Italy

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Extended confiscation in scope of the fundamental rights and general principles of EU

Research Questionnaire (proposal):

Part A – Analysis by each Member of the Research Team of the legal order of their EU Member State

Introductory question: How is the extended confiscation understood in legal order of your EU Member State?

• **RT 1:** How was the adoption of extended confiscation explained in the process of its introduction into the internal legal system in your EU Member State (e.g. by legal amendments):

- before the transposition of Directive 2014/42/EU (if compensation regulation existed)?
- in the transposition procedure into the internal domestic law ?

Was (extended) confiscation seen as unacceptable / acceptable under certain (what?) conditions before the transposition of the Directive 2014/42/EU?

In the years 1992-1993 the Sicilian Mafia organization called "cosa nostra" ("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 his 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 the legislative decree 8 June 1992 n. 306, converted into law of 7 August 1992, n. 356 (in G.U. 07/08/1992), 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 criminalita' mafiosa). These laws strengthened the repressive system of organised crime[1].

In particulare Art. 12-quinquies D.L. n. 306/1992 provided for two different criminal offenses: "Fraudulent transfer of valuables", punishable by imprisonment from two to six years (fully transfused in art. 512-bis of the Italian Criminal Code), and "Unjustified possession of valuables", sanctioned by an editorial framework not dissimilar (from two to four years of imprisonment). Following the intervention of the Costitutional Court, which declared uncostitutional art. 12-quinquies, co. 2, D.L. n. 306/1992 for contrast with articles 3, 24 and 27, co. 2, of the Constitution, with D.L. n. 399 of 20-06-1994, converted by Law no. 501 of 08-09-1994, art. 12-sexies was introduced in the D.L. n. 306/1992, entitled "Particular hypothesis of confiscation".

[1] The conversion law includes a number of provisions: the tightening of the prison regime with the prohibition of granting benefits to members of organized 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. Others changes were introduced by the legislative decree of 20 June 1994 n. 399 converted, with amendments, into the Law 8 August 1994 n. 501

Art. 12 sexies d.l. 306/1992 was replaced by the art. 240 bis ("Confisca in casi particolari"), introduced into the Italian Penal Code by the Italian Legislative Decree 21/2018. This article which concerns extended confiscation, establishes that, for many specific offences indicated within the text of the provision, in cases of convinction (or plea bargaining) it is always ordered to confiscate the money, assets, or other utilities whose origin are unable to be justified by the convicted person, 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 system of law the extended confiscation has been introduced before the transposition of the Directive 2014/42/EU, as a tool to fight the Mafia (criminal organisations, also differently qualified) and acceptable, even if based on a presumption of illicit enrichment and the only element of the disproportionate value of the goods to confiscate (together with the conviction). The doctrine has strongly criticed this form of confiscation considered not consistent with the presumption of innocence, the right to property, the proportionality principle and the right to defence (see below).

Art. 5 of Italian Legislative Decree n. 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/'92, 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, Leg. Decree n. 231/2007. computer crimes (617 quinquies, 617 sexies, 635 bis, 635 ter, 635 quarter, 635 quinquies).

The objective and subjective requirement are: 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); the asset must be *available* to the person (directly or indirectly); 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 l. 161/2017, a jurisprudential principle (consolidated 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 even through the taxable income subtracted from taxation); the owner doesn't demonstrate the proportionate value of his assets (doesn't 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 (2)).

For the purposes of confiscation the goods that were fictitiously registered in the name of third parties or which have been possessed by intermediary natural or legal persons shall also be considered as being at the disposal of the convicted offender (3); 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 prosecutor4.

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 Disp. Att. of the Criminal Procedure Code).

The *confiscation by equivalent* of the extended confiscation was introduced by art. 10, D.L. n. 92/2008 in paragraph 2-ter of art. 12-sexies, D.L. n. 92/2008 and then immediately reformed;

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2) FIANDACA-VISCONTI, *Scenari di mafia,* Torino. 2010, 79 ss.; MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano 2001, 317 ss.

3) Cass., sez. II, 23 March 2011, n. 17287, T., in *www.dejuregiuffrè.it*; Cass. 3 May 2011, n. 22860, P., ivi; Cass. 3 December 2008, n. 4479, L.B., ivi.; Cass. 26 November 2008, n. 1178, ivi.

4 Cass., 24 October 2012, n. 44534, Ced n. 254699.

now it is in § 2 of the art. 240 bis c.p. It is a form of confiscation by equivalent of the goods that are the object of the extended confiscation, that is, 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 link of causality 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, raised 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 also of confiscation by equivalent pursues a punitive efficiency aim with an omnivorous and draconian character, represents a degeneration of the nature of confiscation by equivalent and a punitive abuse without a clear criminal political purpose.

• **RT 2:** is there any case-law in your EU Member State relating to confiscation (e.g. of constitutional court, court of appeals), which:

- referred to (extended) confiscation?
- applied do (extended) confiscation?
- rejected the (extended) confiscation?
- formulate any additional criteria / conditions for the admissibility of (extended) confiscation? What are those criteria? Are those criteria are met in the current extended confiscation regimes?

The case law about extended confiscation is rich in the Italian system of law; in the prosecution the most important positions of this jurisprudence will be analysed.

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 organized crime offenses, - such as mafia-type association, major drug-trafficking, money laundering, kidnapping for purposes of extortion, trafficking in persons and a few others-, perpetrated to pursue the acquisition of undue benefits; this criminal activity is able to accumulate illegal proceeds that can be reinvested to commit other crimes (5). The confiscation pursuant to 12 sexies is based on "a fundamental choice of criminal policy of the legislator, made with 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 presumption, iuris tantum, of illicit origin of the "disproportionate" patrimony available to the offender for such crimes ».

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5) Cass. Sez. un., 17 December 2003, Montella, n. 920, 1182; Cass., 26 April 2007, n. 21250, in *Juris data online*, 4, § 4; Cass., 28 November 2006, n. 92, *ivi*, 4, § 2; Constitutional Court n. 18/'96 and 33/2018; A.M.MAUGERI, *La lotta contro l'accumulazione di patrimoni illeciti*, in *Riv. Trim. Dir. Pen. Ec.*, n. 3, p. 529; Cass., sez. II, 9.1.2018, n. 5378. Cfr. 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*, n. 9, 2018, p. 2834.

The Constitutional Court (33/2018) has established that "the institute is based on the presumption that the disproportionate and unjustified economic resources found in the convicted person derive from the accumulation of illicit wealth that certain categories of crimes are ordinarily capable of producing" and that this presumption is has already been held by the Constitutional Court as not unreasonable and consistent with the principle of equality and the right of defense, also with reference to art. 42 of the Constitution (the protection of the right to property) (C. cost., Ord. n. 18/1996; see C. cost., N. 88/2000). The reasonableness of the presumption under discussion would remain linked to the circumstance that 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 (C. VI, no. 1600 / 1996, Berti)6 [7]

- **The scope**

- The scope of application of this form of extended confiscation, originally introduced as an instrument to combat the infiltration of organized crime into the economy, has increasingly extended in a manner inconsistent with the original intentions of the legislator, as recently highlighted by the Constitutional Court with the judgement n. 33 of 2018; for example also in relation to the crimes of public officials against the public administration[8].

- 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 organized crime, and mafia** in particular, and their massive infiltration into the economic circuit, the choice of "matrix offenses" was not rigorously consistent from the beginning with this declaration of intent. Alongside criminal figures, they postulate an organization and structured, aimed at the achievement of illicit profits, in fact, such as the association of type mafioso or the association aimed at illicit drug trafficking, the censored rule recalled, in fact, from the outset, a series of other crimes - such as extortion, 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, although considered typical of organized crime (and mafia in particular), can in fact be

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6 Constitutional Court n. 33/2018; n. 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, p. 107 ss.; F.BASILE-E.MARIANI, *La dichiarazione di incostituzionalità della fattispecie preventiva*, in *GP* 2019, pp. 151 – 160; G.AMARELLI, *Misure di prevenzione e principio di determinatezza*, in *Treccani - Libro dell'anno*, 2019, pp. 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 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, pp. 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*, n. 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, p. 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*, n. 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 Corte cost., 27 febbraio 2019 n. 24)*, in *GCost* 2019, pp. 322 – 344; A.MANNA, *Misure di prevenzione e diritto penale: una relazione difficile,* Pisa, Pisa University Press, 2019, pp. 182 ss

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8 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. Cfr. 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.

perpetrated in contexts completely free of this and without implying, in an absolute and indefectible way, the quality of "habitual offender" of their author.

- **Disproportionality.**

- Another important element of this form of confiscation is the disproportionality, in conformity with the Art. 5 of the Directive 42/2014, which demands that ***"the value of the property is disproportionate*** *to the lawful income of the convicted person"*; the recital n. 21 also suggests considering "**the fact that the property of the person is disproportionate to his lawful income**" "among those facts giving rise to a conclusion of the court that the property derives from criminal conduct". This element is requested by art. 240 bis c.p. and also for the confiscation preventive measure, and by the Art. 127 bis Código Penal (*L.O. 1/2015),* comiso ampliado, and Art. 437 StPO (special rules for the independent recovery procedure) as gross disproportion (2017 reform).

- In the art. 240 bis c.p. the disproportionality is the only fact that founds the presumption of the assets' illicit origin together with the conviction for a specific crime, for the Directive it is only one fact among other facts "giving rise to a conclusion of the court that the property derives from criminal conduct"; so, as stressed by the Constitutional Court (n. 33/2018) the Italian model is more severe.

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**(9); the generic proof of the disproportionate character of the estate isn't enough, but the prosecutor must show 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.

- "**Temporal reasonableness**". The Directive recital n. 21 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 the property could be deemed to have originated from criminal conduct".

- In this direction the Italian Supreme Court and the Constitutional Court expressly requests the "**temporal reasonableness**" underlining that the presumption of illicit origin of the goods could not in any case "operate in an unlimited and indiscriminate manner, but must necessarily be limited to a temporal reasonableness area that allows a connection to be made between the assets and the criminal act "(C. I, n.41100/2014); this means that the Tribunal can confiscate only the things obtained by the convicted in a period of time reasonably connected with the crime's time"[10]. The Constitutional Court (n. 33/2018) has affirmed: ""The moment of acquisition of the assets should not be, that is, so far from the time of the" spy crime "as to make ictu oculi unreasonable the presumption of derivation of the assets itself from an illegal activity, even if different and complementary to that for which there was a condemnation".

