

In this way, the preventive measure substantially fall within the notion of criminal matter, at least in the broad conventional sense (if one refers to the parameters of the ECtHR) or constitutional sense[422] (the two concepts do not necessarily coincide[423]), in which one can

[420] Court of Cassation, Chamber. I, 1.2.2018, No. 24707, Oliveri.

[421] Court of Cassation, Chamber. I, 15.6.2017, Bosco Mario. No. 349; Court of Cassation, Chamber. I, 14.6.2017 (dep. 30.11.2017), No. 54119, Sottile.

[422] Contistutional Court 43/2017; 68/2017.

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

recognise some of the safeguards specific of criminal law, in a sort of 'variable geometry of guarantees'[424].

Hence, as for the generic dangerousness, the latest and safeguards-oriented case law is not satisfied with mere suspicions or even clues (circumstantial evidence), rather requiring criminal and judicial precedents (previous judgements from which such a dangerousness can be inferred) – as the Supreme Court stated in *Spinelli*.

As underlined by the Constitutional Court No. 24/2019, «a previous criminal **ascertainment** is required. This ascertainment can derive from a conviction or from an acquittal verdict depending on limitation statute, amnesty or pardon which contains, in the reasoning, an ascertainment of the fact's existence and its commission by that concerned subject (Supreme Court of Cassation, No. 11846 of 2018, No. 53003 of 2017, and No. 31209 of 2015)» (§ 11). An acquittal verdict based on the merits ~~for a given fact~~ does not allow – also in light of art. 28 § 1 letter *b)* – that the fact is taken as the basis of the measure, except for some exceptional hypotheses[425]. Among such exceptions, first and foremost, the following can be mentioned: a 'cognitive interference' between the two proceedings (the preventive and the criminal ones) falls on an essential ingredient of the reconstructive part of the preventive judgement; the assessment of habituality to crime cannot be drawn from acquittal verdicts, nor from the pending of another criminal proceedings[426].

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424 MAZZACUVA, (2017), p. 111.

425 Court of Cassation, Chamber. I, 19.4.2018, No. 43826; Chamber. II, 19.1.2018, No. 11846, Carnovale; Court of Cassation, Chamber. I, 1.2.2018, No. 24707, Oliveri; Court of Cassation, Chamber. I, 1.4.2019, No.27696, Immobiliare Peonia s.r.l..

426 Court of Cassation, Chamber VI, 8 April 2020, No. 21045. Even if the same Constitutional Court reaffirms the autonomy of the preventive judgement with respect to the criminal one (Court of Cassation, section I, 15.6.2017, No. 349; No. 43826/2018; section 1, 24.3.2015, No. 31209; section VI, 29.5.2015, No. 23294; 29.5.2015, No. 2308; section II, 29.5.2015, No. 23041); "while starting from the assumption that "the judge of the preventive measure can reconstruct the historical episodes in question in a totally autonomous way - even in the absence of a related criminal proceeding - by virtue of the absence of prejudice and the possibility of autonomous preventive action" (Court of Cassation, No. 43826 of 2018)" (§ 11); and the sufficiency of elements emerging from pending criminal proceedings, Court of Cassation, Chamber VI, 13 July

«Mere clues (circumstantial evidence) are not enough, because the term used should be considered deliberately different and more rigorous than that mentioned in art. 4 Legislative Decree No. 159 of 2011 for the identification of the categories of 'qualified danger', where we speak of '*indiziati*'»[427].

Also in relation to cases of qualified dangerousness, the most attentive case law requires that a judgement about the diagnostic-confirmation phase has been issued[428].

It is possible to include, into the category of 'qualified dangerousness' subjects, those who belong to the mafia association pursuant to art. 1 Law No. 575/1965 and, nowadays, those who participate in the association pursuant to art. 4 Legislative Decree No. 159/2011.

Vague forms of contiguity (including ideological contiguity, commonality of mafia-culture, recognised expenditure of time with subjects involved in the association), as a category with a broader semantic range, are not included[429]; instead, what is included are only conducts attributable to mafia-type association, from which they would differ only for the lower standard of proof necessary for the purposes of social dangerousness judgement.

Therefore, it is required «the evaluation of a situation of contiguity to the association which is functional to the interests of the criminal structure (in the sense that the subject

2017, No. 36216; Court of Cassation, Chamber VI, 25 June 2020, No. 21060; "The prevention judge is not bound by the existence of a penal judgement", Criminal Cassation Chamber II, 18/01/2022, No. 8166.

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

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

429 Trib. Lecce, 4.11.1989, Riotti, in Cassation *pen.* 1990, 690, Court of Cassation, Chamber. VI, 29.1.2014, No. 9747, *Mass. Uff.* No. 259074; Chamber. II, 21.2.2012, No. 19943, *Mass. Uff.* No. 252841; Chamber. II, 16.2.2006, No. 7616, *Mass. Uff.* No. 234745), Court of Cassation, United Chambers, 2.2.2015, Spinelli, No. 4880, *Mass. Uff.* No. 26260 in *Riv. it. dir. proc. pen.* 2015, 922). See MAUGERI, *La riforma delle misure di prevenzione patrimoniali ad opera della l. 161/2017*, cit., 341 ss.; Id., *I destinatari delle misure di prevenzione tra irrazionali scelte criminogene e il principio di proporzione*, in *Ind. pen.* 2017, 81 ss.

must offer an 'effective contribution' to the activity and development of the criminal association)»[430].

The notion of 'belonging' evokes «being part or at least making a concrete contribution to the group»[431]; or it is required that an ascertainment is performed as to what constitutes «the synallagma underlying the attraction of this company into the area of influence of the association»[432].

It is therefore admitted that «the concept of belonging, evoked by the preventive legislation, is broader than that of participation; consequently, importance, in terms of preventive measures, is given to conduct that does not mean a stable bond between the concerned person and the association, rather revealing an activity of collaboration, even if not continuous», substantially including 'external' complicity (concorso esterno nell'associazione mafiosa).

«In order to ground the judgement on current events, the circumstances of the case each time in question must be evaluated in the light of specific indicators, such as the historical nature of the criminal group, the type of participation offered by the concerned person, the particular value of the individual contribution to the activity of the group» [433]; the contribution «consists in an act – even a single act – which is functional to the purposes of the association; situations of mere contiguity or proximity to the criminal group are excluded» [434].

[430] Court of Cassation, Chamber. VI, 29.1.2016, *Gagliano ed altri*, No. 3941, *Mass. Uff.* No. 266541; Court of Cassation, Chamber. VI, 8.1.2016, No. 8389.

[431] Court of Cassation, Chamber. 1, 14.6 (dep. 30/11) 2017, Sottile, No. 54119.

[432] Court of Cassation, Chamber. V, 23.3.2018, No. 20826; Court of Cassation, Chamber. I, 7.4.2010, No. 16783; Court of Cassation, Chamber. I, 17.5.2013, L.C., in CED, 256769), cfr. MAUGERI, *I destinatari delle misure di prevenzione*, cit., 37 ss.

[433] Court of Cassation, Chamber. V, 23.3.2018, No. 20826; Court of Cassation, No. 54119, 2017; Court of Cassation, Chamber. I, 7 aprile 2010, No. 16783; Court of Cassation, Chamber. I, 17 maggio 2013, L.C., in CED, 256769).

[434] Court of Cassation, United Chambers, 4.1.2018, No. 111.

The Supreme Court underlines that this recent opinion «represents a significant interpretative progression compared to previous case law (including Sixth Chamber No. 9747 of 29 January 2014, rv 259074 and others)[435]. In this regard, it is important to stress that safeguards-oriented case law requires that social dangerousness and its relevance are verified in order for personal measures to be applied, also with regards to persons who are suspects of belonging to a mafia association. Presumptions such as 'semel sodalis semper sodalis' shall be avoided [436].

In any case, conducts fulfilling a crime producing illicit income need to be verified, even *incidenter tantum* (and through information gathered in criminal proceedings not contested by the outcome of the judgement in question). Also, these conducts need to be considered as perpetrated (since the illicit income is postulated as an effect deriving from the crime), 'covered' by adequate demostrative evidence (Supreme Court, Sixth Chamber, No. 53003/2017; First Chamber, No. 31209/2015) [437].

The need for judges to take carefully into account, in their verdicts' reasoning, defensive arguments is also stressed, in particular when a "collaborator of justice" accuses of complicity in the crime[438].

However, some judicial precedents allow for the application of a preventive measure after acquittal verdicts (*sentenze di proscioglimento*), issued, in accordance with Article 530 § 2 Code of Criminal Procedure, by virtue of insufficient or contradictory evidence[439]. And in any case,

[435] Court of Cassation 2017 No. 48441.

[436] Court of Cassation, United Chambers., 4 January 2018, Gattuso, No. 111; Court of Cassation, Chamber. I, 5.2.2019, No. 24658; Court of Cassation No. 3309 /2020 ; Constitutional Court 2-6.12.2013 No. 291; see Court of Cassation, Chamber. I, 20/04/2022, No.17530

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

[438] Court of Cassation, No. 1831/2016, Mannina.

[439] Court of Cassation, Chamber I, 28 April 1995, *Lupo.*

the Constitutional Court 8n. 24/2019) confirms that the evaluation of evidence made in preventive proceedings is autonomous with respect to that performed in criminal trials[440].

In conclusion, it is important to empathise this tendency of a part of the jurisprudence to demand a serious ascertainment of the asset illegal origin in the preventive proceeding and to improve the safeguards of the criminal matter.

3. The objective elements.

In order to apply a preventive confiscation,

(a) the prosecutor needs to demonstrate:

i. that the asset is (either directly or indirectly) 'available' to the concerned person;

ii. that there is a 'disproportion' between the abovementioned person's declared income or economic activity and the value of the assets – Law No. 161/2017 transposed into statute law a principle once indisputedly maintained in case law, according to which the defendant cannot justify the origins of the assets by affirming that they are the reinvestment of income generated through tax evasion (with no possibility to demonstrate the proportionate value of

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

purchases performed via the proceeds of tax evasion, or even via taxable income subtracted from taxation);

iii. alternatively, that assets result is the result of unlawful activities or their reinvestment;

(b) and the owner is not able to demonstrate the proportionate value of her/his assets and to justify their legal origin

The onus of challenging the presumption lies on the affected person, who can provide evidence showing the lawful origin of the property in question[441].

As for the concept of assets' availability, the interpretation that has been affirmed for extended confiscation is maintained. In particular, art. 26 Anti-Mafia Code (rule introduced via Decree Law No. 92/2008) establishes that if it is ascertained that certain assets have been falsely registered or transferred to third parties, the judge declares, via the decree ordering their confiscation, the invalidity of acts of their disposal. The following are considered as fictitious:

(a) transfers and assignments, even for payment, carried out during the two years prior to the proposal of the preventive measure, involving a parent, child, spouse, or permanent cohabitant, as well as relatives within the sixth degree, and in-laws within the fourth degree;

(b) transfers and assignments, either free of charge or fiduciary, carried out during the two years prior to the proposal of the preventive measure (art. 26 Legislative Decree No. 159/2011).

These are not absolute presumptions, as they can be challenged via contrary evidence.

Coming to the matter of illicit origin, by virtue of the 2008 reform, preventive confiscation *ex* art. 24 Anti-Mafia Code can be applied only when 'it results' that the proceeds are derived

[441] FIANDACA-VISCONTI, *Scenari di mafia,* ToriNo. 2010, 79 ss.; MAUGERI, *Le moderne sanzioni patrimoniali*, cit., 317 ss.

from illicit activity or used for reinvestment («the items which result to be the result of unlawful activities or the reinvestment») – it can be no longer applied when there is only reason to believe that the aforementioned occurred.

This means, in authors' opinion, that the prosecutor needs to demonstrate the illicit origin of the proceeds according to the criminal law standard of proof, even via circumstantial evidence («serious, precise, and coherent evidence», pursuant to art. 192 Criminal Procedure Code)[442] – she/he cannot grounds such a decision on mere suspicions.

This does not mean that the prosecutor must prove the nexus between each asset and specific crimes, but only that she/he must demonstrate the unlawful origin of the forfeitable assets or the absence of an alternative justification of the assets' collection.

Such interpretation has been shared by, after the 2008 reform, by the Tribunal of Palermo in *Zummo*, and by the Palermo Court of Appeal in *Sapienza*[443].

However, the Supreme Court has established that the standard of proof (of the criminal origin of the profits to be confiscated) is not changed because of the reform, and it is lower than the criminal law standard. It is possible to apply the confiscation on the basis of assumptions, but these must be based on «serious, precise, and coherent circumstances» [444]. All in all, in the opinion of some authors, this means a criminal standard [445]. Arguably, the

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

443 Tribunal of Palermo, Chamber. Preventive Measures, 25 October 2010, Zummo, inedita. See also Court of Cassation, 23 June 2004, in Cassation *pen.*, 2005, 2704; Court of Cassation, 16 gennaio 2007, No. 5234, L.e altro, in *Guida al dir.* 2007, 1067.

444 Court of Cassation, United Chambers, 26 June 2014, Spinelli, No. 4880

445 A.M.MAUGERI, *La riforma delle sanzioni patrimoniali: verso un actio in rem?*, cit., 156 ss.; Tribunal of Palermo, Chamber. Preventive Measures, 25 October 2010, Zummo, inedita. See also Court of Cassation, 23 June 2004, in *Cassation pen.*, 2005, 2704; Court of Cassation, 16.1.2007, No. 5234, L.e altro, in *Guida al dir.* 2007, 1067.

enforcement of the confiscation provided for in art. 34 is possible when «there is reason to believe»[446].