- The Constitutional Court /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 legitimize - even in the face of a conviction for a single offense included in the list - an asset monitoring extended to the entire life of the offender. A result that would risk making the fulfillment of the burden of the interested party to justify the origin of the assets particularly problematic (even if understood as a simple allegation), burden which becomes more complicated the more the purchase of the

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9) Cass., Sect. Un., 17 December 2003, Montella, n. 920, 1187; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass. 30 October 2008, n. 44940; Cass. 13 May 2008, n. 21357, E., in *www.dejure.giuffrè.it*.

[10] Cass. Pen., Sect. VI, n. 54447/2018; Cass. Pen., Sect. I, n. 41100/2014; già prima Cass. Pen., Sect. VI, n. 246083/2010, rel. Fidelbo.

property to be confiscated is backdated "[11]. This is a corresponding temporal delimitation, mutatis mutandis, to that which the same S.U. (Spinelli 2014) considered effective with reference to the similar measure of the preventive confiscation, art. 24 legislative decree 159/2011. This requirement makes the form of confiscation in question more compatible with the presumption of innocence and the right of defense, since its ascertainment makes the burden of proof of the prosecutor more pregnant and the counter-proof of the lawful origin of his assets is less onerous for the owner, avoiding a sort of diabolical probatio on him about the lawful origin of all assets at any time acquired[12]: "the identification of a precise chronological context, within which the power of ablation can be exercised, makes the exercise of the right of defense much easier, …"[13]..

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

• **RT 3:** Is there any specific experience by practitioners in your EU Member State which created a special attitude to (extended) confiscation? (e.g. organised crime, terrorism, drug crime, money laundering)

How did it influence the legislation (formulation of legal provisions of) (extended) confiscation? See RT 1

• **RT 4:** What is the legal nature of extensive confiscation in your EU Member State?

- Is extended confiscation in your EU Member State:
  - a criminal sanction (accessory or principal criminal penalty)?
  - a preventive measure without the nature of criminal sanction (security measure in a broad sense, administrative measure adopted within or outside criminal proceedings)?
  - a precautionary measure on a suspect's assets (civil measure *in rem* or a kind of *ante delictum* criminal prevention measure)?
  - a civil consequence of committing an offense, provided for by criminal law?
  - an autonomous (*sui generis*) instrument of another kind (e.g. a measure aiming at neutralisation of criminal profit and at the removal of illegal proceed)?
- Are there any other evidence rules / lowered standards of evidence relating to extended confiscation?
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- **The nature of the extended confiscation (art. 240 bis c.p.).**
- The Directive allows the MS to choose the nature of the confiscation; this is established in the recital n. 13: “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” **or in the recital n. 10** :“Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court”.
- It is not clear the legal nature of the extended confiscation. It could be assumed that the legislator, in defining this institution as "particular cases of confiscation", refers to the general institution of confiscation provided for by Italian legal system, namely the confiscation *security measure* contemplated by art. 240 c.p. 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 (C. cost., ord. n. 18/1996, Basco; Supreme Court, VI, n. 1600/1996);

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[11] See Cass. Pen., SS.UU., 25 febbraio (15 luglio) 2021, n. 2742; Cass. Pen., Sez. I, n. 19470/2018; Cass. Pen., Sez. I, n. 41100/2014; L.CAPRIELLO, *La confisca allargata e il limite temporale di operatività della misura in executivis*, in *Arch. pen*. 2020, 20 dicembre.

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

[13] Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880 for the preventive measure.

"atypical asset security measure, replicating the characteristics of the anti-mafia preventive measure ..and the same preventive purpose "[14]. Lastly, it is noted that the preventive function has undergone a significant enhancement by the l. 17 October 2017, n. 161, which, with art. 31, introduced multiple changes to the rules on "extended" confiscation "and, in particular, the application even in the event of prescription or amnesty" [15].

- The doctrine criticize 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 recipients (and of the assets) has never figured among the requisites ([16]) of this form of confiscation and in a purely preventive approach it would not make sense to confiscate in confrontations of the heirs ([17]), now allowed with the recent reforms. Furthermore, as highlighted by the doctrine 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 assets, however, are not in itself dangerous but becomes so in relation to a dangerous subject, who could in the future use it to commit crimes ([18]).
- In the doctrine, 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 ([19]); or, penalty of suspicion or sui generis penalty ([20]); or in any case a sanction in the broad sense "released from a fact of crime" ([21]). This measure constitutes a "patrimonial sanction of a purely punitive nature" ([22]), but whose real function is 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" [23]. Or, again, it is observed that the extended confiscation, despite being connected for repressive reasons to the

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14 Cass. S.U., n. 29022/2001, Derouach; Cass. S.U., n. 33451/2014; C. V, n. 1012/2017; Cass. I, n. 19470/2018; Cass. II, n. 5378/2018; Cass. VI, n. 54447/2018.

15 Cassation, V, no. 1012/2017.

16 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 judgment "and the crime" far from establishing ... a judgment of dangerousness ... discolouration in the law in question on the mere occasion ").

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

18 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.

19 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.

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

21 F.SGUBBI, *L'art. 12 quinquies della legge n. 356 del 1992 come ipotesi tipica di anticipazione: dalla Corte Costituizonale all'art. 12 sexies,* Torino 1996, 30; G.SQUILLACI, *La confisca "allargata" qule fronte avanzato di neutralizzazione dell'allarme criminalità*, in *Dir. Pen. Proc.* 2009, 1531, n. 38

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

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

definitive sentence for an exhaustive class of criminal offenses with economic connotation, represents an instrument of neutralization 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 financing further illegal activities, and for supporting legal economic activities with distorting effects on the market and competition ([24]).

The Constitutional Court, in a recent ruling (n. 24/2019), **denies any punitive nature** ("the relative presumption of illicit origin of goods, which justifies their ablation in favor of the community, does not necessarily lead - as sometimes it is argued - to recognize 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 recognized – a mere **compensatory - restorative function** with the rules of the legal system. In the wake of what the Gogitdize judgment of the Edu Court affirmed: "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 Sections 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, section one, no. 4880 of 2015)". This is recently the opinion of some authors[25].

Contra some authors does not consider this position to be shared, although it fully recognizes this restorative-compensatory function to the direct confiscation of ascertained profits (as the offense is not a legitimate right to purchase goods and it would be a question of returning something that one has no right to hold); but 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, on the other hand, 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 ([26]). Furthermore, it must not be forgotten that this form of confiscation also assumes an undoubted *stigmatizing* character of a criminal nature, where it is based on the presumption of illicit origin of assets of disproportionate value and therefore on

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[24] 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

[25] 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).

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

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 afflictivity, 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 incapacitation [27]. 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 born from a macro-criminal point of view as an instrument of economic incapacitation of organized crime and of preventing its infiltration into the lawful economy, but which has taken on the aim of guaranteeing sine die the subtraction of profit ... and ... ends to also assume a punitive impact "([28]).

In consideration of the intrusive nature of this form of confiscation, as also recognized by the Constitutional Court in ruling no. 33/2018, which can affect the entire patrimony and forces the holder to justify his lawful origin, stigmatizing him as a professional offender, should, then, be recognized as punitive, at least in the broad meaning accepted by the Edu Court in relation to the concept criminal matters, in order to recognize the relative 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 nature as an end 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 ([29]).

The extended confiscation as security measure can be applied retroactively, according to the law in force at the time of adoption of the measure; it is applicable the principle of retroactivity concerning security measures (which are laid down in article 200 c. p. invoked by art. 236 c. p.) which is recognized by the Constitution (article 25 paragraph 3 of the Constitution of the Italian Republic). The authors criticize the non inclusion of the security measures in the concept of "criminal matter" in the wide interpretation of the ECourtHR (Engel criteria)[30].

- Is a reversed burden of proof applied by extended confiscation?
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- It is argued, at any rate, that if the burden of the proof about the illicit origin is **on the owner**, as the law requires that the **owner was unable to demonstrate legal origin**. Part of the doctrine denounces an unacceptable reversal of the burden of proof, under which it is for the individual concerned 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 rests primarily on the prosecution, while the person

[27] 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.
[28] A.M.MAUGERI, *Una parola definitiva*, cit., 955
[29] In the matter of MASERA, *La nozione costituzionale di materia penale* Torino 2018, in particular 235.
[30] G.GRASSO, *Commento all'art. 240 c.p.*, in ROMANO-GRASSO-PADOVANI, *Commentario sistematico del codice penale,* III, Milano 2011, p. 609.

concerned has the burden of "allegation" finalized to counter the evidentiary situation against him[31].

- Authoritative doctrine said that "the burden of allegation of the person concerned does not differ greatly from the rules of a normal procedural dialectics, being perfectly natural that the defense should strive to counter the evidences given by the prosecution" [32].
- The Supreme Court has repeated that this form of confiscation complies with the presumption of innocence because art. 12 *sexies* doesn't "presume" the guilt of the accused but only the unlawful source of the assets (33); the right to silence regards only the demonstration of the responsibility of the accused, and after the conviction it isn't relevant (34). The Court admits the mitigation of the constitutional safeguards in respect of property right, but it stresses that the presumption of innocence only concerns the protection of the personal freedom. The right to defence is respected because the owner can demonstrate the lawful source of his assets (35).
- However, the Court imposes on 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 (36); the generic proof of the disproportionate character of the estate isn't enough, but the prosecutor must show 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 demands, in order to refute the presumption, that the owner has to fully demonstrate how he has economically accumulated the assets; it is a substantial burden: *explaining how the suspected has economically accumulated his wealth* (Supreme Court 2004 Montellla). The problem is, therefore, that the silence of the accused becomes evidence supporting the presumption of the illicit origin of the assets (37), in contrast with the right to silence also affirmed by the Directive 2016/242 (recital 24).
- Is the proof of guilt of the offender required to apply extensive confiscation? application after the prescription and without the conviction.
- Yes, normally its application demands a conviction and the proof of guilt (art. 240 bis c.p.), even if this form of confiscation can be applied also if the crime is **statute barred** or amnestied, ex art. 578 bis c.p.p., introduced by l. 161/2017 and amended by l. n. 3/201938; this

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[31] Cass. Sez. un., 17 December 2003, Montella, n. 920, 1187; Cass., sez. VI, 3 aprile 2003, Prudentino, rv. 226492; for preventive confiscation Court of Cassation 21 April 1987 n. 1486; 22 February 1993 n. 746; 5 May 1995 n. 2755

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

33 Cass. Sez. un., 17 December 2003, Montella, n. 920, 1187; Cass. Sez. un., 30 May 2001, Derouach, in *Foro it.* 2001, II, 502 - 504.

34 Cass. Sez. un., 30 May 2001, Derouach, cit., 502.

35 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.

36) Cass., Sez. Un., 17 December 2003, Montella, n. 920, 1187; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass., 13 May 2008, n. 213572, *Ced* Rv. 240091; Cass. 30 October 2008, n. 44940; Cass. 13 May 2008, n. 21357, E., in *www.dejure.giuffrè.it*.

37) Cass. Sez. un., 17 December 2003, Montella, n. 920, 1187; Cass., 26 April 2007, n. 21250, § 4; Cass., 2 June 1994, Malasisi, in *Cass. pen.* 1995, 907; Cfr. Cass., 30 October 2008, n. 44940; Cass., Sect. 1, 5 june 2008, n. 25728; Cc. - dep. 25 june 2008 - Rv. 240471; Cass., 5 June 2008, n. 25728, C.; Cass., 13 May 2008, n. 21357, E., in *www.dejure.giuffre.it*.; see also POTETTI, *Riflessioni in tema di confisca di cui alla legge 501/1994*, in *Cass. 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.

38 "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

norm states that when confiscation has been ordered in special cases pursuant to Article 240 bis c.p. and other legal provisions or pursuant to art. 322 ter c.p., the appeal judge or the Court of Cassation, in declaring the offence expired 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 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 prevention proceedings for the purposes of applying confiscation as a patrimonial preventive measure[39].

The European Court of Human Rights has ECHR has supported this approach, the possibility to apply the confiscation – even if punitive – after the prescription, in the G.i.e.m. case (against Varvara case), in relation to the so called "urban confiscation" which, in case of unlawful site development (art. 44 d.P.R. n. 380/2001 "Testo unico delle disposizioni legislative e regolamentari in materia edilizia"), allows the confiscation of the land and all structures built on it; this form of confiscation has been considered punitive by the ECourtHR in the Sud Fondi judgement and included in the criminal matters. The ECourtHR has affirmed that art. 7 ECHR excludes the possibility of imposing a criminal sanction against a person without the verification and prior declaration (even incidental) of his/her criminal liability, which can be contained within a sentence that, nevertheless, declares the crime to be extinct by statute of limitations. The doctrine criticized the possibility to apply a form of extended confiscation without the final conviction, demanded by the law (art. 240 bis c.p.), in violation of the principle of legality and the possibility to carry on the proceeding after the prescription only to apply the confiscation is considered a violation of the substantial nature of the prescription, affirmed by the Constitutional Court (n. 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' crystallizes 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 stigmatized, by an afflictive sanction, however qualified ")[40]. 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 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 recent reform of the criminal trial (law 134/2020) has modified the rules regarding statute limitation period, which is now definitely interrupted after the verdict of first instance (l. 3/2019). This means that 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 judgment). A forthcoming legislative decree

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prescription or amnesty, they decide on the appeal solely for the purposes of confiscation, after ascertaining the accused's responsibility".

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

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

will regulate the relationship between bar to prosecution and confiscation. There are two possible solutions: the same mechanisms of art. 578 bis c.p.p. will be adopted and even after the exipiry of the bar prosecution period, the Court will have the power to order confiscation after assessing the defendant's criminal liability (confirmed by new art. 115 bis c.p.p.); transfer the decision regarding confiscation after bar prosecution period in the proceeding of prevention, as it is now already foreseen 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.p.).

• **RT 5:** What are the legal instruments for the protection of individual rights in your EU Member State

- at each stage of the confiscation procedure?
- in the substantive legal basis for adjudication?

Are considered as sufficient to protect individual rights and freedoms?

First of all, even if the Constitutional Court recognize compensatory nature to extended confiscation (and preventive confiscation), however, in its opinion "there remain measures that heavily affect property rights and economic initiative, protected at the constitutional (articles 41 and 42 of the Constitution) and conventional level (Article 1 Prot. add. ECHR) "and, therefore, must be subject" to the combined provisions of the guarantees to which the Constitution and the ECHR itself subordinate the legitimacy of any restriction to the rights in question" and that is the provision through a law (articles 41 and 42 of the Constitution) so as to guaranteeing its foreseeability (art. 1 Prot. add. ECHR); compliance with the principle of proportionality (art. 1 Prot. add. ECHR and art. 3 of the Constitution) and respect for the principle of due process (art. 111, first, second and sixth paragraphs, Constitution), provided for by art. 6 ECHR also in civil matters, as well as respect for the right of defense (Article 24 of the Constitution) of the person against whom the measure is required.

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 (Disp. Att. CPP, i.e. Italian Legislative Decree no. 271 of 1989). Confiscation (art. 240 c.p. and special forms of confiscations) can or must be ordered by the trial judge who pronounces 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 rule on it (Court of Cassation, sec. III, 10 September 2015, no. 43397, Lombardo, in C.e.d., no. 265093)[41].

[41] 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. Optional confiscation (art. 240 c.p.) 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. It can only be ordered in the event of a conviction, even after a plea bargain. In 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 extent of 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. The sentence issued at the end of the plea bargain is treated as a judgment of conviction.

In the case of seizure for the purposes of confiscation by equivalent or **extended confiscation** (art. 240 bis c.p.), 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[42], in 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 pronounces the sentence of conviction, or by the enforcement judge. Since confiscation is applied following a conviction, the accused will have enjoyed 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, the practice of postponing the confiscation until the enforcement phase has been adopted. This solution was later embraced by the legislature, first with Law n. 161/2017 (art. 12 sexies, § 4 sexies) and later with Legislative Decree n. 21/2018, which transposed the contents of the criminal procedure code's implementing provisions (art. 183 quarter Disp. Att. Of the Procedural Criminal Code, titled "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 arranges for the same without formalities (art. 667, § 4, Criminal Procedure Code) and, above all, he can take the provision without hearing the parties and the contradictory (inaudita altera parte). Opposition can be raised under penalty of forfeiture, within thirty days of the decree's announcement or notification, based on which a chamber hearing for cross examination may be scheduled (art. 666 c.p.c.) and the provision adopted can be appealed to the Court of Cassation. This procedure, which allows the application of the extended confiscation without hearing the affected, violates the principle of legality because art. 240 bis c.p. demands that the convicted doesn't justify the proportionality and legitim origin of his assets, and this means that he has to have this possibility in a hearing; so this procedure limits the right to defence, even because it excludes the appeal in Court of Appeal and allows only the appeal in Cassation. The Constitutional Court has considered this limitation of appeal consistent with the right to defence, art. 24 Italian Constitution[43]. In the Paraponiaris v. Greece, the European Court even considered incompatible with the principle of the presumption of innocence the application of an ablative measure adopted in procedural stages that do not allow for an adequate exercise of the right of defense[44].

In addition to the conviction, on the other hand, mandatory confiscation is always ordered for 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. Mandatory confiscation is also ordered (in this case regardless of a sentence of conviction) for the assets whose manufacture, use, carrying, possession, or disposal constitutes a crime (article 240 (2, no. 2) of the Italian Penal Code), unless they belong to a person unrelated to the crime and their use, etc. is permitted by administrative authorisation. Finally, it should be noted that confiscation is mandatory for computerised and telematic assets and tools used to commit a series of computer crimes, as well as the assets constituting the profit or product of those crimes (Article 240).

[42] Court of Cassation, JC, 17 December 2003, no. 920, Montella, in C.e.d., no. 226492

[43] Corte cost., 9 giugno 2015, n. 106; cfr. Cass. Pen., Sez. VI, 4 giugno 2014, n. 39911; Cass. Pen., Sez. I, 10 giugno 2014, n. 52058.

[44] ECtHR, I section, 25 September 2008, Paraponiaris v. Greece, ref. no. 42132/06.

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

Seizure and confiscation of assets belonging to third parties. In the Italian legal system, the confiscation of assets belonging to persons unrelated to the commission of a crime95 is generally excluded, both for confiscation pursuant to Article 240 of the Italian Penal Code, as well as for the special hypotheses relating to particular types of offences96. The confiscation referred to under Article 240 (1) of the Italian Penal Code does not enter into effect if it would affect assets belonging to a person unrelated to the crime (Article 240 (3) of the Italian Penal Code). This limitation does not apply, however, for "intrinsically dangerous" assets (Article 240 (2, no. 2) of the Italian Penal Code), such as those whose manufacture, use, carrying, etc., constitutes a crime. For these purposes, the notion of ownership must be understood in the material sense, without having regard to the formal ownership of the asset. With regard to unrelatedness, an unrelated person is someone who has not made any contribution to the commission of the crime and has not obtained any benefit from the unlawful conduct of others97, with the exception of cases in which the third party has innocently benefited from the crime in good faith98. 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.

However, with regard to **patrimonial prevention measures** (SEE below, preventive confiscation ex artt. 24 or 34 d.lgs. 159/2011, without conviction), in order to protect third parties, the accused's assets cannot be subjected to preventive seizure or confiscation when they 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 of equivalent value and of legitimate origins available to the accused, even through a third party (Article 25 of Italian Legislative Decree no. 159 of 2011).

With regard to **extended confiscation,** we have seen that Article 240-bis of the Italian Penal Code also concerns the assets owned by or available to the convicted party in any capacity, even through a natural or legal entity. As anticipated, like preventive confiscation (Article 18 of Italian Legislative Decree no. 159 of 2011), extended confiscation 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 (Article 183-quarter Disp. Att. of the Italian Code of Criminal Procedure).