In relation to the disproportionate character of the property, the Supreme Court requires that this element is demonstrated for every acquisition at the moment of the purchase [447], in the same way analysed above with regards to the extended confiscation (art. 240 bis Criminal Code). Also a demonstration about the chronological connection between the purchase and the dangerousness (*i.e.*, the suspected criminal activity) is required[448]. Normally, for the prosecutor it is easier to give evidence of the unlawful origin.

The Constitutional Court has stressed the importance of the temporal connection between the purchase and the dangerousness [449]. The Supreme Court (*Spinelli* case[450]) recognised the importance of the chronological ~~temporal~~ correlation between the moment

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446 A.M.MAUGERI, *La riforma delle sanzioni patrimoniali: verso un actio in rem ?*, cit., 156 ss.;

447 in this way CONTRAFFATTO, *L'oggetto della confisca di prevenzione e lo standard della prova*, in BALSAMO-CONTRAFATTO-NICASTRO, in *Le misure patrimoniali contro la criminalità organizzata*, Giuffrè 2010, 110 ss.; Court of Cassation pen., Chamber. VI, 31 May 2011 (dep. 26 July 2011), No. 29926, TG e altri (see MENDITTO, *Sulla rilevanza dei redditi non dichiarati al fisco ai fini del sequestro e della confisca di cui all'art. 12-sexies del d.l. n. 306/92, conv. dalla l. n. 356/92*, in *www.penalecontemporaneo.it*); Court of Cassation, 15 April 1996, Berti, in Cassation *pen.* 1996, 3649.

448 *Court of Cassation, United Chambers, 26 june 2014, Spinelli, No. 4880; Court of Cassation*, *13 May 2008, No. 21357, E.; Court of Cassation., 4 July 2007, No. 33479; Court of Cassation*, *16 April 2007, No. 21048; Court of Cassation, 23 March 2007, Cangialosi e altro, No. 18822,* Ced Rv. *236920; Court of Cassation*, *16 January 2007, No. 5234, L.e altro, in* Guida al dir. *2007, 1067; Court of Cassation*, *13 June 2006, Cosoleto e altri, No. 24778,* Ced rv. *234733; Court of Cassation, 3 February 1998, Damiani, in* Arch. No. proc. pen. *1998, p. 424 e* Ced rv *No. 210230.; Court of Cassation*, *2 May (15 July) 1995, No. 2654, Genovese,* Ced Rv. *202142; Court of Cassation, No. 5365 del 1998;* contra *Court of Cassation, 21 April 2011, No. 27228; Court of Cassation*, *9 February 2011, No. 6977, B. e altro; Court of Cassation*, *15 December 2009, No. 2269; Court of Cassation, Chamber I, 4 June 2009, No. 35175; Court of Cassation*, *29 May 2009, No. 35466; Court of Cassation*, *8 April 2008, No. 21717, Failla e altro, in* C.e.d. Rv.. *240501; Court of Cassation, Chamber I, 11 December 2008, No. 47798, C.,* in *Cassation pen. 2009, 10, 3977; Court of Cassation,* 23 gennaio 2007, No. 5248, G., in *Cassation pen. 2008, 1174; Court of Cassation, Chamber I, 5 October 2006, Gashi, No. 35481,* Ced Rv. *234902. See A.M.MAUGERI, Profili di legittimitá costituzionale delle sanzioni patrimoniali delle sanzioni patrimoniali (prima e dopo la riforma introdotta dal decr. No. 92/2008): la giurisprudenza della Corte Costituzionale e della Suprema Corte*, in F.Cassano (a cura di) *"Gli strumenti di contrasto ai patrimoni di mafia"*, Bari, Neldiritto Editore Srl. 2009, 69 ss.; *ID., Dalla riforma delle misure di prevenzione patrimoniali alla confisca generale dei beni contro il terrorismo, in* O.MAZZA-F.VIGANO', *Il "Pacchetto sicurezza" 2009 (Commento al d.l. 23 febbraio 2009, No. 11 conv. in legge 23 aprile 2009, No. 38 e alla legge 15 luglio 2009, No. 94), Torino 2009, p. 465; A.GIALANELLA, Un problematico punto di vista sui presupposti applicativi del sequestro e della confisca di prevenzione, cit., 368.*

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

450 Court of Cassation, United Chambers, 26 June 2014, Spinelli, No. 4880.

of purchase of the assets and the social dangerousness [451]; it has underlined, first of all, that the lack of this element would end up emptying the presumption of illicit origin and transform the preventive confiscation into a mere penalty of suspicion in contrast with the constitutional and supranational safeguards of the right to property (articles 41 and 42 Constitution, and article 1 Prot. No.1 ECHR).

As already stated by scholars, this requirement makes the form of confiscation in question more consistent with the presumption of innocence and the right of defence, since its ascertainment makes the burden of proof upon the accusation more pregnant and the counter-proof upon the defence, about of the lawful origin of assets, less onerous. In this way, a sort of 'probatio diabolica' upon the owner about the lawful origin of all assets at any time acquired is avoided: «the identification of a precise chronological context, within which the power of ablation can be exercised, makes the exercise of the right of defence much easier, … ».

The Constitutional Court (No. 24/2019) «aimed at circumscribing the area of confiscable assets, limiting them to those acquired in a period of time reasonably correlated to that in which the subject appears to have been engaged in criminal activities». This requirement «evidently derives from the need to maintain reasonableness in the (relative) presumption of the illicit purchase of the items, on which the seizure and preventive confiscation are based. This presumption, in fact, makes sense from time to time, inasmuch as it can reasonably be assumed that the confiscated items or money are the result of the criminal activities in which

[451] Court of Cassation, Chamber VI, 6.8.2021-7.12.2021, No. 36421; Court of Cassation, Chamber V, 23.11.2020-14.1.2021, No. 1543; e Court of Cassation, Chamber. II, 13.3.2018-27.3.2018, No. 14165, con nota di B. Rossi, *Le condizioni per l'applicabilità della confisca dei beni degli appartenenti ad associazioni mafiose*, in *Cassation pen.*, 2018, No. 7-8, 2382 ss. and D.Albanese, *Confisca di prevenzione: smussato il requisito della 'correlazione temporale'*, in *Dir. pen. cont.*, No. 4/2018, 193 ss.; Court of Cassation, Chamber VI, No. 47567/2013; C. II, No. 43776/2013; C. VI, No. 13049/2013; C. V, No. 26041/2011; C. I, No. 21357/2008.

the subject was engaged at the time of their acquisition, even if it is not necessary to establish the precise causal derivation from a specific crime».

In any case, it is argued whether the burden of proof about the illicit origin lies with the owner, because the law requires that the owner is not able to demonstrate the legal origin [452]. The Supreme Court established that it is only a 'burden of allegation', as examined for the extended confiscation (art. 240 bis Criminal Code), but doubts still remain about the respect of the right to silence.

This discipline can be considered as consistent with this constitutional guarantee only where it is interpreted in the sense that the prosecutor demonstrates the unlawful source of the assets to confiscate. It is important to consider that, after the separation of the patrimonial preventive measures from the personal measures, the demonstration of the illicit origin is the only element that can justify confiscation.

4. The nature of preventive confiscation.

The United Chambers of the Supreme Court of Cassation, in an important case, ruled on the legal nature of the preventive confiscation and affirmed that it is neither a criminal sanction, nor a 'preventive' measure[453]. Instead, such confiscation falls within a third category ('*tertium genus*') and consists of an administrative penalty. As such, it is comparable (with regards to its content and effects) to the security measures provided for in article 240 § 2 Criminal Code («...It is always ordered the confiscation of the items that are the price of an offence, of items whose production, use, possession or alienation constitute an offence even if no conviction verdict has been issued ...»). This approach was confirmed by many Supreme Court's cases.

[452] MAUGERI, *Le moderne sanzioni, cit.*, 377 ss. - 839 ss.

[453] Court of Cassation, United Chambers, 3 July 1996, No. 18, in the case against *Simonelli.*

After the introduction, in 2008, of the principle of 'disjoint application' of personal and property-related measures, a new debate has developed about the legal nature of the preventive confiscation.

According to a thesis, the lawmakers' choice to make the confiscation independent of the requisite of the concerned person's dangerousness is an element from which one can infer the afflictive nature of this measure[454].

According to another thesis, the preventive confiscation is preventive in nature.

This issue was addressed by the United Chambers of the Supreme Court of Cassation with *Spinelli* (judgement No. 4880 of 26 June 2014). The Court ruled out that, following the introduction of the principle of disjoint application, and despite the fact that confiscation can now be ordered regardless of the 'current' dangerousness of the subject, the confiscation does not have the legal nature of a criminal sanction – therefore it can be applied retroactively. Also, the Court maintained that the element of dangerousness is inherent in the asset (the '*res*'), due to its unlawful acquisition, and it 'genetically' pertains to the asset, on a permanent and potentially indissoluble basis. The fact that financial preventive measures shall be released from the requirement of individuals' *current* dangerousness reflects the phenomenal reality, having regard to the ontological-naturalistic difference between personal and material reality[455]. The Supreme Court affirmed the preventive nature of the confiscation, stressing that the temporal connection between the purchase and the dangerousness, *i.e.*, the suspected criminal activity, is fundamental to guarantee the preventive nature of the confiscation.

[454] Cassation, 13 November 2012 No. 14044, in the case against Occhipinti.

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

Only in *Occhipinti*, after the 2008 reform and the separation between personal and patrimonial preventive measures, the Supreme Court affirmed the punitive nature of the measure in question[456]. The Supreme Court affirmed that confiscated assets and items, «since they are the result of illicit acquisition, contain a negative connotation, which imposes their mandatory acquisition by the State». Besides, the 'objectively sanctioning' nature of preventive confiscation is maintained, with application, as a consequence, of the principle of non-retroactivity. This interpretation is based on the ECtHR interpretation of the notion of criminal matter, which requires the ascertainment of the sanction nature beyond the formal qualification. In the ruling in question, the Court observed that it is no longer possible to equate the preventive confiscation to a security measure where the common assumption, *i.e.*, the judgement of current social danger, has failed; the confiscation of assets or items of a person who is no longer dangerous, and even against her/his heirs and successors, does not affect a person who was part of the Mafia in order to prevent him/her to commit other offences, but targets the person only because he/she was part of the Mafia.

As analysed above with reference to the extended confiscation, the Constitutional Court, in a recent ruling (No. 24/2019), denied any punitive nature: «the relative presumption of illicit origin of items, which justifies their ablation in favour of the community, does not necessarily lead – as it is argued – to recognise the substantially sanctioning-punitive nature of the measures in question». Instead, it attributes both to the extended confiscation and to the preventive confiscation a mere compensatory-restorative function in light of the law, as the EctHR similarly affirmed in *Gogitdize*: «from the point of view of the system, the ablation of these assets is not a sanction, but rather the natural consequence of their illicit acquisition, which determines – as well highlighted by the recent ruling, already mentioned, of the United Chambers of the Court of Cassation – a genetic defect in the constitution of the same

[456] Court of Cassation, 13 November 2012, No. 14044, *Occhipinti*.

property right of those who have acquired the material availability, resulting all too obvious that the social function of private property can only be fulfilled on the indeclinable condition that its purchase complies with the rules of the legal system. Therefore, the acquisition of assets *contra legem* cannot be considered compatible with that function, so that a purchase affected by illegal methods can never be opposed to the state system (Court of Cassation, section one, No. 4880 of 2015)».

As examined above, some scholars accept this opinion[457].

Even though the Constitutional Court denied the punitive nature of preventive confiscation, it admitted that seizure and confiscation preventive measures «remain measures that heavily affect property rights and economic initiative, protected at both constitutional (articles 41 and 42 Constitution) and conventional (Article 1 Prot. add. ECHR) level 'and, therefore, must be subject' to the joint application of guarantees to which the Constitution and the ECHR subordinate the legitimacy of any restriction to the rights in question», *i.e.*: the provision through a law (articles 41 and 42 of the Constitution) in order to guarantee the measures' foreseeability (art. 1 Prot. add. ECHR); compliance with the principle of proportion (art. 1 Prot. add. ECHR and art. 3 of the Constitution); and compliance with the principle of due process (art. 111, §§ 1, 2, and 6 Constitution), provided for in art. 6 ECHR also in civil matters; as well as respect for the right of defence (Article 24 Constitution).

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

The EctHR has always denied, since the *Marandino* (in this case the Commission) and the *Raimondo* cases, the punitive nature of the confiscation *ex* article 2-ter Law No. 575/1965

[457] See note No. 118; see F. MENDITTO, *Le misure di prevenzione personali e patrimoniali*, Milano, Giuffrè, 2019, 507 ss. who stresses the preventive nature.

and, subsequently, article 24 Legislative Decree No. 159/2011, on the basis (as affirmed in the Supreme Court case law[458]) of the recognition of its preventive nature, which is founded on the evaluation that the concerned person is socially dangerous.

The Court, already in the *Labita* case[459], has recognised the compatibility of preventive measures with ECHR, only because they are based on an assessment of the concerned person's social dangerousness. By virtue of the preventive and non-punitive nature of the anti-mafia confiscation, one can affirm the consistency of this measure with the right to property (Article 1 1st Protocol Additional to the ECHR), the presumption of innocence (Article 6 § 2), and the principle of legality (Article 7) – hence, its retroactive application is permitted[460].

The preventive measure, in the opinion of the Court, cannot be considered as a criminal sanction, according to the three criteria established in *Engel.* [461]

The Court, accepting the arguments of the Italian Government, recognised that anti-mafia confiscation is a preventive measure which does have different function and nature than that of criminal sanctions. While the latter tends to repress the violation of criminal law provisions and, hence, its application depends on the ascertainment of an offence and of the guilt of the defendant, the preventive measure does not presuppose a crime and a conviction[462];

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458 Italian Supreme Court, United Chambers, 25 March 2010, No. 13426, Cagnazzo, in www.dejure.it; cfr. Constitutional Court, 11 (12) July 1996, No. 275.