With regard to third party protection, the **preventive procedure** has become a reference for confiscation in particular cases to which the framework contained in the Anti-Mafia Code (Legislative Decree no. 159 of 2011) applies. In particular, Article 104-bis (1-quinquies) Disp. Att. of the Italian Code of Criminal Procedure, introduced by Italian 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"; the same (Article 104-bis (1-sexies) Disp. Att. of the Italian Code of Criminal Procedure) **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 regard to the effects of the extended confiscation, after determining the liability of the accused (article 578-bis of the Italian**

Code of Criminal Procedure). From the standpoint of **burden of proof**, the jurisprudence 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 he/she believes there might be false intermediation, based on factual elements[45]. If it is ascertained that certain assets have been falsely registered or transferred to third parties, the judge declares the relative acts of disposal to be null with the decree ordering their confiscat purposes, the following are assumed to be 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 prevention measure (art. 26 d.lgs. 159/2011). These assumptions are relative and allow for evidence to the contrary.

Furthermore, in order to ensure the protection of third parties in good faith, Article 52 of Italian Legislative Decree no. 159 of 2011 states that the confiscation **mustn't affect the credit rights** of any third parties indicated by documents with ascertained dates prior to the seizure, as well as any real guarantee rights established prior to the seizure, provided that the following conditions are met: a) that 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) that 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, that the underlying relationship is proven; d) in the case of debt securities, that the bearer proves the underlying relationship and that which legitimises their possession.

The remedies available to third parties in case of seizure or confiscation. 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).

The system for the protection of third parties, provided for by the Legislative Decree no. 159 of 2011 for the preventive confiscation (art. 24 d.lgs. 159/2011, without conviction), **has been extended to confiscation ex Article 240-bis of the Italian Penal Code** and to any form of seizure or confiscation in regard to crimes mentioned by Article 51 (3-bis) of the Italian Code of Criminal Procedure (Article 104- bis (1-quater) Disp. Att. of the Italian Code of Criminal Procedure).

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 of Italian Legislative Decree no. 159 of 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 infallible: it follows that, in the event that they should fail to

[45] Court of Cassation, sec. II, 23 June 2004, no. 35628, Palumbo et al., in C.e.d., no. 229726.

present themselves, the validity of the order will not be revoked. 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 legitimacy, since he/she is not part of the criminal trial, the unrelated third party has no opportunity to make his/her case during the course of the trial[46], nor to challenge the portion of the criminal sentence regarding the confiscation[47] (although, as mentioned above, he/she can challenge the seizure provision). The third party can therefore only await the final decision and *call for enforcement proceedings, since, pursuant to art. 676 of the Italian Code of Criminal Procedure*, he/she is only able to use enforcement hearings to claim his/her right to have the confiscated asset returned[48]. The enforcement judge will be responsible for ascertaining the good faith of the third party, since the retention of his/her right to the confiscated asset depends upon that requirement[49]. It must, however, be taken into consideration that the aforementioned Article 104-bis (1-quinquies) Disp. Att. of the Italian Code of Criminal Procedure now 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".

With regard to preventive confiscation, on the other hand, Chapter IV of Italian 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[50].

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

• **RT 6:** Does – in your opinion based on the answer of the above mentioned questions / the literature in your EU Member States – extended confiscation comply with the principles of:

legality?

- legal specificity of a statute?
- proportionality?
- non-retroactivity of the /more severe/ statute?
- protection of the citizen's trust in the state and law?
- the right to private property?
- the rights to defence?
- the rights to a fair trial?
- the presumption of innocence?
- the right to privacy?
- and others relevant rights – what sort of?

The modern types of extended confiscation intended to fight criminal organisations, also appear in themselves to be symptomatic of the change in paradigms that characterises more generally contemporary criminal law in the passage from a 'classic' model to a 'modern or

[46] 0 Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, in C.e.d., no. 262283.
[47] 1 Court of Cassation, sec. I, 14 January 2016, no. 8317.
[48] Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, cit.
[49] 3 Court of Cassation, sec. 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
[50] Court of Cassation, JC, 22 February 2018, no. 39608.

'post-modern' one ([51]); 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 rights of citizens.

According to part of the doctrinal thought the type of "extended" confiscation included in art. 240 bis c.p. violates some constitutional principles (52).

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

Some scholars think that there is a price to pay in terms of citizens' guarantees for a more effective fight against organised crime, the strategic objective being to attack the economic base of organised crime through the property of the individual criminal and thus to restrict the further spread of such a serious social disease and to prevent the pollution of the legal economy as a result of the laundering of dirty money. 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 capitaI in legitimate economie 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 notion of guaranteeing citizens' rights. Historically, the fundamental safeguards offered by a penal system take as their reference point punitive sanctions that impinge on the value of personal liberty - a value which is still of primary importance today; classic penal principles should be mitigated when the sanction exclusively affects property rights and then only with preventative objectives in mind. An affirmative argument assumes that in the current evolutionary stage of legal systems, property rights no longer occupy a primary position in constitutional values but certainly rank below the importance attributed to personal liberty ([53]).

This is true, but, 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 ([54]); if a government has an uncontrollable power on property rights of a citizen, all other rights became without value ([55]) (if a government can confiscate liberally the assets of citizens, there is no more freedom, because property is a guarantee for freedom). Art. 1 of the Protocol of the European Convention of Human Rights affirms: "property rights are a condition for personal and familiar independence". Property is also a mean to express the freedom of economic initiative ([56]).

Furthermore, if the proof of illicit source is lacking, confiscation is a penalty whieh must be proportionate to the gravity of the crime and to guilt; a sanction that can confiscate alI 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 onus of proof, because according to this fundamental principle of a democratic State all the facts, on which the penalty is founded, have to be proved in criminal proceedings with the safeguards of the criminal law, whereas in the confiscation proceeding the other crimes (if it is required the conviction) or the crimes (in the *actio in rem*) from which the unlawful assets

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[51] C.VISCONTI-G.FIANDACA, *cit*., 73; see also MAUGERI, *cit.*, 5 ss.; G.FIANDACA-E.MUSCO, *Perdita di legittimazione del diritto penale*, in *Riv. it. dir. proc. pen.* 1994, 24; LÜDERSSEN, *Züruck zum guten alten, liberalen, anständigen Kernstrafrecht?*, in *Fest. Jäger* 1993, 268 ss..

52 A.M.MAUGERI, *Le moderne sanzioni, cit.*, 668 ss., 736 ss., 754 ss., 831 ss.

[53] G.FIANDACA – S.COSTANTINO, *op. cit.*, 81 – 82.

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

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

[56] *United States v. James Daniel Good Real Property,* 114 Supreme Court 492 (1993); MAUGERI, *cit.*, 670.

derive aren't demonstrated; in these procedures the estate is confiscated only on the assumption that it comes from offences but without the proofs of this unlawful origin. The safeguards of the criminal procedure are not respected, first of all the right to silence, because the presumptions of the illegal origin can become 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 guarantees of the defendant -in particular the right to defence and the connected right to silence -(as far as to respect the presumption of innocence as rule for the dignity of the proof) ([57]).

In conclusion, in order to find a good balance between the exigencies of the efficiency 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 doesn't mean that the prosecutor must prove the relationship between goods 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 in order to respect the fundamental guarantees of the presumption of innocence, the right to silence, the right to property 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 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*"([58]).

Confiscation might be limited in relation to goods acquired during the perpetratìon of the crime or in a reasonable connected period of time; this temporal connection should aim to limit the contrast of these expanded confiscations with the principle of proportionality ([59]).

In any case money, commodities or other assets, acquired or matured earlier than the criminal activity of the convicted offender began, 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.

The application of non conviction based forms of confiscation must be limited only to specific and limited situations; the risk linked to the expansion of the *actio in rem* is also the sacrifice of the rights of bona-fide third parties.

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

[58] 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.

[59] A.M.MAUGERI, *Le moderne sanzioni patrimoniali*, cit., 625 ss. - 775.

- **Rt4** Is there only one type of extended confiscation or are there in fact several different instruments with a common name?
- Does a non-conviction-confiscation exist in your EU Member State?

1. The preventive confiscation.

The law 13 September 1982 n. 646 regulating "Mafia-type criminal association and provisions on preventive measures concerning property" (known as the "Rognoni-La Torre Act" from the names of the parliamentarians that proposed it) marks a turning point in the fight against organised crime. The article 416 bis, governing the crime of mafia-type criminal association, was introduced into the criminal code[60].

In order to counter the economic interests of the mafia, the "Rognoni-La Torre Act" introduced the anti-mafia seizure and confiscation (articles 2 bis, 2 ter and 2 quater). These additions radically change the contrast strategy against Mafia, which now hinges on the fight against the illicit assets. The innovations can be summarised as follows: it is established a link between preventive measures against persons and preventive measures related to property[61].

After some reforms(62), in 2011 Legislative Decree no. 159/2011 introduced the 'Code of antimafia laws, relevant preventive measures and newantimafia provisions'(hereafter Antimafia Code). The Antimafia 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 ability to be applied to specific categories of persons who have not been attributed criminal responsibility through sentencing, but only suspected.

For this reason such ablative measures are differentiated from confiscation and are defined as *ante* or *praeter probationem delictum* (63). Normally they concern or are concerned with

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

[61] 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 organization. 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, 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.

62) Inter alia, l. n. 125/2008 and l. n. 94/2009.