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

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

461 ECTHR, *Engel e Altri*, in *Publications de la Cour Européenne des Droits de l'Homme* 1977, Série A, vol. 22, 36.

462 ECTHR, 25 March 2003, *Madonia v. Italy*, No. 55927/00, § 4; Id., 20 June 2002, *Andersson v. Italy*, No. 55504/00, § 4; Id., 5 July 2001, *Arcurie tre altri v. Italy*, No. 52024/99, § 5;Id., 4 September 2001, *Riela vv. Italy*, No. 52439/99, § 6; Id., *Bocellarie Rizza v. Italy*, No. 399/02, § 8.

rather, it seeks to prevent the commission of offences from people who are considered dangerous.

By accepting the case law of the Court of Cassation, the European Court denied that the respondent assumes the status of the accused and that confiscation constitutes substantially a criminal sanction, relevant to the purposes of the Convention. It also stressed that the preventive proceeding is independent of the criminal proceedings and does not involve a finding of guilt (a conviction).

The anti-mafia confiscation presupposes only a preliminary statement of social dangerousness, based on suspicion of belonging to a mafia-type association of the affected person and, therefore, does not have any repressive function, but preventive, aimed at preventing the illicit use of the items[463].

In the opinion of the Court, the severity of the measure is not a sufficient criterion for determining whether it is a criminal sanction, emphasising that confiscation is not an exclusive measure of criminal law but is widely used, for example, in administrative law. The legal order of the Council of Europe Member States shows that very strict measures, but necessary and appropriate to protect the public interest, are also provided for outside the realm of criminal law[464].

4.2. The critics by the scholarship.

The scholars criticise this approach because the preventive confiscation limits the property right or allows to forfeit the whole property; it limits the freedom of economic activity and stigmatises the affected person, without a demonstration of guilt and a

463 *Ibidem.*

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

conviction. The preventive proceeding is intended to affirm: (a) the dangerousness, even if in the past, of a subject; and therefore (b) even if on a circumstantial level, the commission of (or involvement in) a criminal activity that represents the source, in whole or part, of the subject's financial situation.

The Constitutional Court itself, in judgement No. 24/2019, based the rationale of the confiscation on the presumption of a criminal activity which is the source of the enrichment to be confiscated. Confiscation substantially presupposes a judgement of qualified delinquency (*mafioso*, participant in an association aimed at drug dealing, extortionist, etc., the crimes referred to in Article 51 bis Criminal Procedure Code, referred to in letter b) of Article 4 Legislative Decree No. 159/2011, or the others referred to in art. 16) or habitual delinquency (as a subject who lives in whole or in part with the proceeds of the crime), which involves the interdiction of the subject for the future from entrepreneurial activities.

The scholars use the expression 'judgement of legal degradation of the concerned person' with «impairment or mortification of the dignity and prestige of the person»[465].

. Even if it were to be considered that the confiscation in the strict sense assumes a reparative character, the stigmatising effect is linked to the attribution of crimes – which is disruptive for the personal and professional reputation – connected to the submission of the subject to the preventive procedure. This would imply the application of a higher system of guarantees than the purely civil one, which is proper of a merely remedial measure.

[465] M.PELISSERO, *I destinatari della prevenzione praeter delictum: la pericolosità da prevenire e la pericolosità da punire*, in *Riv. trim. dir. proc. pen.*, 2017, 441. Cfr. PADOVANI, *Misure di sicurezza e misure di prevenzione*, Pisa, 2015, 234; FIORENTIN, *Le misure di prevenzione personali nel Codice antimafia, in materia di stupefacenti e nell'ambito delle manifestazioni sportive*, Milano, 2012, 25; BOLIS, *I recenti sviluppi del dialogo tra corte Edu e Corte di Cassazione sulla confisca di prevenzione per pericolosità generica*, in *Ind. Pen.*, No. 3, 2018, 752.

Besides, a violation of the ordered preventive measures is punishable by a sentence of up to five years' imprisonment[466]. The highly repressive nature of the preventive measures is further compounded by the fact that the application of such measures is considered an aggravating factor in the context of sentencing for various criminal offences under the Criminal Code.

The same solution is reached by adopting the *Engel* criteria to include a measure in the autonomous notion of 'criminal matter'[467]: the official formal qualification or the determination of the legal system to which it belongs[468]; the 'nature itself' of the infringement with particular reference to its forms of typification and the procedure adopted [469] («the very

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

[467] ECHR, 8.6.1976, *Engel e Altri*, cit., 36; Id., 26.3.1982, *Adolf c. Gov. Austria*, in *Riv. dir. internaz.*, 1984, 121, e in *Publications de la Cour Européenne des Droits de l'Homme* 1982, Série A, vol. 49, 15; Id., 10.2.1983, *Albert et le Compte*, *ivi*, vol. 58, 16; Id., 21.2.1984, *Öztürk v. Germany*, in Série A, No. 73, 18, § 50 e in *Riv. it. dir. proc. pen.*, 1985, p. 894; Id., 25.8.1987, *Lutz, Englert e Nölkenbockhoff v. Germany*, Série A, vol. 123, 22; Id., 22.5.1990, *Weber v. Switzerland*, *ivi*, vol. 177, 17-18; Id., 27.8.1991, *Demicoli c. Malte*, in *Pubblications de la Cour Européenne des Droits de l'Homme*, *ivi.* vol. 210, 1991, 25; Id., 25.2.1993, *Funke*, *ivi*, vol. 256, 30; Id., 10.6.1996, *Benham c. Royaume-Uni*, in *Recueil de Arrêts et Dêcisions* 1996, III, No. 10, 756; Id., 8.12.1998, *Padin Gestoso c. Espagne*, *ivi* 1999, II, 361 ss.; Id., 3.5.2001, *J.B. v. Switzerland*, Application No. 31827/96, in *www.coe.int*, § 44; Id., 9.10.2003, *Ezeh and Connors* v. the United Kingdom, No. 39665/98 e 40086/98, *ivi*, § 91. Sulla nozione di materia penale cfr. M.DONINI-L.FOFFANI, *La "materia penale" tra diritto nazionale ed europeo*, Torino, Giappichelli, 2018. See about the application of these criterions to Italian preventive confiscation A.MANNA, *Misure di prevenzione e diritto penale: una relazione difficile,* Pisa, 2019, 197 ss.

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

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

nature of the offence is a factor of greater import»); the nature of the sanction[470], and the degree of severity of the sanction[471], considered as the sole criterion in *Engel*[472].

Beyond the official formal qualification which, although defined as the first criterion, constitutes only a starting point in *Engel*, a *ratio cognoscendi* («the indications that derive from it have only a formal and relative value»[473]), by examining the first criterion, the nature of the offence[474], it must be highlighted that preventive confiscation can be included in the notion of criminal matters because it presupposes crimes, an unlawful act[475], and the ascertainment of the involvement of the concerned person in a criminal activity, either as a qualified dangerous offender, or as a habitual offender; it does not presuppose facts qualifying as civil or administrative offences[476].

To establish the nature of the infringement, the nature of the proceeding assumes particular importance, which can assume in fact autonomous relevance as a criterion determining the nature of an offence[477]. In the present case, the proceeding essentially

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

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

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

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

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

475 Cfr. MASERA, *La nozione costituzionale di materia penale*, Torino, Giappichelli, 2018, 214.

476 MASERA, *op. cit.*, 217.

477 ECHR, 10.6.1996, *Benham*, cit., 756.

assumes the characteristics of an enforcement proceeding and takes place before a criminal court (even if today, with the reform of the judicial system introduced by Law No. 161/2017, the court should have interdisciplinary skills – civil, bankruptcy, criminal, etc.).

The Italian lawmakers themselves have considered the preventive procedure as criminal, where in art. 3, letter d) Legislative Decree 7 August 2015 No. 137 (Implementation of framework decision 2006/783/GAI) also included the confiscation *ex* art. 24 and 34 Legislative Decree No. 159/2011 – and the proceeding for the adoption of the extended confiscation *ex* art. 240 bis Criminal Code – in the context of decisions taken in 'criminal proceedings': «d) confiscation order: a measure issued by a judicial authority in the context of criminal proceedings, which consists in definitively depriving a person of an asset, including confiscation orders pursuant to article 12-sexies of the Decree Law of 8 June 1992, No. 306, converted, with modifications, into Law 7 August 1992, No. 356, and those arranged pursuant to articles 24 and 34 of the Code of anti-mafia laws and prevention measures, pursuant to Legislative Decree 6 September 2011, No. 159, and subsequent amendments»[478].

The second criterion – that is, the nature of the sanction – must be specified with reference to both the nature of the sanction and the aims pursued through it: a penal sanction must have a repressive (afflictive) nature, and pursue both general and special prevention-purposes, according to a purely punitive model[479] («criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence»[480]).

The preventive confiscation risks having a punitive nature to the extent that it can subtract lawfully acquired assets where there is no proof of their illicit origin, but it is based on a

[478] (15G00152) GU Serie Generale No. 203, 02-09-2015.

[479] ECHR, 21.2.1984, *Oztürk*, cit., 894; Id., 3.5.2001, *J.B. v. Switzerland*, No. 31827/96, § 48; cfr. HEITZER, Punitive Sanktionen im Europäischen Gemeinschaftsrecht, Heidelberg, 1997, 38 ss.

[480] ECHR, 9.10.2003, *Ezeh and Connors*, cit., § 102. Cfr. ECHR, 21.2.1984, *Öztürk*, cit., 20-21, § 53; Id., 24 febbraio 1994, *Bendenoun*, cit., 20, § 47; Id., 2 settembre 1998, *Lauko v. Slovakia*, No. 26138/95, in *Reports* 1998-VI, 2504-05, § 58.

presumption *contra reum*, as well as certainly having a stigmatising and limiting impact on the right to freedom of economic initiative. As for the rest, as already highlighted in relation to the direct confiscation of profit, it pursues general and special preventive purposes, as well as – in macroeconomic terms – the purpose of protecting the economy and legitimate businesses from criminal infiltration, representing an incapacitation of organised or professional crime, dedicated to illicit enrichment[481].

If one looks at the severity of the measure – apart from the inconsistent use made by the ECtHR itself of this criterion, which is sometimes considered irrelevant [482] – it is sufficient to recall that, in the *Grande Stevens v. Italy* case, the disqualification from two to four months from carrying out a managerial activity is considered as a particularly severe punishment («was such as to compromise the integrity of the persons concerned» and «the temporary loss of their honour for the representatives of the companies involved»[483]). Isn't the confiscation of all assets, or rather, considering only the disqualifying effects of confiscation, the associated imposition of reporting obligations and the devastating effect on a person's reputation and economic and managerial reliability, severe enough?

Not to mention that following the disjunction of personal measures from the patrimonial ones, the confiscation can be applied *sine die*, regardless of the moment in which the social dangerousness has arose, even where the alleged illicit activity dates back absolutely and the

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

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

483 *ECtHR*, *Grande Stevens v. Italy*, 7.7.2014, No. 18640/10, § 97.

original illicit profits are now reinvested in entirely legitimate activities. The anti-mafia confiscation knows no statute limitation; this element has increasingly made the impact of this measure more severe and afflictive.

Precisely in the light of this stigmatising scope, it is deemed necessary to adopt a criminal law model in the matter of preventive measures, at least in the broad meaning accepted by the ECtHR – even if not in the matter of preventive measures –, allowing for higher safeguards and above all, as also maintained by the foreign scholarship about civil forfeiture, the adoption of the criminal standard of proof of assets' illicit origin[484]. When it comes to confiscating entire assets due to their origin in crime, one cannot be satisfied with a civil standard as if it were a mere matter between private individuals in which the State has no interest (as the North American scholarship correctly points out).

One should then reflect on the consequences, in terms of the protection of third parties, of the Constitutional Court's opinion regarding the nature of preventive confiscation, not justifying any sacrifice of the interests of third parties where it is a mere civil measure, rather than a public measure aimed at pursuing the needs of public order and protection of the economy[485]. For example, how is the sacrifice of third parties' rights justified, for their credits are guaranteed only to the extent of 60% (which should not be justified even if it were recognized that preventative confiscation falls within the notion of criminal matter)?

Some scholars considered that this form of confiscation represents an original purchase in favour of the State[486] and, lastly, the Council of State also established that the asset, «as a result of the confiscation, acquires a rigidly public imprint, which does not allow it to be

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484 KING, *Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture*, in *The International Journal of Evidence & Proof*, 2002, v. 16, 348; HENDRY-KING, *Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids,* in *Crim Law and Philos*, 2016; KING-WALKER, *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Routledge.

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

486 Court of Cassation, United Chambers. un., 28.4.1999, Baccherotti, in *Foro it*. 1999, II, c. 580, about confiscation pursuant to art. 644 Criminal Code

diverted, even temporarily, from the constraint of destination and public purposes. This determines the assimilability of confiscated assets' legal regime to that of the assets forming part of the unavailable State patrimony (see Council of State, Third Chamber, 7 May 2016, No. 2993; Council of State, Third Chamber, 16 June 2016, No. 2682)»[487].

Both the ECtHR[488] and the EU Court of Justice, as well as the Constitutional Court [489] recognise, moreover, the possibility of modulating the safeguards within the broad concept of criminal matters, *i.e.*, not the criminal law 'hard core' (usually involving imprisonment)[490]. From this perspective, it could be considered that extended/preventive confiscation falls within the broad concept of criminal matters, while acknowledging that the foundation that justifies confiscation must be identified, instead of in in an alleged punitive purpose *tout court* of criminal behaviours that cannot be ascertained, in the aim of removing from crime – especially organised crime – the wealth having an illicit origin, which represents a factor of 'pollution' of the market and legitimate businesses, as recognised by the Constitutional Court No. 24/2019.