63) 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

judicial proceeding for the application of personal preventive measures (special surveillance by the police or the prohibition or obligation of residence in a specific location) for, amongst others, person who : ("special dangerousness")

– according to art. 16 Antimafia Code - are - based on objectively verifiable facts- suspected (under investigation) for affiliation with the Mafia, Camorra or other criminal groups however they may be known locally that act according to methods typical of mafia groups" (art. 1, l. 575/1965, as modified by the law 646/1982 and now art. 4 Antimafia Code),

– or suspected ("under investigation) for commission of the crimes provided in art. 51, § 3 *bis* Criminal Procedure Code (crimes connected to criminal organisations, kidnapping for profit, racketeering, ..) or Article 12-*quinquies*, § 1, law n. 356/1992;

– or who have committed acts preparatory to acts of terrorism or are - based on objectively verifiable facts- suspected (under investigation) for terrorism acts (also foreign fighters);

– Ordinary dangerousness (when it was established that the individual posed a danger to public safety.):

– "(1) individuals who, on the basis of factual evidence, may be regarded as habitual offenders - (art. 19 l. 152/'75, now art. 4, 1, c) that recalls art. 1 Antimafia Code) (declared unconstitutional by Constitutional Court, n. 24/2019 after ECHR De Tommaso judgement[64]);

– (2) individuals 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; 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, 1423/1956, now art. 4, 1, c) that recalls art. 1 Antimafia Code)

After the recent reforms it is possible to apply the preventive confiscation without imposing personal preventive measures (which require proof of danger to society) and even in cases where the owner dies during the proceeding or has died in the five years before the beginning of the procedure (art. 18 Ant. Code); so it is truly an *actio in rem* (65).

In any case the law (art. 6 Antimafia code), the Constitutional Court and the Supreme Court demand the **"pericolosità sociale"** (danger to society), even if it isn't current, this means that he/she was in the past a danger to society on the basis of circumstancial evidence of criminal activity or some kind of involvement in criminal activities or proximity to organised crime (art. 18 Ant. Code) 66; the Suprem Court (United Sections Spinelli 2014) established that the

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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."

64 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.*, N. 4, 2017, P. 129

65 See Corte Cost. 9 February 2012, n. 21, in *Dir. pen. cont.*, www.penalecontemporaneo.it/.

66 Corte Cost. 9 February 2012, n. 21.

confiscation becomes a punitive and uncivil sanction without the ascertainment of the dangerousness, even if in the past.

The ECourtHR has established in De Tommaso case that personal preventive measure violated art. 2 Prot. 4 ECHR which provides that any measure restricting the freedom of movement must be adopted in accordance with domestic law, for the lack of foreseeability of the relevant Act, thus resulting in excessive discretion in defining the category of generic dangerousness on the part of the judge. Notwithstanding judgments 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 (requiring, for example, 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 of Protocol No. 4 to the Convention.Notwithstanding judgments 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 (requiring, for example, 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 of 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"[67].

Referring also to the case law of the ECtHR and in particular the de Tommaso case, the Constitutional Court (n. 24/2019) declared unconstitutional the provision allowing for the first type of personal and in rem preventive measures (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

67 118. 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 judgment 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.

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 to 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”.

It is possible to distinguish two types of preventive confiscation: the provision for the confiscation of assets which a subject has at his disposal, when the value of said assets is disproportionate to declared income or economic activity, or when *it transpires (results)* that they are derived from illicit activity or used for reinvestment, and, at any rate, are assets for which the defendant has not demonstrated a legitimate origin (art. 24 Leg. Decree 159/2011) (68); the provision regarding 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, whether *there is motive to believe* that these assets are the fruit of illicit activity or constitute the reinvestment of such assets, and the owner has not demonstrated a legitimate origin (art. 34 Leg. Decree 159/2011) (69). In this last case the possible relationship between the application of preventive measures regarding first the person and then his assets no longer exists given that the assets confiscated belong to the subject to whom preventive measures have not been applied or even proposed (70).

In preventive proceeding it is not necessary to establish criminal liability for events committed in the past and which may lead to a conviction, the *decision being based on “circumstantial evidence”* (and not on proof). The preventive procedure may develop independently of criminal procedure so much so that it has often been pointed out by some scholar that the very prosecutorial elements that in a criminal trial have not led to conviction for participation in mafia association, can warrant the application of preventive measures; it is possible, in fact, to apply the preventive confiscation after the acquittal. Lower standards are required regarding the evidence necessary for the application of preventive measures on both personal and patrimonial level against the same individual, namely the existence of mere circumstantial evidence of membership of a criminal organization and the illicit origin of assets (71).

Although after the 2008 reform preventive confiscation ex art. 24 Antimafia code can be applied only when *it transpires (results)* that the proceeds are derived from illicit activity or used for reinvestment (“the goods which result to be the fruit of unlawful activities or the reinvestment”), and no longer when *there is reason to believe*; this means, in authors’ opinion, that the prosecutor has to *prove* the illicit origin of the proceeds on the basis of the criminal standard of the proof, even by circumstantial evidence (“serious, precise and concordant”, art. 192 of the Italian criminal procedure code), whereas he cannot base his decision on mere suspicions. This doesn’t mean that the prosecutor must prove the nexus between each asset and specific crimes, but only that he has to demonstrate the unlawful origin of the forfeitable assets or the absence of an alternative justification of the collection of assets. This interpretation is adopted after the 2008 reform by the Tribunal of Palermo in Zummo case, but the Supreme

68 Art. 2 *ter,* l. 575/1965, introduced by art. 14 l. 646/1982, and now art. 24 of the Antimafia Code.
69 Art. 3 *quinquies,* 1. 1423/1956, introduced by art. 24 d.1. 306/1992, now art. 34, § 7 of the Antimafia Code.
70 S.HEIN-C.VISCONTI, *op. cit.*, 94 - 95; A.M.MAUGERI, *Le moderne sanzioni, cit.*, 409.
71 HEIN-VISCONTI,. *cit.*, 95.

Court has established that the standard of the proof isn't changed with the reform, the **standard of the proof** (of the criminal origin of the profits to confiscate) **is lower than the criminal standard** and it is possible to apply the confiscation on the basis of assumptions, but these have to be based on "serious, precise and concordant" circumstances" 72. the Court doesn't want to higher the standard of the proof, but demands "serious, precise and concordant circumstances". Arguably, the enforcement of the confiscation provided by art. 34 is possible when "*there is reason to believe"* 73.

In relation to the **disproportionate** character of the property the Supreme Court requires the demonstration of this element for every acquisition at the moment of the purchase (74) in the some way analised for the extended confiscation (art. 240 bis c.p.) and even an explanation of the temporal connection between the purchase and dangerousness, that is the suspected criminal activity (75); 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 (76). The Supreme Court (United Sections Spinelli[77]) recognized the importance of the temporal correlation between the moment of purchase of the assets and the social dangerousness 78, underlining, first of all, that the lack of this element would end up emptying the presumption of illicit origin of content and transform the preventive confiscation into a mere penalty of suspicion in contrast with the constitutional and supranational safeguards of the right to property (art. 41 and 42 Constitution and art. 1 Prot. n.1, ECHR). As already stated by authors, this requirement makes the form of confiscation in question more compatible with the presumption of innocence and the right of defense, since its ascertainment makes the burden of proof of the accusation more pregnant and the counter-proof

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72 Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880

73 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.; Tribunale di Palermo, sez. Misure di prevenzione, 25 October 2010, Zummo, inedita. See also Cass., 23 June 2004, in *Cass. pen.*, 2005, 2704; Cass., 16 gennaio 2007, n. 5234, L.e altro, in *Guida al dir.* 2007, 1067.

74 Così CONTRAFFATTO, *op. cit*., p. 110 ss.; Cass. pen., Sez. VI, 31 May 2011 (dep. 26 July 2011), n. 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*); Cass., 15 April 1996, Berti, in *Cass. pen.* 1996, p. 3649.

75 Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880; Cass., 13 May 2008, n. 21357, E.; Cass., 4 July 2007, n. 33479; Cass., 16 April 2007, n. 21048; Cass., 23 March 2007, Cangialosi e altro, n. 18822, *Ced Rv*. 236920; Cass., 16 gennaio 2007, n. 5234, L.e altro, in *Guida al dir*. 2007, 1067; Cass., 13 June 2006, Cosoleto e altri, n. 24778, *Ced rv*. 234733; Cass., 3 February 1998, Damiani, in *Arch. n. proc. pen*. 1998, p. 424 e *Ced rv* n. 210230.; Cass. 2 May (15 July) 1995, n. 2654, Genovese, *Ced Rv.* 202142; Cass., n. 5365 del 1998; *contra* Cass., 21 April 2011, n. 27228; Cass., 9 February 2011, n. 6977, B. e altro; Cass., 15 December 2009, n. 2269; Cass., sez. I, 4 June 2009, n. 35175; Cass., 29 May 2009, n. 35466; Cass., 8 April 2008, n. 21717, Failla e altro, in *C.e.d. Rv.*. 240501; Cass., sez. I, 11 December 2008, n. 47798, C., in *Cass. pen*. 2009, 10, 3977; Cass., 23 gennaio 2007, n. 5248, G., in *Cass. pen*. 2008, 1174; Cass., Sez. I, 5 October 2006, Gashi, n. 35481, *Ced Rv.* 234902. See MAUGERI, *Profili di legittimitá costituzionale delle sanzioni patrimoniali, cit.,* p. 69 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, p. 465; GIALANELLA, *Un problematico punto di vista sui presupposti applicativi del sequestro e della confisca di prevenzione*, cit., 368.

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

[77] Cass., Unit. Sect., 26 june 2014, Spinelli, n. 4880.

78 Cass., Sect. VI, n. 47567/2013; C. II, n. 43776/2013; C. VI, n. 13049/2013; C. V, n. 26041/2011; C. I, n. 21357/2008.

of the lawful origin of his assets is less onerous for the owner, avoiding a sort of diabolical probatio on him about the lawful origin of all assets at any time acquired: "the identification of a precise chronological context, within which the power of ablation can be exercised, makes the exercise of the right of defense much easier, …".

It is argued, at any rate, if the **burden of the proof** about the illicit origin is on the owner, as the law requires that the owner wasn't able to demonstrate the legal origin (79). The Supreme Court established that it is only a "burden of allegation", but doubt remain about the respect of the "right to silence"; it is possible to consider this discipline consistent with this constitutional guarantee only where the "result" is interpreted as the imposition on the prosecutor of the charge to demonstrate 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.

The united sections of the Supreme Court of Cassation ruled on the legal nature of the preventive confiscation in an important judgment[80] and affirmed that it is not a criminal sanction nor a "preventive" measure. To the contrary, such confiscation falls within a third category ("tertium genus") and consists of an administrative penalty. As such, it is comparable - as to its content and effects - to the security measures provided for by article 240, paragraph 2 of the criminal code (which reads as follows: "...It is always ordered the confiscation of the things that are the price of an offence, of things whose production, use, possession or alienation constitute an offence even if no conviction has been pronounced ...."). This approach was confirmed by many judgments of the Court of cassation.

After the introduction of the principle of "disjoint application" of personal and against property measures in 2008, a new debate has developed about the legal nature of the preventive confiscation[81]. According to a thesis, the choice of untangling confiscation from the requisite of dangerousness of the subject has demonstrated its afflictive nature. According to another thesis, the preventive confiscation is preventive in nature. The issue was therefore remitted to the united sections of the Court of Cassation that, on 26 June 2014, pronounced the judgment n. 4880 (in the case against Spinelli). The Court of Cassation affirms 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 (and therefore can be applied retroactively). The Court of Cassation affirms that the connotation of dangerousness is inherent in the asset (the "res"), due to its unlawful acquisition, and it pertains to it "genetically", on a permanent basis and, potentially, indissoluble; - the fact that financial preventive measures shall be released from the requirement of the current dangerousness of the individual reflects the phenomenal reality, having regard to the ontological-naturalistic difference between personal and material reality[82]. The Supreme Court affirms the preventive **nature** of the confiscation stressing that the temporal connection between the purchase and the dangerousness, that is the suspected criminal activity, is fundamental to guarantee the preventive nature of the confiscation.

Only in the Occhipinti case the Supreme Court has affirmed the punitive nature after the reform of 2008 and the separation between the personal and the patrimonial preventive measures[83]. The Court of Cassation affirms that confiscated assets and goods, "since they are the result of illicit acquisition, contain a negative connotation, which imposes their mandatory

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79 MAUGERI, *Le moderne sanzioni, cit.*, 377 ss. - 839 ss.

[80] United sections, 3 of July 3 1996 n.18, in the case against Simonelli.

[81] Court of Cassation, 13 November 2012 n. 14044, in the case against Occhipinti.

[82] 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 things in the hands of those who are deemed to belong – or have belonged to a subjective category of dangerousness provided for by the law.

[83] *

acquisition by the State". According to some scholars, this part of the judgment shows the criminal nature of the preventive confiscation; indeed, the confiscation of assets or goods 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[84]

The Constitutional Court, as analysed for the extended confiscation, in a recent ruling (n. 24/2019) **denies any punitive nature** ("the relative presumption of illicit origin of goods, which justifies their ablation in favor of the community, does not necessarily lead - as sometimes it is argued - to recognize the substantially sanctioning-punitive nature of the measures in question "), but attributes **both the extended confiscation and the preventive confiscation** a mere **compensatory - restorative function** with the rules of the legal system, stressing the necessity to guarantee in any case the legality principe, the proportionality principe and the right to due process and of defense.

The preventive nature of the preventive confiscation confirms its "retroactivity", which means that it is applicable according to the law in force at the time of adoption of the measure.

With regard to preventive confiscation (see below), Article 28 of Italian 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 he/she was unaware of it through no fault of his/her 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. of the Italian 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; b) in the event that facts ascertained with definitive penal judgements, arising or becoming known after the conclusion of the prevention 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

Moreover, **Art. 34 antimafia** code (before art. 3 quinquies l. 575/'65) has introduced the confiscation of assets used in the exercise of 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 motive to believe* that these assets are the fruit of illicit activity or constitute the reinvestment of such assets, and the owner has not demonstrated a legitimate origin [85]. Regardless of the fact that the property is at the disposal of the socium sceleris, the law does not require the existence of a fictitious interposition between the third party and the "proposed", as occurs in the art. 24 antimafia code (for the confiscation), as it does not require a "proposed", but only requires sufficient evidence to believe that the exercise of certain economic activities (such as laundering) can still help the activities of the affiliated persons. This has eliminated one of the major obstacles to the identification of assets of illicit origin and the ensuing application of confiscation, namely the difficulties linked to the demonstration of the actual relationship between the dummy and the person whose account the dummy holds. In the case of companies with a plurality of partners, considered for the

[84] Cfr. Maugeri*

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

application of preventive measures, it is not necessary to start as many processes as there are partners, rather it will suffice to simply bring a single case against the same company considered collectively.

2[86]. **CHAMBER HEARING IN THE PREVENTION PROCEEDINGS** The application of preventive measures takes place in the context of 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 person concerned. As already mentioned, the notice of the hearing (article 7 paragraph 2 Anti-Mafia Code) is not only an order to appear in court (vocatio in iudicium), but is also meant to inform the person of the facts in relation to which he/she is called to defend himself/herself. In fact, the notice of the hearing shall contain, under the penalty of nullity, detectable at every stage of the proceedings, "the indication of the measure proposed 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 n. 2341) . Consequently, in the prevention procedure applies the principle of correlation between the facts complained of and the judicial decision, which cannot impose a stricter measure than the one contained in the notice of the hearing. The Court of cassation has clarified that, for the principle of favor rei, is possible a reformatio pro reo, and therefore to qualify as a common dangerousness the one initially suggested as "qualified" (Court of Cassation 28 June 2006, n. 25701).
OTHERS PROCEDURAL GUARANTEES 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. Mandatory presence of the Prosecutor and 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 n. 1288). The individual can request that the hearing be conducted in public and not in chamber (Article 7 Anti-mafia Code "the President orders that the proceedings be conducted in public hearing when the person concerned so requests") (Bocellari and Rizza v. Italy, no. 399/02, 13 November 2007).
THE APPEAL. In the appellate proceedings the same defensive guarantees of first instance proceedings apply. For example, the person concerned may request a public hearing. Article 27, paragraph 1 of the Anti-Mafia Code provides that the individual can appeal orders of confiscation and seizure. The persons legitimate to appeal are "the public prosecutor, the public prosecutor appointed to the court of appeal and the individual concerned". Appellate proceedings respect the adversarial principle, since the presence of the Prosecutor and the defence counsel is mandatory and the individual concerned has the right to be heard by the judges, if he/she so request. The Court of Appeal may review the merits of the decision of the judge of first instance The decision of the Court of Appeal is taken not only on the basis of the findings contained in the documents filed with the judgment of first instance, but also on the basis of new facts emerged and acquisitions of evidence conducted in the course of appellate proceedings. The decision of the Court of Appeal can be appealed by the public prosecutor and the person concerned before the Court of Cassation (without suspensive effect), within ten days of the communication or notification of the filing of the decision[87]. 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 motivation,

[86] 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)
[87] Article 10, paragraph 4, Anti-Mafia Code, which reproduce the article 4, paragraph 11, of the "1956 Act

although formally present, is vitiated by errors so grave that the reasons for the decision are unintelligible"[88].

2. **The protection of third parties in preventive confiscation in the opinion of the Constitutional Court**.
   From the reasoning of the Constitutional Court can be deduced that the system of protection of third parties introduced by the Code Anti-Mafia and from Act no. 228/2012 provides for a reasonable balance between protection of third parties and confiscation.
   The Constitutional Court, in the judgment of 28 May 2015 n. 94, declared the constitutional illegitimacy of article 1, paragraph 198, of the Act n. 228/2012, insofar as it does not include among creditors who are to be satisfied within the limits and in the manner indicated therein also the holders of credits from employment. The Constitutional Court affirms that that the lack of protection for claims that do not fall within those protectable pursuant to art. 1, paragraph 198, Act 228/2012, is in contrast to article 36 of the Constitution because it "prejudices 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, paragraph 194, Act 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 Constitutional Court, the sacrifice of the creditor-worker does not have a reasonable justification in the balance between the interests underlying prevention measures, and therefore is in violation of article 36 of the Constitution. The judgment affirms some general principles useful to resolve some 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 subjected 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 n. 101, declared the manifest inadmissibility of the issue of constitutionality raised for violation of articles 3, 24 and 41 of the Constitution23 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.

3. **The ECourtHR case law on Italian preventive confiscation**.

The Court E.C.H.R. has always denied, since the *Marandino* (in this case the Commission) and the *Raimondo* cases, the punitive nature of the confiscation under article 2-ter law n. 575/1965 and, subsequently, article 24 d.lgs n. 159/2011, on the basis, as affirmed in the

[88] D.CARDAMONE, op. cit.

Supreme Court case law[89], of the recognition of its preventive nature which is founded on the evaluation that the recipient represents a social danger.

The Court, already in the *Labita* case[90], has recognized the compatibility of preventive measures with ECHR only because they are based on an assessment of the recipient's social dangerousness. From the recognition of the preventive and non-punitive nature of the anti-mafia confiscation derive the consistency of this measure with the right to property (Article 1 of the 1st Additional Protocol to the Cedu) and the presumption of innocence (Article 6 § 2) and the principle of legality (Article 7) (retroactive application is permitted)[91].

The measure of prevention, in the opinion of the Court, cannot be compared to a criminal sanction according to the three criteria established in the Engel case. [92]

The Court, accepting the arguments of the Italian Government, recognizes that anti-mafia confiscation is a measure of prevention which has a distinct function and nature from that of criminal sanction. While the latter tends to repress the violation of a criminal law and hence its application is subordinate to the determination of an offense and the guilt of the defendant, the measure of prevention does not presuppose a crime and a conviction[93], but it seeks to prevent the commission 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, and stresses 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 was subject to the application of a personal preventive measure) and therefore does not have any repressive function, but preventive, aimed at preventing the illicit use of the goods. [94]

In the opinion of the Court, the severity of the measure is not a sufficient criterion for determining whether it is a criminal sanction, emphasizing 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 criminal law. [95]

Furthermore the Court didn't affirm the violation of the right to property provided by art. 1 of the First Protocol because also the purpose of this form of confiscation is proportionate to the instrument, i.e. the fight against organised crime like the Mafia ([96]), "an aim that was in the general interest…..The Court is fully aware of the difficulties encountered by the Italian State

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[89] Italian Supreme Court, United Sections, 25 March 2010, n. 13426, Cagnazzo, in www.dejure.it; cfr. Corte cost., 11 (12) July 1996, n. 275.

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

[91] Commission eur., 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, Requeten. 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*, n. 4514/07, § 45.See A.M.MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano 2001, 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.

[92] ECTHR, *Engel e Altri*, cit., 36.