Nevertheless, in consideration of the punitive impact that extended confiscation assumes and in particular the preventive one, by applying the standpoint of 'variable safeguards' of criminal matters, it should be required that in the absence of a conviction – and of an assessment about the sanction's proportionality to the sentence's commensuration parameters, starting from guilt –, in order for the rule of law to be respected, the removal of profits can be justified only insofar as, and to the extent that, their criminal origin is

[487] Council of State, Chamber. III, 4.3.2019, No. 1499.

[488] ECHR, 23.11.2006, Jussila c. Finlandia, No. 73053/01.

[489] Constitutional Court, 97/2009 e 196/10; Constitutional Court 68/2017; 109/2017; 43/2017; 487/99; L.MASERA, *op. cit.,*1 ss.

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

ascertained; only in this way, considering the degree of stigmatising criminal impact of this sanction, it is possible to bring out the economic/compensatory rebalancing function mentioned by the Constitutional Court[491].

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

5.1. The principle of legality

In the opinion of the ECtHR, the confiscation, as an interference with the applicants' right to the peaceful enjoyment of their possession *ex* Article 1 Protocol Additional No. 1 to

[491] A.M. MAUGERI, *Art. 240 bis c.p.*, in *Codice penale*, a cura di T. PADOVANI, cit., 1659 ss. In this direction J. HENDRY-C. KING, *Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids,* in *Crim Law and Philos*, 2016, 20: «Where the State is alleging that an individual has benefited from criminal activity, it is difficult for a lower burden of proof than the criminal standard of beyond reasonable doubt even to be countenanced Nevertheless, countenanced it is, and more: through Part 5 of POCA, efficiency is privileged over certainty and due process safeguards are abandoned in the service of the legislative intent to ensure that c*rime does not pay*. Indeed, the lowering of the standard of proof makes it significantly more straightforward to prove matters of both fact and law: '[e]ven a modest degree of civil content introduced into the strategy, the trading of the criminal standard for the civil standard of proof in the confiscation process, facilitates the task of realising an attack on the financial elements of crime' (Gallant 2005: 19). More troubling still is the way in which a person who has been subject to an unsuccessful criminal prosecution can nonetheless be subject to subsequent proceedings under Part 5 of POCA (*Taher* 2006), or how civil recovery proceedings can continue even after a criminal prosecution has been discontinued. This was the case in *Jia Jin He and Dan Dan Che* (2004: para. 67), where in spite of the decision not to prosecute - 'no doubt because it was considered that [criminal proceedings] would not succeed' - civil recovery proceedings were still permitted. Part 5 proceedings have even been successful in circumstances where the criminal case was stayed as an abuse of process (*Hymans* 2011). This jurisprudence highlights the way in which civil recovery, where criminal prosecution is either impossible or has been unsuccessful, allows the State to take a second bite at the cherry. To be clear on this point: under such proceedings the parties are the same (i.e., the State against the individual), the allegations will often concern the same conduct, and the evidence can even be the same as that relied upon in the unsuccessful criminal prosecution—the *only* salient difference is the reduced standard of proof. These observations combine to indicate that civil recovery is an express mechanism for State circumvention of those enhanced procedural protections inherent to the criminal process. The most bewildering aspect of this state of affairs, however, has been the willingness of the courts to accept unchallenged the legislative label 'civil' for such proceedings, particularly in light of the repercussions for due process and individual rights. Indeed, considering that it is arguably the role of the courts to regulate the exercise of state power with a view to ensuring its compliance with the rule of law (O'Cinneide 2009), this raises the question: why, then, such an apparent reluctance to do so in terms of civil recovery? Moreover, is this likely to be the case for *all* such procedural hybrids?».

the Convention, must have a legal basis (must be established by law), which must have the quality of the law in the Court's interpretation: this means that the law should be accessible and foreseeable.

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

So, the Italian legislation violates Article 2 of Protocol Additional No. 4 to the Convention because of the personal preventive measures. The same reasons are valid in relation to the violation of art. 1 of Protocol Additional No. 1 about the patrimonial preventive measures (see § 2).

After the *De Tommaso* case, the Constitutional Court – as analysed above – declared the unconstitutional character of the category of recipient *ex* art. 1 letter a) Legislative Decree No. 159/2011.

In general, the Constitutional Court considered the preventive system outlined by Law No. 1423/1956 as compatible with the principles of the Constitution, as it is placed to guarantee the orderly and peaceful development of relations between citizens, both with reference to articles 13, 16, 17 and 25 § 3 of the Constitution, and by virtue of the parallelism with the security measures; however, it provided a contribution to the development of a

more civil rights-oriented statute by demanding the jurisdictional safeguards - as already anticipated in early decisions No. 2, 10 and 11 of 1956 -, and respect for the principle of legality, and specifically affirming that «these are two essential and intimately connected requirements, because the lack of one nullifies the other, making it merely illusory».

The Constitutional Court then specified that one cannot be satisfied with the very uncertain connotations about the 'type of author' and the evaluation of some concrete manifestation of mafia-related activity is needed.

In order to respect the principle of legality, the Constitutional Court's judgement No. 177/1980 – as also recalled by the European Court in *De Tommaso* – declared the unconstitutionality of the category of criminals "*inclined to commit crimes*" (those «whose outward conduct gives good reason to believe that they have criminal tendencies»), envisaged by Law No. 1423/1956, due to its vagueness (the Court found it not to be defined in a sufficiently detailed way) and demanded, at least, the definition of the behaviours underlying the judgement of dangerousness (in the past, diagnostic assessment) and the definition of the crimes in relation to which social dangerousness is to be assessed (for the future, prognostic evaluation).

In this case, the Court authoritatively ruled that the reciprocal implication between the 'principle of legality' and the 'judicial guarantee' postulates, as an essential corollary, the rejection of the 'suspect' as a sufficient presupposition for the application of a preventive measure; as a consequence, the ascertainment of dangerousness must necessarily be based on «an objective evaluation of the facts», so as to «exclude purely subjective and uncontrollable assessments by those who promote or apply the preventive measures»[492].

[492] As stressed by the European Court "In respect of all other categories of individuals to whom the preventive measures are applicable, the Constitutional Court has come to the conclusion that Act No. 1423/1956 contained a sufficiently detailed description of the types of conduct that were held to represent a danger to society. It has found that simply belonging to one of the categories of individuals referred to in section 1 of the Act was not a sufficient ground for imposing a preventive measure; on the contrary, it was necessary to establish the existence of specific conduct indicating that the individual

The principle of non-retroactivity *ex* art. 7 is not applied because the preventive confiscation is not considered by the European Court a punishment; this means that it is applicable according to the law in force at the application time.

In the opinion of the Supreme Court, the preventive measures are equivalent to the security measures and, therefore, art. 200 § 2 Criminal Code is applied[493]. The issues of constitutional legitimacy have been declared unfounded in relation to the violation of articles 24, 25 and 42 of the Constitution since the anti-mafia legislation refers to assets «of which the suspect directly or indirectly has the availability (...), at the time of application of the measure, due to the current membership of the subject in mafia associations, due to the methods of acquisition or the reproducibility of wealth polluted at the origin, so that also the asset, due to the aforementioned conditions, ends up being a tool for the development of the mafia organisation, of its members and therefore also dangerous" [494]. This is a logical consequence of the aim pursued, namely the ablation of illicit assets consolidated over time. This opinion was confirmed with the retroactive application of the reforms of 2008 and 2009, which substantially extended the scope of patrimonial measures, separating their application from that of personal ones. The Supreme Court has applied the principle of non-retroactivity only to the confiscation by equivalent of the preventive confiscation, considered punitive[495].

The scholarship argue about this opinion because, first of all and as already examined, it considers the principle of non-retroactivity applicable to security measures by virtue of art.

concerned posed a real and not merely theoretical danger. Preventive measures could therefore not be adopted on the basis of mere suspicion, but had to be based on an objective assessment of the "factual evidence" revealing the individual's habitual behaviour and standard of living, or specific outward signs of his or her criminal tendencies (see the Constitutional Court's case-law set out in paragraphs 45-55 above)".

493 For all, Court of Cassation 9.12.1986, Piccolo, in Giust. Pen. 1988, c. 8

494 For all, Court of Cassation. 18.5.1992, Vincenti and others, in Cassation Pen. 1993, 2377.

495 Court of Cassation, Chamber I, 28.2.2012, Barilari, No. 11768, in *Mass. Uff.*, No. 252297; cfr. Court of Cassation, 5.2.2016, Hadjovich, No. 4908, in *Mass. Uff.*, No. 266312; Court of Cassation, 10.2.2016, Bevilacqua, No. 5336, in *Mass. Uff.*, n 265957.

7 of the ECHR and, therefore, to preventive measures. The latter are not only considered to be punitive measures, due the broad concept of criminal matter of the ECHR, but also because the distinction between preventive measures *ante delictum* and measures *post delictum* is no longer relevant: in fact, it can be considered that *ante delictum* preventive measures are also applied following the commission of crimes, indeed they presuppose the offences' commission, starting from the existence of the mafia-type association[496]. To allow lawmakers to retroactively introduce measures that are substantially restrictive of fundamental rights (such as the preventive measures) seems hardly compatible with democratic principles.

5.2. The property right.

The Court has always affirmed that Article 1 of Protocol Additional No. 1 to the Convention, which guarantees in substance the right to property, comprises three distinct rules.

First, the principle of peaceful enjoyment of property in general.

Second, deprivation of possessions are subject to certain conditions.

Third, Member States are entitled, among other items, to control the use of property in accordance with the general interest.

The second and third rules, which are concerned with instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule[497]. The Court demands that the confiscation, which

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

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

constitutes an interference with the applicants' right to the peaceful enjoyment of their possessions, is provided for by law, pursues a legitimate aim, and is proportionate to the aim.

«The Court notes that in cases where the confiscation followed a conviction, and thus constituted a penalty, the Court found that such interference fell within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties. That provision had to be construed in the light of the general principle set out in the first sentence of the first paragraph which requires that there exists a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many examples, *Sofia*, cited above and *Phillips*, cited above, § 51). In other cases, where a confiscation measure had been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (within the meaning of Article 6 § 1 of the Convention) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, the Court has again held that such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 and in such cases, also, the measure had to be reasonably proportionate to the aim sought to be realised (see *Gogitidze and Others*, cited above, §§ 94 and 97)»[498].

In particular, as for preventive confiscation the European Court affirmed: «even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1, which gives the State the right to adopt such laws as it deems necessary to control the use of property in accordance with the general interest»[499].

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

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

The Court noted that confiscation of the applicants' assets «was therefore an interference prescribed by law» (in that case it was ordered pursuant to section 2(3) of the 1965 Act); «next that the confiscation complained of sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. It therefore considers that the aim of the resulting interference serves the general interest»[500]. «It remains to be determined, nevertheless, whether this interference was proportionate to the legitimate aim pursued. In this connection the Court points out that the impugned measure forms part of a crime-prevention policy; it considers that in implementing such a policy the legislature must have a wide margin of appreciation both with regard to the existence of a problem affecting the public interest which requires measures of control and the appropriate way to apply such measures. The Court further observes that in Italy the problem of organised crime has reached a very disturbing level».

In this way, the Court did not affirm the violation of the right to property provided for in art. 1 of the First Protocol Addition to the Convention, because also the purpose of this form of confiscation is proportionate to the instrument, *i.e.*, the fight against organised crime like the Mafia[501], «an aim that was in the general interest… The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this 'organisation' has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued, … »[502].

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

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

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

The Court has confirmed this approach also in *Todorov and others v. Bulgaria*[503]: «In a series of cases against Italy the Court found that the forfeiture of assets of suspected Mafia members was proportionate to the legitimate aim pursued. It pointed out that in Italy the problem of organised crime had reached 'a very disturbing level', which justified the impugned measures»[504].

Even the Constitutional Court has denied the relevance of the issues of constitutionality of some provisions and, in particular, the contrast of patrimonial measures with the guarantee of the right to property. Even the limitation of the constitutional guarantee of property is considered functional to the fight against organised crime and the protection of the market and free competition, threatened by the massive infiltration of illicit capital into legitimate businesses – the right to property can be limited to allow property to serve its own social function (Constitutional Court 464/1992; order No. 105/1989). The aim is to guarantee the genuineness of the economic traffic and the correct observance of the market rules (order No. 105 of 1989 and 675 of 1988), by preventing «the eventual entry into the market of money obtained from the exercise of criminal activities or offences» (order No. 675 of 1988). This is the position of the Constitutional Court judgement No. 24/2019, as examined above, which demands the respect of the principles of legality and proportionality.

5.3. The presumption of innocence and fair trial principles.

503 ECHR, 13.10.2021, *Todorov and others v. Bulgaria*, No. 50705/11, § 190.

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

The European Court has more than once affirmed the compatibility of Italian procedure, developed in the area of preventive measures regarding assets, with the safeguards of fair trial established by art 6.1.

The Court did not apply art. 6 § 2 (the presumption of innocence) because the confiscation is a preventive measure, not a penalty, and «the presumption of innocence enunciated in Article 27 of the Constitution does not concern preventive measures, which are not based on the criminal liability or guilt of the person concerned (Constitutional Court, judgement No. 23 of 1964)»[505]. The European Court endorsed the arguments of the Italian Government.

«The Court notes that in this case section 2 (3) of the 1965 Act establishes, where there is 'sufficient circumstantial evidence', a presumption that the property of a person suspected of belonging to a criminal organisation represents the proceeds from unlawful activities or has been acquired with those proceeds».

However, in the Court's opinion, every legal system «recognises presumptions of fact or of law. The Convention obviously does not prohibit such presumptions in principle. However, the applicants' right to peaceful enjoyment of their possessions implies the existence of an effective judicial guarantee. Consequently, the Court must consider whether, having regard to the severity of the applicable measure, the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities (see, *mutatis mutandis*, the Agosi judgement cited above, p. 18, § 55).