[93] ECTHR, 25 March 2003, *Madonia v. Italy*, n. 55927/00, § 4; Id., 20 June 2002, *Andersson v. Italy*, n. 55504/00, § 4; Id., 5 July 2001, *Arcurie tre altri v. Italy*, n. 52024/99, § 5;Id., 4 September 2001, *Riela vv. Italy*, n. 52439/99, § 6; Id., *Bocellarie Rizza v. Italy*, n. 399/02, § 8.

[94] *Ibidem*.

[95] ECTHR, *Prisco*, cit.; *Raimondo*, cit., 16-17; *Madonia*, cit., § 4; *Bocellarie Rizza*, cit., § 6; *Riela*, cit., §§ 4-5;*Arcuri*, cit., § 3; Commission Eur., *Marandino*, 78.

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

in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this "organization" has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued, ..». This judgment is unacceptable where it suggests that the end justifies the means or, in other words, where the Court recognizes that the fight against criminal organisation allows the sacrifice of the safeguards ([97]).

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 for "fair trial" established by art 6.1. The Court didn't apply art. 6, § 2 (the presumption of innocence) because the confiscation is a preventive measure and isn't a penalty, "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 n. 23 of 1964)" ([98]); the Court endorsed the arguments of the Italian Government.

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, judgment no. 23 of 1964)". "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, judgment no. 177 of 1980)". The Court required the respect of the right to defence, demanding "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…There had been no violation of article 1 of Protocol n. 1" , "…. any violation of those rights entailing their nullity……"; "the presumption concerning the unlawful origin of the property of persons suspected of belonging to organisations of the mafia type is not incompatible with Article 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…."([99]).

In some cases, however, the ECHR has sentenced Italy for the violation of Article 6 § 1 (right to a fair hearing) of the Convention because the proceedings on the application of preventive measures had not been public in nature. The public character of proceedings before

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

[98] Commission eur., 15 April 1991, *Marandino*, no. 12386/86, in *Decisions et Rapports (DR)* 70, 78; 22 Februar 1994, *Raimondo*, in Série A vol. 281, 7; 15 June 1999, *Prisco*, n. 38662/97; 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.

[99] 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.

the judicial bodies protected litigants against the administration of justice in secret with no public scrutiny and also constituted an instrument which preserved trust in the courts, thereby contributing to the implementation of the goal of Article 6 of the Convention: that is 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 "against 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 pecuniary situation of the person on trial ([100]).

More recently theEuropean Court has convicted Italy in De Tommaso case, already examined.

4. The application of extended confiscation against the enterprise as tool to fight the organised crime.

In order to fight the infiltration of the organized crime in the economy, in Italy extended confiscation, art. 240 bis c.p. (after conviction) and preventive confiscation, art. 24 antimafia code (without conviction), and also the confiscation ex art. 416 bis, § 7 criminal code (in the form of the confiscation of the instrument) are used to forfeit the enterprise that is considered an investment or a tool of a mafia association.

Normally these forms of confiscation can impact only on the illegal proceeds of a crime or on the instrument of that crime, but in order to counter the criminal infiltration into the economy, the Italian Supreme Court consider the firm itself as an instrument or proceed of the crime. In particular, in order to simplify the confiscation of businesses, the Italian Supreme Court uses the category of 'mafia enterprise' to justify the confiscation of an entire company or of compendiums of all company shares in cases where proceeds of illegal origin have become fused with lawful assets[101]. This category is applied whether the initial capital is of lawful origin and has been invested in an illegal activity (exercised with mafia method) or the unlawful initial capital has been invested in lawful activities.

When the illegal proceeds are merged with the company's legal funds, it becomes increasingly difficult to distinguish between lawful and unlawful and this could result in the confiscation of the whole enterprise. Although these forms of confiscation should affect only the illicit proceeds or the reinvestment of criminal assets, the Court forfeits, at least according to the interpretation of a certain case law, the entire contaminated activities, regardless of the illicit origin of the assets[102].

In the opinion of the Supreme Court, in a typically complex business enterprise, it was not possible to operate with a clear distinction between licit and unlawful assets, given the unique character of a company, which is the combined and synergistic result of capital, capital goods, labour force and other components, legally incorporated and united in the pursuit of the aim represented by the exercise of the company, as defined in civil law (art. 2555 cc). The overall unit constitutes an autonomous economic and social reality, because the various factors interact with the same aim and complement each other; the contribution of licit components (regarding entrepreneurial capacity and initiative) cannot be discerned from that attributed to illicit

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

[101] Supr. Court, 30 January 2009, n. 17988, Ced. n. 244802; Supr. Court, 08/02/ 2007, n. 5640.

[102] Cass., Sect. 5, 30 January 2009, Baratta, n. 17988, Rv 244802; Cass., sez. II, 11 February 2015, n. 9774; Cass., Sect. II, 8 February 2007, n. 5640, Schimmenti; Cass., 23 January 2014, n. 16311; Cass., Sect. VI, 4 July 2019, n. 49750; Cass., Sect. II, 19 November 2019, n. 3883.

resources, especially the subject's companies have been supported by the mafia organisation, in a perverse circuit of common interests[103].

Such a wide interpretation of the concept of 'mafia enterprise' transforms the confiscation of profits and reinvestment into a form of general confiscation of property. This would constitute a disproportionate punishment in violation of the legality principle and of the constitutional protection of private property, as well as of the principle of proportionality [104], because the law (art. 416 bis, § 7, art. 240 bis c.p. and art. 24 L. D. 159/2011) allows only the confiscation of the crime proceeds and reinvestment.

Another way to forfeit an entire enterprise in the praxis of the jurisprudence is to consider the owner Mafioso and to apply the assumption that if the owner is 'Mafioso', the enterprise must be unlawful[105]. The problem here is that a similar assumption is used as a sort of 'experience rule', applicable without checking whether in the concrete case this rule is valid and is realised in practice. So also this wide interpretation apply a kind of general confiscation in violation of the legality principle. Not only this solution doesn't distinguish the different situations.

In the praxis, with some simplification, the distinction is possible among economic enterprises which are, as affirmed by authors and by the Suprem Court[106].

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

The first two hypotheses do not pose particular problems because the companies' funds are of illicit origin and managed with mafia method, and so the confiscation of the whole enterprise is justified.

The latter case is more complex because different situations are possible: (a) the company, originally legal, has become a tool in the hands of the mafia through extortion, exploitation or money laundering; (b) the company is managed with only some relation to organised crime, e.g. simply the depositing of moneys to launder, without alteration of the business cycle. In the first case the company becomes a tool of the criminal organisation and it is close to the first two cases[107]. More problematic is the case of the enterprise with 'mafia participation', where the holder is not a figurehead but still represents his interests. In this latter case, the Court must clearly verify whether the company is managed with mafia methods and when this mafia

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[103] Cass., 23 January 2014, n. 16311.

[104] A.M.MAUGERI, *La Suprema Corte pretende un uso più consapevole della categoria dell'impresa mafiosa in conformità ai principi costituzionali*, in *Dir. pen. cont*. 2015, 339.

[105] Corte d'Appello di Caltanissetta, Sez. I, 18 ottobre 2012 (23/10/2012).

[106] Cfr. Cass., sez. 5, 31 gennaio 2018, Isgrò, n. 32688, Rv. 275225; Cass., sez. V, 22 febbraio 2019, n.43405; Cass., sez. V, 31 gennaio 2018, n. 32688; Cass., sez. V, 27 settembre 2019, n. 10983. See CONTRAFFATTO, *L'oggetto della confisca di prevenzione e lo standard della prova*, in BALSAMO-CONTRAFATTO-NICASTRO (a cura di), *Le misure patrimoniali contro la criminalita' organizzata*, Milano 2010, 117 ss.; A.M.MAUGERI, *La Suprema Corte pretende*, cit., 339.

[107] Cass., sez. 5, 31 gennaio 2018, Isgrò, n. 32688, Rv. 275225; Cass., sez. V, 22 febbraio 2019, n.43405; Cass., sez. V, 31 gennaio 2018, n. 32688; Cass., sez. V, 27 settembre 2019, n. 10983. Per questa catalogazione cfr. F.CONTRAFFATTO, *L'oggetto della confisca di prevenzione e lo standard della prova*, in BALSAMO-CONTRAFATTO-NICASTRO (a cura di), *Le misure patrimoniali contro la criminalita' organizzata*, Milano 2010, 117 ss.; A.M.MAUGERI, *La Suprema Corte pretende un uso più consapevole della categoria dell'impresa mafiosa in conformità ai principi costituzionali*, in *Dir. pen. cont*. 2015, 339; F.SIRACUSANO, *L'impresa a "partecipazione mafiosa" tra repressione e prevenzione*, in *Arch. pen*. 2021, 15 ss.; R.SCIARRONE, *Mafie, relazioni e affari nell'area grigia*, Torino 2011, 11.

contamination started, or whether the company has merely had some kind of relationship with organised crime, without alteration of the business cycle.

The latter case, the enterprise with mafia participation, is one that deserves more attention and requires a limiting of the seizure and confiscation only within the bounds of the unlawful proceeds or their reinvestment in accordance with law (art. 416 bis, § 7, art. 240 bis c.p. and art. 24 L. D. 159/2011) which allows only the confiscation of the crime proceeds and reinvestment, rather than an indiscriminate confiscation of the whole enterprise. This is of fundamental importance, in particular, when the company has had only a limited connection with organised crime; otherwise the Court imposes a general confiscation in violation of the principles of legality and proportionality and of the constitutional protection of private property[108].

The same problems arise when the jurisprudence considers a company 'totally illicit' and 'forfeitable' because illegal proceeds have been invested such that they cannot be discerned.[109] This is a consequence of the extension of application of preventive measures not only against people suspected of being Mafiosi, but also against those suspected of any habitual criminal activities, including corruption or tax evasion.