The Court notes that the proceedings for the application of preventive measures were conducted in the presence of both parties in front of three successive courts, the District

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

Court, the Court of Appeal and the Court of Cassation. In particular, the applicants, instructing the lawyer of their choice, were able to raise the objections and adduce the evidence which they considered necessary to protect their interests, which shows that the rights of the defence were respected. Under Article 1 of Protocol Additional No. 1 to the Convention, the proceedings for the application of preventive measures were conducted in the presence of both parties and with respect for the rights of the defence in front of three successive courts. Those courts could not base their conclusions on mere suspicions and gave full reasons on all the points at issue, which meant that any risk of arbitrariness was avoided»[506].

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

Despite the admission that the assumptions were in accordance with art. 6 ECHR, the European Court affirmed «that preventive measures could not be adopted on the basis of mere suspicions and are justified only when based on the objective establishment and assessment of facts which reveal the behaviour and lifestyle of the person concerned (Constitutional Court, judgement No. 23 of 1964)". "They had to establish and assess objectively the facts submitted by the parties»[507].

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[506] Among others, Arcuri case.

[507] Arcuri, cit.: „and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily. On the contrary, the Italian courts based their decision on the evidence adduced against the first applicant, which showed that he was in regular contact with members of criminal organisations and that there was a considerable discrepancy between his financial resources and his income. The domestic courts also carefully analysed the financial situation of the other applicants and the nature of their relationship with the first applicant and concluded that all the confiscated assets could only have been purchased by virtue of the reinvestment of Mr Rocco Acuri's unlawful profits and were *de facto* managed by

«More recently it confirmed that the constitutionality of preventive measures still depends on respect for the rule of law and the possibility of applying to the courts for a remedy. Furthermore, the above two conditions are closely linked. Thus it is not enough for the law to indicate vague criteria for the assessment of danger; it must set them forth with sufficient precision to make the right of access to a court and adversarial proceedings a meaningful one (Constitutional Court, judgement No. 177 of 1980)». The Court required the respect of the right to defence, demanding that a «proceeding for the application of preventive measures must be adversarial and conducted with respect for the rights of defence, any violation of those rights entailing their nullity …the presumption concerning the unlawful origin of the property of person suspected of belonging to organisations of the mafia type is not incompatible with art. 24 of the Constitution, which safeguards the rights of the defence, since confiscation can only take place when there is sufficient circumstantial evidence concerning the unlawful origin of the property in question and in the absence of a rebuttal…»[508].

About that, it is important to stress that for the European Court the respect of the civil standard of the proof – *i.e.*, preponderance of evidence – is sufficient in order to demonstrate the illicit origin of the proceeds to confiscate, as affirmed in *Balsamo* or in *Gogitidze* case[509]; or

him, with the official attribution of legal title to the last three applicants being merely a legal dodge designed to circumvent the application of the law to the assets in question (see, *mutatis mutandis*, Autorino v. Italy, application No. 39704/98, Commission decision of 21 May 1998, unreported)""

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

509 *Balsamo*, cit., § 91. The Court also found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1 (compare also with the case of *Silickienė*, cited above, §§ 60-70, where a confiscation measure was applied to the widow of an alleged corrupt public official). More

«the Court further reiterates that it is not *per se* arbitrary, for the purposes of the "civil" limb of Article 6 § 1 of the Convention, that the burden of proof shifted onto the applicant in the vetting proceedings after the IQC had made available the preliminary findings resulting from the conclusion of the investigation and had given access to the evidence in the case file (see *Gogitidze and Others v. Georgia*, No. 36862/05, § 122, 12 May 2015, in the context of forfeiture proceedings *in rem*, and, *mutatis mutandis*, *Grayson and Barnham v. the United Kingdom,* nos. 19955/05 and 15085/06, §§ 37-49, 23 September 2008, in the context of a confiscation order in drug-trafficking cases)»[510].

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

recently in *Gogitidze and Others* (cited above, § 108, concerning a confiscation applied in civil proceedings), the Court also found that the civil proceedings *in rem* through which the applicants - one of whom had been directly accused of corruption in a separate set of criminal proceedings, and two other applicants, were presumed, as the accused's family members, to have benefited unduly from the proceeds of his crime - had suffered confiscations of their property, could not be considered to have been arbitrary or to have upset the proportionality test under Article 1 of Protocol No. 1. The Court found that it was reasonable for all three applicants to be required to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets.

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

[510] ECHR, Xhoxhaj v. Albania, 31.5.2021, Application No. 15227/19.

other activities) –, it is necessary that «a causal link, direct or indirect, had to be established, or had to be presumable, between the assets to be forfeited and the criminal activity. The Supreme Court stated furthermore that the finding of such a link had to be "logically justified" and based on the individual circumstances of each case, and that failure to establish a causal link would mean that any interference with the defendant's property rights is disproportionate (see paragraphs 104-106 above)»[511].

In *Paulet* the ECtHR stated that although that provision «contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake»[512].

Also, the Constitutional Court did not detect the contrast between patrimonial measures and the presumption of innocence. In some rulings on similar cases (art. 708 of the criminal code, art. 12-quinquies Law Decree No. 306 of 1992, art. 12-sexies Law Decree No.

[511] § 212; see § 215: "the national authorities provided at least some particulars justifying the provenance of the assets subject to forfeiture from the established offence, in the context of each specific case" "the domestic courts provided some particulars as to the criminal conduct in which the assets to be forfeited were alleged to have originated, and showed in a reasoned manner that those assets could have been the proceeds of the criminal conduct shown to exist. As long as such analysis has been carried out, the Court will generally defer to the domestic courts' assessment, unless the applicants have shown such assessment to be arbitrary or manifestly unreasonable (see, *mutatis mutandis*, *Arcuri and Others*, decision cited above, and *Bongiorno and Others*, cited above, § 49)". "In order to conclude that the requisite fair balance had been achieved, that is that the interference with the applicants' property rights was proportionate to any legitimate aim pursued, it would require the national authorities to provide at least some particulars as to the alleged unlawful conduct having resulted in the acquisition of the assets to be forfeited, and to establish some link between those assets and the unlawful conduct … The Supreme Court has defined the latter link widely, saying that it could be direct or indirect, expressly established or presumable… However, even though according to the facts of the case the existence of a causal link between the 1993 offence committed by the first applicant and the assets acquired by the applicants, usually much later, was by no means evident, as discussed above, the domestic courts examining the forfeiture application made no effort to justify such a link. They pointed to the discrepancy, as established by them, between the first and second applicants' income and expenditure, without giving any further reasons whatsoever, and dismissed the first and second applicant's objections in that regard…. Furthermore, they failed to indicate whether the value of the assets to be forfeited equalled the established discrepancy between the applicants' income and expenditure... Nor did the national courts, as mentioned, ever try to reason that the first applicant had been implicated in any other criminal activity".

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

306/1992) ~~it essentially emerges that~~ the Court, while recognising that the measures in question are based on a presumption of the illegitimate illicit origin of the assets, believed that this presumption is reasonable and compliant with constitutional principles (No. 48 of 1994, which declared the unconstitutionality of art. 12-quinquies Law No. 306 of 1992, see order No. 675/1988 on the extension to socially dangerous people of prevention measures; order No. 105/88).

In some cases, the ECHR sentenced Italy for the violation of Article 6 § 1 of the Convention (right to a fair hearing) because the proceedings on the application of preventive measures were not public. The public character of proceedings before the judicial bodies protected litigants against the administration of justice in secret with no public scrutiny and constituted an instrument which preserved trust in the courts, thereby contributing to the implementation of the goal of Article 6 of the Convention: *i.e.*, a fair trial.

The Court considered it essential that the litigants in proceedings for the application of preventive measures were offered, at the least, the opportunity to request a public hearing before the specialised divisions of the ordinary and appeal courts. The new 'Anti-Mafia Code' has introduced the opportunity to request a public hearing (art. 7); it is important to stress the Court's invitation to consider the stakes in play and the significant effect of the confiscation on the personal and economic situation of the person on trial [513].

After this judgement, the Constitutional Court (No. 93/2010) declared the unconstitutionality of Law 1423/1956 to the extent it did not provide for the public hearing.

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

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

In the opinion of the ECtHR preventive measures do not violate the principle of substantial *ne bis in idem* (Article 7 of the IV Protocol Additional to the Convention) because such «measures cannot be compared to a penalty and, consequently, the applicants cannot claim to have been 'criminally prosecuted or punished' in the context of the disputed procedure»[514].

Two elements need to be analysed.

First of all, after the separation of the preventive patrimonial measures from the personal measures (Legislative Decree No. 92/2008), the preventive confiscation has become a 'sword of Damocles' *sine die*, because a preventive proceeding can be started in order to apply the confiscation also if the proposed was dangerous in the past (the dangerousness is not current), *i.e.*, he/she was suspected of criminal activity in the past without temporal limits. What counts is only that the property has been obtained in temporal connection with the 'dangerousness', as examined above.

The Supreme Court addressed the question of constitutional legitimacy raised due to the absence of a deadline to submit the request for the application of the provision, in violation of articles 3, 27 and 42 of the Constitution: «The constitutional principles and those contained in the European Convention on Human Rights do not impose a time limit on the possibility of requesting confiscation, nor does the absence of such a limit appear unreasonable (given the particular nature and purpose of the prevention proceeding) and such as to determine an impairment of the right of defence, in providing proof of the legitimate origin of the items. Indeed, the defence can resort to any means of proof, not only documentary, which after many years may not be easy to find, but also oral and the judge, in

514 ECourtHR, Capitani e Campanella c. Italia, 17 November 2011, No. 24920/07, § 30; Cacucci-Sabatelli, 25 August 2015, No. 29797/09, § 2

evaluating the same, must take into account the difficulties of providing precise proof in relation to income received or expenses incurred in not very recent years»[515].

Also recently the Supreme Court has confirmed that: «The question of constitutional legitimacy is manifestly unfounded in relation to Articles 18, 29, 34-ter Legislative Decree 6 September 2011, No. 159, by contrast with the articles 3, 24 § 2, 27 § 2, 111 §§ 1 and 2 of the Constitution and 6 § 1 of the ECHR, in the part in which, with respect to the moment of the end of the dangerousness of the concerned person, it is not provided a time limitation of the propositional action or a statute limitation of the preventive measure, given that the existence of the dangerousness of the affected at the time of purchase of the asset constitutes an unavoidable prerequisite for the application of the preventive measure, which is transferred to the assets in a permanent and indissoluble way, since it is the result of the illicit acquisition by the dangerous subject»[516].

The second aspect concerns the respect of the *ne bis in idem* principle in the proper sense, meaning the validity of *res iudicata* and the possibility to reopen the preventive proceeding against the same property and owner.

The lack of a statute limitation rule (*imprescrittibilità*) for the preventive confiscation is accompanied in practice by the non-recognition of the *ne bis in idem* principle, or, at least even where the application of the principle is affirmed, it is highlighted that it applies *rebus sic stantibus*; the result is a greater efficiency of the prosecution system for illicit enrichment, but also a risk of overcriminalisation effects or of establishing a sort of endless sanctioning circuit.

[515] Court of Cassation, Chamber V, 25 November 2015, No.155.

[516] Court of Cassation, Chamber II, 25/02/2022, No.11351.

Above all, the applicability of the *ne bis in idem* principle between criminal proceedings and prevention proceedings is denied [517], since the prerequisite for the application of a preventive measure is not an 'offence', but a general 'condition' of danger, which can be deduced not only from individual unlawful, criminal or administrative facts, but also from a broader picture of life habits, relationships and acquaintances [518]. Therefore, the criminal proceeding and the prevention proceeding develop on the basis of ontologically different assumptions, so that no constraint arises for the application of a penalty with respect to the preventive measure which only apparently overlaps the former.

The *Grande Stevens* judgement is not considered applicable because, in terms of (formal) legal classification of the offence, it is not a question of comparison between a criminal and an administrative offence, since the assumption of the preventive measure is not an 'offence' of any nature, but a 'condition'[519]. In reality, as also highlighted by foreign scholars in relation to other forms of *actio in rem* [520], the same people and for the same facts can be subjected to the preventive procedure after or at the same time of the criminal trial, or perhaps following the acquittal.

As for, instead, the application of the *ne bis in idem* principle in the prevention proceeding, the Supreme Court has established that the principle in question is applicable, but the *res judicata* preclusion operates *«rebus sic stantibus»* and, therefore, does not prevent the re-evaluation of the danger for the purposes of applying a new or more serious measure where

[517] Court of Cassation, Chamber I, 11.03.2016, n. 27147. C.PARODI, *In tema di* bis in idem *tra processo penale e procedimento di prevenzione*, in *Arch. pen.*, 2014, 3.

[518] Court of Cassation, 16.7.2014, No. 32715; Chamber II, 21.2.2012, No. 19943, Rv. 252841; Chamber. VI, 6.10.2015, No. 44608; Chamber II, 4.6. 2015, No. 26235, Rv. 264387; Chamber VI, 16.7.2014, No. 32715; Chamber II, 21.2.2012, No. 19943, Rv. 252841; Chamber VI, 22.3.1999, No. 950, Rv. 214504; United Chambers, 3.7.1996, No. 18, Rv. 205261; Constitutional Court., 22.7.1996, No. 275; United Chambers., 25.3.2010, No. 13426.

[519] Court of Cassation, 16.7.2014, No. 32715, Rv. 261444.

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

further elements are acquired, priorly or subsequently to the *res judicata*, but still not evaluated. This involves a judgement of greater gravity of the dangerousness and of inadequacy of the measures previously adopted[521] (should the application of a new preventive measure be permitted when the one ordered previously is still in force, what is required is only that the new measure is adopted with reference to new elements, which need to be ascertained at a time following the adoption of the first measure)[522].

All the aforementioned is always based on the consideration that «The preventive decision does not ascertain the existence of a crime and the responsibility of a person ... The preventive measure does have an instrumental nature, an inherent provisional nature, it is aimed at containing social danger and therefore at preventing crimes. Therefore, the structural and systematic affinity with precautionary measures is evident due to the common nature of instrumentality and provisional nature as decisions 'at the state of the art, which is by definition not immutable» [523].

In *Dimitrovi*, the ECtHR contested, in relation to an extended form of confiscation without conviction, the possibility of applying the confiscation also with reference to 'absolute dating facts' (*i.e.*, without statute of limitations and without *res judicata*), because of a violation of the principle of legality and foreseeability of the State intervention: «In that regard, the Court notes that in the case at hand the CPA provided that the State's claims under its Chapter Three could not lapse through prescription (see paragraph 25 above), which meant that individuals being investigated under it could be required to provide

[521] Court of Cassation, Chamber II, 22.6.2015, Friolo; Court of Cassation, United Chambers 29.10.2009, No. 600, Rv. 245176; Court of Cassation 21.12.2006, No. 33077, Rv. 235144; Court of Cassation. 1.3.2006, 25514 Rv. 234995; Chamber I, 16.1.2002, No. 5649, Rv. 221155; Court of Cassation, United Chambers., 13.12.2000, No. 36, Riv 217668.

[522] Court of Cassation, Chamber. I, 21.9.2006, No. 37788, Rv. 235165; Court of Cassation, UNITED CHAMBERS, 24.10.2009, No. 600, Galdieri, Rv. 245176; Court of Cassation, Chamber. 2, 14.5.2009, No. 25577, Rv. 244152.

[523] Court of Cassation, United Chambers., 13.12.2000, No. 36, Riv 217668; Court of Cassation 21.9.2006, No. 33077, Rv. 235144; Court of Cassation 1.3.2006, 25514, Rv. 234995.

Court of Cassation, United Chambers. I, 21.9.2006, No. 37788, Rv. 235165.

evidence of the income they had received and their expenditure many years earlier and without any reasonable limitation in time. In addition, as apparent from the applicants' case, decisions of the prosecution authorities to discontinue proceedings under Chapter Three, after establishing that their continuation was unjustified, had no binding force. In the present case, even though they concluded in 2002 that there was no legal ground for bringing an action for forfeiture against the first applicant and her husband, in 2004 the prosecution authorities opened new proceedings under Chapter Three, concerning the same people and the same period of time (see paragraphs 7-11 above). It thus appears that, as pointed out by the applicants (see paragraph 36 above), the prosecution authorities were free to "open, suspend, close and open again proceedings at will at any time". All this, coupled with the fact that the procedure under Chapter Three of the CPA was very rarely resorted to after 1989 (see paragraph 28 above), means that the CPA did not meet the foreseeability requirement set out in the paragraph above, which entails that a person should be able – if need be with appropriate advice – to reasonably foresee the consequences which a given action may cause (see, *mutatis mutandis*, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV)»[524].

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

[524] ECHR, 3.6.2015, Dimitrovi v. Bulgaria, No. 12655/09, § 46

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

205. Thus, the Court cannot agree with the applicants that the reversal of the burden of proof resulted in itself in a disproportionate interference with their property rights. It will take into consideration, however, the difficulties the applicants might have faced in meeting their burden of proof due to the lengthy periods of time covered by the confiscation proceedings and the other factors described above»[525].

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

6. The confiscation ex art. 34 Anti-Mafia Code.

Moreover, Art. 34 Anti-Mafia Code (once art. 3 quinquies Law No. 575/1965) has introduced the confiscation of assets used while conducting an economic activity that, based on sufficient grounds, is considered objectively useful for the activity of persons who are considered for preventive measures or are defendant in ongoing criminal proceedings for crimes linked to organised crime. The confiscation is applied where «there is reason 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[526].

[525] ECHR, 13 October 2021, Todorov and others v. Bulgaria, No. 50705/11, §§ 202 ss.

[526] Art. 3 *quinquies,* 1. 1423/1956, introduced by art. 24 d.1. 306/1992, now art. 34, § 7.

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 concerned person, as occurs instead in art. 24 Anti-Mafia Code (for the confiscation), because it does not require a "proposed" (affected person considered dangerous), but only requires sufficient evidence to believe that the exercise of certain economic activities (such as laundering) can still contribute to some affiliated persons' activities. This has eliminated one of the major obstacles to the identification of assets of illicit origin and the following application of confiscation, *i.e.*, 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 the partners are; yet it will suffice to simply bring a single case against the same company considered collectively[527].

7. Procedural Aspects (summary)

«The preventive confiscation is applied at the outcome of an inquisitorial proceeding, where the rights of the accused are less guaranteed. The accused will have the right to challenge the decree applying the patrimonial measure (Art. 27 of Italian Legislative Decree No. 159 of 2011, which recalls Article 10 of the same decree, regarding the formalities for challenging personal preventive measures) by appeal and, also, by appeal to the Supreme Court for violation of the law» (challenges that have a suspensive effect with regard to confiscation and, in the presence of the conditions envisaged by the law, to request its revocation)[528].

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

[528] F. DIAMANTI - ALEXANDRA DE CAIS - S. BOLIS, *Italy,* cit., 327.

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

From the standpoint of the burden of proof, the case law has confirmed that the prosecutor must rigorously demonstrate the existence of situations that concretely confirm the formal nature of the ownership, with the aim of leaving the asset effectively and autonomously available to the accused; this availability must be ascertained through rigorous, intense, and in-depth investigation, as the judge is required to explain the reasons why she/he believes there might be false intermediation, based on factual elements[529].

As analysed above, in the opinion of some scholars and according to some judicial precedents, the standard of proof of illegal origin is the criminal standard, at least the circumstantial evidence on the basis of many, serious, and coherent elements («serious, precise, and coherent», art. 192 Criminal Procedure Code)[530]. There is no reversal of the burden of proof, but only a burden of allegation on the affected person, even if the accused's inability to meet this burden on the points pertinent to the investigation, as well as her/his silence, assume circumstantial value or can support the evidentiary value of insufficient elements. The illegal origin and the disproportion must be ascertained by the prosecution in relation to each individual asset, and with reference to their time of purchase[531].

7.1. Chamber Hearing in the prevention proceedings.

The application of preventive measures takes place in the context of a chamber hearing. The court, within thirty days from the proposal of application of a preventive measure, shall schedule the hearing and shall give notice of the hearing to the concerned person. As already

[529] Court of Cassation, Chamber II, 23 June 2004, No. 35628, Palumbo et al., in C.e.d., No. 229726.

[530] See note 200, § 3.

[531] F. DIAMANTI - ALEXANDRA DE CAIS - S. BOLIS, *Italy,* cit., 327.

mentioned, the notice of the hearing (article 7 § 2 Anti-Mafia Code) is not only an order to appear in court (*vocatio in iudicium*), but also means to inform the person of the facts in relation to which she/he is called to defend herself/himself.

In fact, the notice of the hearing shall contain, under the penalty of nullity which can be declared at every stage of the proceedings, «the indication of the proposed measure and the facts on the basis of which the proposal for the application of the preventive measure is based» (Court of Cassation 24 October 1988 No. 2341). Consequently, in the preventive procedure the principle of correlation between the facts complained of and the judicial decision applies, meaning that the judge cannot impose a stricter measure than the one contained in the notice of the hearing. The Court of cassation has clarified that, by virtue of the *favor rei* principle, a *reformatio pro reo* is possible, and therefore a situation at an earlier time considered as 'qualified' dangerousness can be deemed to be 'common dangerousness' at a later time (Court of Cassation 28 June 2006, No. 25701).

7.2. Other procedural guarantees.

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

(b) Mandatory presence of the Prosecutor and the Defence counsel: the Court of Cassation has considered invalid the hearing in chambers held without the presence of Defence counsel and without evaluating the request for adjourning of the hearing for the legitimate impediment of Defence counsel (Court of Cassation, 29 July 1997, No. 1288).

(c) The individual can request that the hearing is conducted in public and not in chamber (Article 7 Anti-mafia Code: «the President orders that the proceedings are conducted

in public hearing upon request by the concerned person») (*Bocellari and Rizza v. Italy*, No. 399/02, 13 November 2007).

7.3. The appeal.

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

Appellate proceedings respect the adversarial principle, since the presence of the Prosecutor and the Defence counsel is mandatory and the concerned individual does have the right to be heard by the judges, if she/he so requests. The Court of Appeal may review the merits of the decision of the judge of first instance; its decision is taken not only on the basis of the findings contained in the documents filed with the judgement of first instance, but also in light of new facts emerged, as well as on the grounds of evidence gathered in the course of appellate proceedings.

The decision of the Court of Appeal can be appealed by the public prosecutor and the concerned person before the Supreme Court of Cassation (without suspensive effect), within ten days of the communication or notification of the filing of the decision[532]. The appeal can be made only on points of law. The appeal for inadequate reasoning is not expressly provided for in the law; however, the case law has affirmed that appeal is permitted in cases where «the reasoning, although formally present, is vitiated by errors so grave that the reasons for the decision are unintelligible»[533].

[532] Article 10, paragraph 4, Anti-Mafia Code, which reproduces article 4, paragraph 11, of the 1956 Act.

[533] D.CARDAMONE, *op. cit.*

More generally, the effort of making preventive measures increasingly 'jurisdictional' is realised both through appropriate legislative interventions, such as Law No. 161/2017 which modified the discipline of the preventive procedure in terms of guarantees in various aspects, and at a jurisprudential level, *e.g.*, via the recent recognition, by the United Chambers of the Supreme Court, of the applicability of the grounds for recusal envisaged by art. 37 § 1 Criminal Procedure Code, «in the event that the judge has previously expressed merit assessments on the same fact against the same subject in another preventive proceeding or in a criminal trial». In this way, the impartiality of the judge is guaranteed[534].

7.3. **Revocation**.

With regard to preventive confiscation, Article 28 Legislative Decree No. 159 of 2011 introduced the possibility of revocation, which allows the confiscation to be rendered ineffective in the event that the conditions for its application are shown to be no longer valid.

Under penalty of inadmissibility, the request for revocation must be submitted within six months from the date upon which one of the cases permitting the request occurred, unless the concerned party is able to prove that she/he was unaware of it through no fault her/his own.

The formalities of the revocation process are the same as those for the extraordinary appeal (usable against final judgements) referred to as a revision (Articles 630 *et seq.* Code of Criminal Procedure), and will be available in one of the following mandatory scenarios:

(a) in the event of the discovery of new decisive evidence after the conclusion of the proceedings;

[534] Court of Cassation., United Chambers., c.c. 24.2.2022, Lapelosa.

(b) in the event that facts ascertained with definitive criminal judgements, arising or becoming known after the conclusion of the preventive proceedings, absolutely exclude the existence of the conditions for the application of the confiscation;

(c) in the event that the ruling on the confiscation was motivated, exclusively or in a determining manner, based on documents recognised as false, falsehoods during the trial, or an event envisaged by the law as a crime.

Definitive confiscation entails the assumption of the asset's ownership by the State.

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

With regard to preventive confiscation, in order to protect third parties, preventive seizure/confiscation cannot be applied to the accused's assets when these have been legitimately transferred to third parties in good faith at any time: in this case, the seizure and confiscation are carried out in relation to other assets, with regards to an equivalent value, which do have a legitimate origin, and are available to the accused, also via a third party (Article 25 Legislative Decree No. 159 of 2011).

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

The Constitutional Court, in the judgement of 28 May 2015 No. 94, declared the inconstitutionality of article 1 § 198 Act No. 228/2012, insofar as it does not include, among creditors who are to be satisfied within the limits and in the manner indicated therein, the holders of credits from employment. The Constitutional Court affirms that the lack of protection for claims that do not fall within those protectable. pursuant to art. 1 § 198 Act No. 228/2012, contrasts with article 36 Constitution, because it «jeopardise the right, granted to the worker by the first paragraph of that provision, to a remuneration proportional to the

quantity and quality of his work, and in any case sufficient to ensure a free and dignified existence for him and his family». Given the general prohibition to start or continue enforcement actions on the confiscated property, set out in art. 1 § 194 Act No. 228/2012, the worker may not be able to act for the payment of his credits, both when his debtor's assets are insufficient to satisfy his claim, and in the event of confiscation of the entire estate of the employer. According to the Constitutional Court, the sacrifice of the creditor-worker does not have a reasonable justification in the balance between the interests underlying preventive measures, and therefore is in violation of article 36 of the Constitution.

The judgement affirms some general principles useful to resolve certain issues related to the protection of third-party creditors. The system designed by the Anti-Mafia Code is in conformity with the Constitution 'as a whole' because it is based on a reasonable balance of interests. The legal framework in force is the result of the balance between two interests that oppose each other: on the one hand, the interests of the creditors of the persons, who are subject to a financial measure, not to suddenly lose their right to have their claims satisfied; on the other hand, the public interest to ensure the effectiveness of financial measures and the achievement of its purposes, consisting in depriving the individual of profits of illegal activities. The Constitutional Court, by a decision of 5 June 2015 No. 101, declared the manifest inadmissibility of the issue of constitutionality raised for violation of articles 3, 24, and 41 of the Constitution and, therefore, affirmed the compliance with the Constitution of third party creditors' protection system introduced by the Anti-Mafia Code, with specific reference to the provisions aimed at ensuring adequate certainty as to the substance of the claim and its priority with respect to the preventive measure.

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

of the disputed claims and the subsequent establishment of a 'payment plan', with time frames inspired by the insolvency law[535].

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

In particular, with regard to preventive seizure, if the seized assets are formally owned by a third party (or a third party is able to claim real or personal usage rights to the seized assets), they shall be called upon by the Court, with a motivated decree, to present themselves during the proceedings, within the thirty days following the enforcement of the seizure order (Article 23 Legislative Decree No. 159/2011).

At the hearing, the concerned parties will have the opportunity to make their case with the assistance of an attorney, as well as to request any elements useful for the purposes of the confiscation ruling. If the latter is not ordered, the Court will order that the assets be returned to their owners.

The participation of the third parties in the proceedings, however, is not mandatory: it follows that, if they fail to attend the hearing, the validity of the order is not jeopardised. The third parties will then be able to make their case at an enforcement hearing, once they have already lost possession of their assets. According to the jurisprudence of the Supreme Court, since the unrelated third party is not a part in the criminal trial, she/he has no opportunity to make her/his case during the trial[536], nor to challenge the portion of the criminal judgement regarding the confiscation[537] (although, as mentioned above, she/he can challenge the seizure provision).

[535] Court of Cassation, United Chambers, 22 February 2018, No. 39608.

[536] Court of Cassation, Chamber II, 10 January 2015, No. 5380, Purificato, in C.e.d., No. 262283.

[537] Court of Cassation, Chamber I, 14 January 2016, No. 8317.

The third party can therefore only wait for the final decision and call for enforcement proceedings, since, pursuant to art. 676 Criminal Procedure Code, she/he is only able to use enforcement hearings to claim her/his right to have the confiscated asset returned[538]. The enforcement judge will be responsible for ascertaining the good faith of the third party, since the retention of her/his right to the confiscated asset depends upon that requirement[539]. However, it must be taken into consideration that the aforementioned Article 104-bis § 1-quinquies Criminal Procedure Code implementing provisions states that «during the trial, third parties vested with property interests or personal rights of enjoyment on seized assets, available to the accused in any capacity, must be summoned».

Furthermore, in order to ensure the protection of third parties in good faith, Article 52 Legislative Decree No. 159 of 2011 states that the confiscation must not affect the credit rights of any third parties indicated by documents with ascertained dates prior to the seizure, as well as any items-related guaranteed rights established prior to the seizure, provided that the following conditions are met:

(a) the accused does not have other assets suitable for satisfying the credit upon which the patrimonial guarantee can be enforced, with the exception of credits backed by legitimate pre-emptive rights on seized assets;

(b) the credit is not instrumental to the illegal activity or to that which constitutes its fruits or the re-use thereof, provided that the creditor demonstrates good faith and an unawareness of the illegal activity;

(c) in the case of promise of payment or acknowledgement of debt, the underlying relationship is proven;

(d) in the case of debt securities, bearer proves the underlying relationship and that which legitimises their possession.

538 Court of Cassation, Chamber II, 10 January 2015, No. 5380, Purificato, cit.

539 Court of Cassation, Chamber I, 8 January 2010, No. 301, P.g. in c. Capitalia Service J.v. s.r.l. et al., in C.e.d., No. 246035

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

Seizure for prevention is ordered by the Court, also *ex officio*, with a motivated decree, in relation to the assets that could be directly or indirectly available to a person against whom a proposal for preventive measures has been submitted, when their value is disproportionate to the subject's declared income or occupation, or when, based on 'sufficient evidence', there is reason to believe that they are or constitute the re-use of the fruits of illegal activities (Article 20 Legislative Decree No. 159 of 2011).

In cases of urgency, the seizure can be carried out 'in advance' with respect to the hearing. In this case, if there is a real danger that the assets intended to be confiscated will be lost, removed or alienated, the Public Prosecutor at the court of the capital city of the district where the person lives, the Public Prosecutor at the court in whose district the person resides, the National Anti-Mafia and Counterterrorism Prosecutor, the Chief of Police, or the Director of the Anti-Mafia Investigative Directorate may, upon submitting the proposal, ask the President of the Court responsible for applying the preventive measure to order the seizure of the assets before the date of the hearing. The President of the Court arranges for this with a motivated decree within five days of the request. The ordered seizure ceases to be effective if not validated by the Court within thirty days of the proposal.

Moreover, during the course of the proceedings, in cases of particular urgency, the seizure is ordered by the President of the Court with a motivated decree, and ceases to be effective if not validated by the Court within the next thirty days (Article 22 Legislative Decree No. 159 of 2011).

Finally, there is also the possibility of 'subsequent' seizure and confiscation, which can even be adopted after the application of a personal prevention measure, at the request of the legitimised subjects (Article 24 § 3 Legislative Decree No. 159 of 2011).

In order to apply seizure for preventive purposes to an asset, its current direct or indirect availability to the subject undergoing the preventive procedure must be proven.

The *fumus* consists in the presence of a link between the asset and the illegal activity, deduced from 'sufficient clues' indicating that the asset is (or constitutes the re-use of) the fruit of illegal activities. With regard to a disproportion with respect to the subject's declared income or occupation, the case law has clarified that reference to the Italian National Institute of Statistics (ISTAT) indexes is not sufficient, as it is necessary to verify the inadequacy of the income obtained by the family-unit with respect to the value of the acquisitions, based on the established data[540].

In terms of duration, the seizure for prevention purposes ceases to be effective if the courts do not file the confiscation decree within one year and six months from the date upon which the assets came into the judicial administrator's possession. In the case of complex investigations, this deadline may be extended for six-month periods by court decree (Article 24 § 2 Legislative Decree No. 159 of 2011).

The seizure for prevention purposes is revoked by the court when it is determined that it is targeting assets of legitimate origins or assets that could not have been directly or indirectly available to the suspect, or in any other case where the proposal for the application of the patrimonial prevention measure is rejected. The court orders the resulting transcripts and annotations to be entered into the public registers, the corporate books, and the business register"[541].

10. The application of the Regulation No. 1805/2018 to the Italian preventive confiscation.

[540] Court of Cassation, Chamber. V, 4 February 2016, No. 14047, Fiammetta, in C.e.d., No. 266426.

[541] F. DIAMANTI-ALEXANDRA DE CAIS- S.BOLIS, *Italy,* cit., 320 s.

Italian preventive confiscation can be included within the scope of the Regulation, under the notion of a confiscation order issued "within the framework of proceedings in criminal matters" (Article 1 of the Regulation) for several reasons[542].

Firstly, as analysed above, the autonomous EU concept of 'proceeding in criminal matters' requires only a link with a crime. Additionally, with specific reference to confiscations without conviction, the EU Commission has recently emphasized that, for the purposes of the Regulation, such provisions can be considered part of a 'procedure in criminal matters' as long as a connection with a crime is present[543].

Given this autonomous concept of a criminal proceeding, preventive confiscation is included because it is applied in a proceeding 'in relation to an offence' (Recital 13 of the Regulation). It requires that the recipient be considered 'a social danger' due to suspected criminal activity, and the assets are confiscated because they are the proceeds of crime (the disproportionate value of the assets serves as circumstantial evidence of criminal origin, or the assets are derived from illicit activity or used for reinvestment, and, in any case, the 'dangerous' owner has not demonstrated a legitimate origin).

Furthermore, the procedure for applying preventive confiscation essentially assumes the characteristics of an enforcement proceeding and takes place before a criminal court. This

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

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

remains true even after the reform of the judicial system introduced by Law No. 161/2017, which mandates that the court have interdisciplinary skills (civil, bankruptcy, criminal, etc.). The Italian lawmakers also considered the prevention procedure to be criminal in nature, as reflected in Article 3, letter d) of Legislative Decree 7 August 2015, No. 137 (implementing Framework Decision 2006/783/JHA). This provision includes confiscation pursuant to Articles 24 and 34 of Legislative Decree No. 159/2011, and the procedure for the adoption of extended confiscation under Article 240 bis of the Criminal Code, within the context of decisions taken in criminal proceedings: «d) confiscation order: a measure issued by a judicial authority in the context of criminal proceedings, which consists of definitively depriving a person of an asset, including confiscation orders… and those arranged pursuant to Articles 24 and 34 of the Code of Anti-Mafia Laws and Preventive Measures, pursuant to Legislative Decree 6 September 2011, No. 159, and subsequent amendments»[544].

Additionally, the change of the expression «criminal proceeding» used in the proposal of Regulation with «proceeding in criminal matter» – as stressed in the «Council of the European Union Interinstitutional File: 2016/0412 (COD)2016/0412 (COD), doc. No. 12685/17 of 2.10.2017» – has been the result of the pressure of the Italian delegation, which - supported by some other delegations – observed that the proposed wording of the scope of the Regulation as defined in Art. 1(1), with the words «criminal proceedings», posed a problem, since its system of so-called 'preventive confiscation' would be excluded. According to Italy, its system of confiscation would not fall, at least not entirely, within the notion of 'criminal proceedings' as currently used in the proposed Regulation. However, Italy suggested using the concept of Article 82(1) TFEU and referring to «proceedings in criminal matters». This would allow to include its system of preventive confiscation, whereas freezing and confiscation orders issued within the framework of proceedings in civil and administrative

[544] (15G00152) GU Serie Generale No. 203 of the 02-09-2015).

matters would explicitly be excluded; confiscation orders issued under its system of preventive confiscation have a clear link with criminal activities and therefore fall in principle within the framework of proceedings in criminal matters. Similar procedural safeguards as in criminal proceedings, notably foreseen by the six Directives on procedural rights, are adequately respected.

During the meetings of the Working Party on Judicial Cooperation in Criminal Matters (COPEN), held on 28 September 2017, a number of Member States indicated that they would be willing to support – or at least to accept – the amendment requested by Italy. Some Member States stressed that the mutual recognition of (freezing orders and) confiscation orders in the European Union would be greatly enhanced if this system could benefit from the application of the Regulation. It was underlined that the Italian system is considered to be one of the most effective confiscation systems in the European Union.

Member States would not be obliged to have such a system themselves, but *they should merely be able to recognize and execute confiscation orders issued by Member States under such a system.*

Some other Member States – and Germany, in particular – expressed doubts about the advisability of this amendment. They noted that the Italian system of preventive confiscation seemed to be of a hybrid nature (criminal/administrative) and questioned whether it could fall under the legal basis of Art. 82 (1) TFEU.

In order to compensate for concerns about compliance with the fundamental guarantees of criminal matters in the proceedings for the adoption of non-conviction based confiscation, Germany has demanded the introduction of an important ground for refusal centered on the violation of individual guarantees[545] and stipulated in Art. 8(1)(f) for the freezing order: "in exceptional situations, there are substantial grounds to believe, on the

[545] C Grandi, 'Il mutuo riconoscimento dei provvedimenti di confisca'(2021) *Leg. Pen.* < http://www.lalegislazionepenale.eu > accessed 31.5.2021, 24.

basis of specific and objective evidence, that the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right to defence". The same ground is provided for the confiscation order in Art. 19(1)(h). In any case, the affected person may challenge the application of mutual recognition by demonstrating that the fundamental guarantees of criminal matters have been violated in the concrete case (a specific violation of fundamental rights) and, thus, by invoking the ground for refusal provided for by Art. 8(1)(f) and 19(1)(h)[546]. In sum, with this ground for refusal a real reason for refusal focused on the violation of individual guarantees makes its debut in the field of mutual recognition.[547]

Also to address these concerns, the Presidency asked the Council's Legal Service for an opinion on the issue, expressed in doc. 12708/17 as follows: "The Presidency considers that the decision to extend the scope to include preventive confiscation systems, such as the Italian system, is a political one and therefore requires guidance from the Ministers".[548] Eventually, the broader wording was adopted so as to include the Italian system of preventive confiscation-

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

. Therefore, with this amendment, as it appears in Recital 13 and in the press release of 8 December 2017 on the orientation reached by the Council on the draft Regulation, it is

[546] S Oliveira e Silva, *op. cit.*, 206 s.

[547] C Grandi, *op. Cit.*, 24.

[548] Opinion of the Legal Service, Brussels, 29 September 2017 (OR. en) 12708/17 Limite Jur 453 Jai 854 Copen 288 Droipen 125 Codec 1483.

proposed, inter alia, *to ensure that mutual recognition covers a broad spectrum of confiscations, including those adopted without conviction and including certain preventive confiscation systems, provided that there is a link to a crime:* proceedings aimed at confiscating the proceeds or instruments of crime.

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

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

In particular, in order to take into account Eurojust's specific area of competence, it was agreed that the Italian Desk of Eurojust must be involved whenever the execution of seizure measures has to be coordinated with execution of personal precautionary measures or investigation activities (searches, witness hearings, technical activities) to be carried out simultaneously with seizures in different countries».

In the end, the preventive confiscation has to be included in the Regulation's scope, but it would be important not only to adopt a criminal standard of the proof of the criminal asset origin, but also to improve the respect of the procedural safeguards according to the recital

No. 18 of the Regulation, which demands the respect of the procedural rights set out in Directives 2010/64/EU ([6]), 2012/13/EU ([7]), 2013/48/EU ([8]), (EU) 2016/343 ([9]), (EU) 2016/800 ([10]) and (EU) 2016/1919 ([11]), and which imposes, above all, that "the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular, the essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings, but which are covered by this Regulation.

The scholarship has criticised this procedure for the lack of criminal trial guarantees: an only 'apparent' judicial guarantee would apply and the principle of the adversarial procedure – the observance of which is demanded by the European Court of the Human Rights also in relation to the preventive proceeding by virtue of article 6 § 1[549] – is violated where this proceeding does not guarantee the taking of evidence in cross-examination (at least when it is repeatable) and the evidence has already been formed in the preliminary investigation phase without cross-examination (in the preventive procedure it is not necessary to take the declarative evidence between the parties, being sufficient that the proposed has, through the examination of the documents, the possibility of full knowledge of their content and the right to counter-argument)[550]. The contradictory, moreover, is imposed by the principle of jurisdiction claimed by the Constitutional Court itself[551] and presupposes adequate evidentiary and judgement rules inherent to the strictly procedural phase[552]. The scholarship

[549] The ECtHR peacefully recognizes the right to be heard (adversarial procedure) also in civil matters, as an expression of the principle of a fair trial pursuant to art. 6 ECHR, see ECHR, 22.9.2009, *Cimolino* c. *Italia*, No. 12532/05, § 43; 11.12.2007, *Drassich c. Italia*, § 33; 16.2.2006, *Prikyan e Angelova c. Bulgaria*, § 52; 13 ottobre 2005, *Clinique de Acacias e Altri c. Francia*, § 38; 25.10.2013, *Khodorkovskiy and Lebedev v. Russia*, No. 11082/06 e 13772/05, § 707.

[550] Court of Cassation., Chamber VI, 19.7.2017, *Maggi e altro*, No. 40552, *Mass. Uff.* No. 271055.

[551] Constitutional Court, No. 2, 10 and 11 of the 1956, No. 45/1960, No. 23/1964.

[552] Cfr. CISTERNA, *La natura promiscua della confisca tra misura di sicurezza e sanzione punitiva in rapporto alle nuove tecniche sanzionatorie della criminalità del profitto*, in A.BARGI-A.CISTERNA, (eds.), *La giustizia patrimoniale penale*, Torino, Giappichelli, 2011, 93; MONTAGNA *Procedimento applicativo delle misure ablative di prevenzione e garanzie del giusto processo*, *ivi*, 453 ss.

has disputed about whether this procedure is too bent on an inquisitorial structure[553], starting from the lack of a real separation between the preliminary phase of investigation and the phase dedicated to the judgement and evaluation of the test themes[554]. For further considerations on the reforms introduced in the preventive proceeding by Law No. 161/2017 and on the reforms necessary to guarantee due process pursuant to art. 6 of the ECHR and in compliance with the claims of art. 8 of Directive 42/2014, as well as in order to increase mutual trust at the basis of judicial cooperation and mutual recognition, reference is made to the examination carried out elsewhere[555].

In any case, the 'Union of Criminal Chambers' (the association of lawyers expert in criminal law) criticised the introduction of unacceptable procedural limitations such as remote hearings, or the lack in the reform of those minimum procedural adjustments capable of making the defence effective such as, just to mention a few, the granting of terms to appear congruous and respectful of the constitutional provisions and the elimination of the limit of the sole violation of the law among the defects reportable before to the Supreme Court[556].

As highlighted in the works of the General States on the fight against the Mafia, indeed, «the reform text does not address some of the issues – such as those relating to the exercise of the right to probation, the methods of conducting the preliminary investigation, the

553 L.FILIPPI, *Il procedimento di prevenzione patrimoniale*, Padova, Cedam, 2002, 69; A.MANGIONE, "*La misura di prevenzione patrimoniale fra dogmatica e politica criminale"*, 2001, Padova, Cedam, 263; ID., "*Le misure di prevenzione anti-mafia al vaglio dei principi del giusto processo*", in (editor) F.CASSANO, *Le misure di prevenzione patrimoniali dopo il "pacchetto sicurezza*, 2009, NelDiritto Editore, 20 ss.; C.VALENTINI, *Motivazioni della pronuncia e controlli sul giudizio per le misure di prevenzione*, 2008, Padova, Cedam, 72. Cfr. A.QUATTROCCHI, *Lo statuto della pericolosità qualifcata sotto la lente delle Chamberioni Unite*, in *Diritto penale contemporaneo – Rivista trimestrale*, 2018, 1, 82 ss.; MAZZA, *La decisione di confisca dei beni sequestrati*, in S.FURFARO (editor), *Misure di* prevenzione, Torino, Utet Giuridica, 2013, 480.

554 M.MONTAGNA, *Procedimento applicativo delle misure ablative di prevenzione*, cit., 457.

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

556 Unione camere penali, *Modifiche al sistema delle confische: l'Unione delibera lo stato di agitazione*, *http://www.camerepenali.it/cat/8550/modifiche_al_sistema_delle_confischel'unione_delibera_lo_stato_di_agitazione.html*.

system of knowability of the acts formed by the prosecution – which appear more relevant for the complete achievement of a 'due process of prevention'»[557]. Another important proposal is that the legislative outline of the application proposal for the measure should be filled with contents: only by defining the contours of the introductory act of the public party, it will be possible to allow a full explanation of the right of defence also in the prevention proceeding[558].

In any case, also in relation to this form of confiscation, the affected person can challenge the application of mutual recognition by proving that the fundamental guarantees of criminal matters have been violated in the concrete case (a specific violation of fundamental rights) and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) («the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence») and 19, h) («in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence»)[559].

This seems the solution more reasonable with respect to the hypothesis, formulated by the scholars, that – also in consideration of the leading cases *Aranyosi* and *Gavanozov II* – the preventive procedure presents a *deficit* with respect to both the fundamental and structural principles; a *deficit* which «depends on a situation of law, deriving precisely from the

557 A.BALSAMO, in Relazione Tavolo XV *Mafia e Europa*, coordinated by Prof.ssa Maugeri, in *https://giustizia.it/giustizia/it/mg_2_22.page*.

558 C. GRANDI, 341 s.

559 S. OLIVEIRA E SILVA, *op. cit.*, 206 s.

incompatibility of the discipline of preventive confiscation with the guarantees whose observance conditions the operation of the mutual recognition mechanism»[560].

In order to improve the application of the Regulation No. 1805/2018, in conclusion, the improvement of the harmonisation through the new Directive 2024/1260 is paramount, because – in line with what established by the German Constitutional Court – the Luxembourg judges themselves recognised that national standards on fundamental rights regain depth – also as a function of impeding mutual recognition obligations – in areas where the level of harmonisation achieved on a European scale is limited[561].

ART. 240 CRIMINAL CODE – Confiscation

In the event of a conviction, the judge may order the confiscation of items that were used or intended to commit the crime, and of the items that are the product or profit of the crime.

Confiscation is always ordered:

1) of the items that constitute the price of the crime;

1-bis) of the assets and computer or telecommunication devices that are found to have been used, in whole or in part, to commit the crimes referred to in Articles 615 ter, 615 quater, 615 quinquies, 617 bis, 617 ter, 617 quater, 617 quinquies, 617 sexies, 635 bis, 635 ter, 635 quater, 635 quinquies, 640, second paragraph, number 2-ter), 640 ter, and 640 quinquies, as well as the assets that constitute the profit or product thereof, or sums of money, assets, or other benefits over which the offender has availability, corresponding in value to such profit or product, if it is not possible to seize the direct profit or product;

560 Only as a possible option, C.GRANDI, *op. cit.*, 293 s.

561 C.GRANDI, *op. cit.*, 314 who quoted Court of Justice UE, 30 May 2013, C-168/13 PPU, *Jeremy*; K. LENAERTS, J. A. GUTIÉRREZ-FONS, *The European Court of Justice and Fundamental Rights in the Field of Criminal Law*, in AA. VV., *Research Handbook on European Criminal Law*, cit., 7 ss.; V. MITSILEGAS, *EU Criminal Law*[2] (Modern Studies in European Law), Oxford (Hart Publishing), 2022, 215; A. WILLEMS, *The Principle of Mutual Trust*, cit., 97.

2) of items whose manufacture, use, carrying, possession, or sale constitutes a crime, even if no conviction has been pronounced.

The provisions of the first part and of numbers 1 and 1-bis of the preceding paragraph do not apply if the item, asset, or computer or telecommunication device belongs to a person unrelated to the crime. The provision of number 1-bis of the preceding paragraph also applies in the case of the application of a penalty upon request of the parties in accordance with Article 444 of the Code of Criminal Procedure.

The provision of number 2 does not apply if the item belongs to a person unrelated to the crime and its manufacture, use, carrying, possession, or sale can be authorized by an administrative permit.

ART. 322-*ter* CRIMINAL CODE – Confiscation.

In the event of a conviction, or the application of a penalty upon request of the parties in accordance with Article 444 of the Code of Criminal Procedure, for any of the offenses provided for in Articles 314 to 320, even if committed by the individuals referred to in the first paragraph of Article 322-bis, the confiscation of assets constituting the profit or price of the crime is always ordered, unless they belong to a person unrelated to the crime, or, when this is not possible, the confiscation of assets over which the offender has availability, for a value corresponding to such price or profit.

In the event of a conviction, or the application of a penalty in accordance with Article 444 of the Code of Criminal Procedure, for the offense provided for in Article 321, even if committed pursuant to the second paragraph of Article 322-bis, the confiscation of assets constituting the profit of the crime is always ordered, unless they belong to a person unrelated to the crime, or, when this is not possible, the confiscation of assets over which the offender

has availability, for a value corresponding to that profit and, in any case, not less than the value of the money or other benefits given or promised to the public official or to the person entrusted with a public service or to the other individuals indicated in the second paragraph of Article 322-bis.

In the cases referred to in the first and second paragraphs, the judge, in the conviction sentence, determines the sums of money or identifies the assets subject to confiscation as they constitute the profit or price of the crime or as they correspond in value to the profit or price of the crime.

ART. 240-*bis* CRIMINAL CODE – Extended confiscation

In cases of conviction or the application of a penalty upon request, in accordance with Article 444 of the Code of Criminal Procedure, for any of the offenses provided for in Article 51, paragraph 3-bis, of the Code of Criminal Procedure, or in Articles 314, 316, 316-bis, 316-ter, 317, 318, 319, 319-ter, 319-quater, 320, 322, 322-bis, 325, 416 committed with the aim of committing the offenses provided for in Articles 453, 454, 455, 460, 461, 517-ter, and 517-quater, 518-quater, 518-quinquies, 518-sexies, and 518-septies, as well as in Articles 452-bis, 452-ter, 452-quater, 452-sexies, 452-octies, first paragraph, 452-quaterdecies, 493-ter, 512-bis, 600-bis, first paragraph, 600-ter, first and second paragraphs, 600-quater 1, related to the conduct of producing or trading pornographic material, 600-quinquies, 603-bis, 629, 640, second paragraph, No. 1, excluding the case where the act is committed under the pretext of exempting someone from military service, 640-bis, 644, 648, excluding the case under the second paragraph, 648-bis, 648-ter, and 648-ter 1, or Article 2635 of the Civil Code, or for any of the offenses committed for purposes of terrorism, including international terrorism, or to subvert the constitutional order, the confiscation of money, assets, or other benefits

for which the convicted person cannot justify the origin, and of which they, either directly or through an intermediary individual or legal entity, are the owner or have availability in a manner disproportionate to their declared income for tax purposes or to their economic activity, is always ordered. In any case, the convicted person cannot justify the legitimate origin of the assets on the basis that the money used to purchase them is the result of or reinvestment from tax evasion, unless the tax obligation has been fulfilled through legal means. Confiscation under the preceding provisions is ordered in the event of conviction or application of a penalty upon request for the offenses under Articles 617-quinquies, 617-sexies, 635-bis, 635-ter, 635-quater, and 635-quinquies when the conduct described involves three or more systems.

In the cases provided for in the first paragraph, when it is not possible to confiscate the money, assets, and other benefits referred to in the same paragraph, the judge orders the confiscation of other sums of money, assets, and benefits of legitimate origin for an equivalent value, of which the offender has availability, even through an intermediary person.

ART. 24 LEGISLATIVE DECREE No. 159/2011 – Confiscation

1. The court orders the confiscation of the seized assets for which the person against whom the proceedings have been initiated cannot justify the legitimate origin, and for which, either directly or through an intermediary individual or legal entity, the person is found to be the owner or to have availability under any title, in a manner disproportionate to their income declared for tax purposes or to their economic activity, as well as assets that are found to be the result of illicit activities or represent the reinvestment of such activities. In any case, the person under investigation cannot justify the legitimate origin of the assets by claiming that the money used to purchase them is the result of or reinvestment from tax evasion. If the

court does not order the confiscation, it may apply, even ex officio, the measures referred to in Articles 34 and 34-bis, provided that the conditions specified therein are met.

1-bis. When the court orders the confiscation of total corporate shares, it also orders the confiscation of the related assets constituted as a business under Articles 2555 and following of the Civil Code. In the confiscation order concerning corporate shares, the court specifies the bank accounts, and the assets constituted as a business under Articles 2555 and following of the Civil Code to which the confiscation extends.

2. The seizure order loses its effect if the court does not issue the confiscation decree within one year and six months from the date the judicial administrator takes possession of the assets. In the case of complex investigations or significant asset holdings, the deadline specified in the first period may be extended by a reasoned decree of the court for six months. For the purposes of calculating the above deadlines, the causes of suspension of the terms for pretrial detention, as provided for by the Code of Criminal Procedure, are taken into account, insofar as they are compatible; the deadline is also suspended for a period not exceeding ninety days if it is necessary to carry out expert assessments on the assets over which the person against whom the proceedings have been initiated is found to have direct or indirect control. The deadline is also suspended for the time necessary for the final decision on a recusal request filed by the defence attorney, and for the period from the death of the person under investigation, which occurs during the proceedings, until the identification and summoning of the persons referred to in Article 18, paragraph 2, as well as during the pendency of the deadlines set out in paragraphs 10-sexies, 10-septies, and 10-octies of Article 7.

2-bis. With the final order of revocation or annulment of the confiscation decree, the cancellation of all registrations and annotations is ordered.

3. The seizure and confiscation can be adopted, upon request by the subjects referred to in Article 17, paragraphs 1 and 2, when the conditions are met, even after the application of

a personal preventive measure. The request is adjudicated by the same court that ordered the personal preventive measure, following the procedures provided for in the relevant proceedings and in compliance with the provisions of this title.