It is important to emphasise that the Directive n. 42/2014 in the recital n. 11 establishes, through the definition of the concept of 'proceeds', an important limit to the extension of these models of confiscation: ". . . proceeds can include any property . . . which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds". This specification is a very important safeguard against the application of extended confiscation or a preventive measure to entire companies as it allows forfeiture of only those invested illegal proceeds. In recitals 17 and 18 the Directive actually suggests the introduction of a clause to ensure compliance with the principle of proportionality in two cases. Firstly, "the relevant provisions could be applicable where [. . .] such a measure is proportionate [. . .] to the value of the instrumentalities concerned". Secondly, "confiscation should not be ordered" in exceptional circumstances, where confiscation would represent an undue hardship for the affected person[110].

These clauses ensure respect for the proportionality principle in cases where illegal profits have been reinvested and their removal would result in jeopardising the viability of a business (Lackner and Kühl, 2011). In Italy, though, these clauses, already present in other legal systems, have not been introduced with the law n. 202/2016 which has enforced the directive; this represents a serious violation of the directive prescriptions and a lost opportunity to improve the safeguards in the Italian legal order.

Contrary to the praxis of the Italian jurisprudence which presumes the illicit origin of the business from the circumstantial evidence (or suspicions) of the mafia participation of the owner, it is useful to remember, moreover, the correct approach of the Supreme Court in the "Cinà" case[111], recently confirmed by the Supreme Court[112]. The Court considers, according with the principle of legality, that the "availability", the proximity or the "will to be at disposal" of the owner with the mafia association is not enough circumstantial evidence to infer the illicit origin of the entire business and the corporate shares. In the Court's opinion in order to confiscate the company, it is necessary to demonstrate, according to the standard of the proof of the preventive proceeding (a facilitated standard of proof in comparison with the criminal

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[108] Cass., sez. 5, 31 gennaio 2018, Isgrò, n. 32688, Rv. 275225; CONTRAFFATTO, *cit.*, 117 ss.; A.M.MAUGERI, *La Suprema Corte pretende*, cit., 339.

[109] Supr. Court, 10/06/2013, n. 32032.

[110] Para.18 specifies that this exceptional circumstance should only be permitted 'in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive.'

[111] Supr. Court, 17/12/2013, n. 12493. See the previous paragraph.

[112] Cass., sez. II, 6 giugno 2019 (dep. 17/07/2019), n. 31549.

standard[18]), that the company is "the result of illegal activity" or that the company has actually taken advantage of the holder's adhesion to mafia in carrying out its activities. More specifically, the demonstration is necessary, at least at the level of circumstantial evidence: (a) that the original asset acquisition was made possible by the buyer's unlawful activity though without demanding proof of a direct link, in the form of causal link, between the illegal activity and the obtaining of assets; (b) that the growth and the accumulation of wealth by the company was actually facilitated by the illegal activity of the holder "belonging to the Mafia". In the latter case the Supreme Court requires that the holder, "at least, used his mafia quality to create favourable conditions, putting in place the activities appropriate to impose, illicitly, the enterprise in the market because only in this case, can it be said – according to the provision of the law – that the capital increase is "the result of illegal activities".

The Court states correctly that the illicit origin of the company assets or the corporate shares cannot be inferred from the fact that the owner is suspected (and is, therefore, considered a danger to society): "The preventive confiscation is not connected with the Mafioso status of the subject but [derives] from the activity exercised by him".

The Supreme Court has repeatedly stated that, "The existence of adequate evidence of membership to a criminal association is not enough to believe that assets, although large and rapidly acquired, are of illegal origin. It is necessary, [. . .] indeed, to have evidence which suggests that the assets are the result of illegal activity or their reinvestment, due to the disproportion with the declared income or economic activity, or for other reasons" (Cass., n. 35628 del 23/6/2004; n. 1171 del 19/3/1997; n. 265 del 5/2/1990) "[113].

"The legitimizing aspect of the ablation is not the generic contamination - for its use by the dangerous subject -, but the illicit modality of its financial acquisition, in whole in part, with circumstantial evidence of derivation of this acquisition with illicit resources, which allows to consider the danger transferred to the asset"[114] .

5.The problems of the confiscation of companies.

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

Nevertheless, even setting aside the problems of respect for the rule of law connected with the application of forms of extended confiscation [115] – the consequences of confiscating a business are more complicated than those resulting from the seizure of properties: the risk to the very future of the company and to the jobs it provides, along with the negative social consequences attached to such job losses.

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

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[113] Cass., sez. II, 6 giugno 2019 (dep. 17/07/2019), n. 31549 (richiama Cinà).

[114] Cass. sez. V, 22 febbraio 2019 (dep. 23/10/2019), n. 43405; Cass., sez. II, 19 novembre 2019 (dep. 29/01/2020), n. 3883.

[115] C.KING- C.WALKER, *Dirty assets. emerging issues in the regulation of criminal and terrorist assets*, Routledge, 2014; J.HENDRY-C.KING, *Expediency, legitimacy, and the rule of law: Asystems perspective on civil/criminal procedural hybrids*, Crim Law Philos, 2017 11.4 ,733.

survived during the seizure. Secondo i dati della relazione 2019 dell' A.N.B.S.C. la forma di destinazione assolutamente prevalente, se non quasi totalitaria, delle aziende sequestrate e confiscate è quella della liquidazione che ha interessato 1.338 imprese; secondo i dati più accreditati solo 3 aziende su 10 giungono *in bonis* alla confisca definitiva[116].

ART. 240 CRIMINAL CODE

Art. 240 C.C., Confiscation "1. When a conviction occurs, the court may order the confiscation of the assets that were used or were intended to commit the crime, and of things which are the product or the profit of the crime.
2. The confiscation always concerns: 1) assets that constitute the price of the offense; 1bis) assets and computer devices used in whole or in part to commit the offenses referred to in articles 615-ter, 615- quater, 617-quinquies, 617-sexies, 635-bis, 635-ter, 635-quater, 635-quinquies, 640-ter and 640- quinquies5 ; 2) assets, the manufacture, the use, the carriage, the possession or the sale of which constitutes a criminal offense, even if a conviction is not made.
3. Paragraph 1 and numbers 1 and 1-bis of paragraph 2 shall not apply if the asset, the good or the computer device belong to a person unrelated to the crime. Paragraph 2, number 1-bis, shall also apply in case of application of the penalty on request of the parties pursuant to Article 444 of the Code of Criminal Procedure6 .
4. Paragraph 2 shall not apply if the asset belongs to a person unrelated to the crime and the manufacture, the use, the carriage, the possession or the disposal may be authorised by administrative approval.

• article 322ter of Criminal Code, Confiscation. Confiscation of profit and price is mandatory for crimes committed by public officials against the public administration; in particular for crimes provided under articles 314 (embezzlement), 315 (embezzlement against a private person), 316 (embezzlement taking advantage of other's error), 316-bis (embezzlement against the State), 316-ter (misappropriation of funds against the State), 317 (concussion7), 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). • When goods which should be confiscated belong to a third person unrelated to the crime, a confiscation of goods of an equal value is disposed.

ART. 240 BIS CRIMINAL CODE, EXTENDED CONFISCATION
In cases of conviction or plea bargain pursuant to article 444 of the criminal procedure code, for some of the crimes envisaged by article 51, paragraph 3-bis, of the criminal procedure code, by articles 314 (embezzlement), 316 (embezzlement taking advantage of other's error), 316-bis (embezzlement against the State), 316-ter (misappropriation of funds against the State, 317 (extortion), 318 (bribery for the performance of an offical function), 319 (bribery for actions contrary to official duties) , 319-ter (bribery in judicial proceedings), 319-quarter (undue inducement to give or promise benefits), 320 (bribery of aa public service employe), 322

[116] A.N.B.S.C, Report 2019 and 2017; see SAVONA-BERLUSCONI (eds.), *Organised crime infiltration of legitimate business in Europe: a pilot project in five European countries*. Trento: Transcrime – Università degli Studi di Trento (2015) http://www.transcrime.it/wp-content/uploads/2015/11/Project-ARIEL_Final-report.pdf; ROMANO, *La l. 17 ottobre 2017, n. 161 e l'amministrazione giudiziaria dei patrimoni sottratti al crimine: una risposta, non sempre adeguata, alla richiesta di intervento* legislativo, in *Proc. pen. e giustizia* 2018, n. 2, 372.

(incitement to bribery), 322-bis ((embezzlement, extortion, undue inducement to give or promise benefits, bribery, and incitement to bribery of members of the International Criminal Court, European Community bodies, and officials of the European Community and of foreign countries), 325 (use of invention or discoveries known by reason of office), 416 (criminal association), carried out for the purpose of committing the crimes envisaged by articles 453 (counterfeiting o currency, spending and introducing counterfeit currency into the State, in conspiracy with others), 454 (alteration of currency), 455 (spending and introducing counterfeit currency into the State, not in conspiracy with the others), 460 (counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps), 461 (fabrication or possession of watermarks paper), 517-ter (manufacture and sale of goods produced by usurping industrial property rights) and 517-quarter (counterfeiting of geographical indications or designations of origin of agricultural and food products), as well as articles 452-quarter (environmental disaster), 452-octies first paragraph (aggravating circumstances for environmental crimes), , 493-ter (improper use of credit or payment cards), 512-bis (fraudulent transfer of funds), 600-bis, first paragraph (child prostitution), 600-ter, first and second paragraph (child pornography), 600-quater .1 (possession of pornographic material with minors) relating to the conduct of production or trade of pornographic material, 600-quinquies (tourist initiatives aimed at exploiting child prostitution), 603-bis (illicit brokering and exploitation of labour), 629 (extortion), 644 8usury), 648 (receiving stolen goods), excluding the case referred to in the second paragraph, 648-bis (money laundering), 648-ter (use of money, assets or utilities of illicit origin) and 648-ter.1(self laundering) , from article 2635 of the civil code (corruption between private parties), or for some of the crimes committed for purposes of terrorism, even international, or of subversion of the constitutional order, it is always ordered to confiscate the money, assets or other utilities whose origins are unable to be justified by the convicted person and of which, even through a natural or legal person, he / she appear 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. Whatever the case, the convicted person can not justify the legitimate origins of the assets on the assumption that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion, unless the tax obligation was extinguished through compliance with the law. Confiscation pursuant to the above provisions is ordered in the case of conviction or plea bargaing for the crimes referred to under articles 617-quinquies (installation of equipment designed to intercept, impede or interrupt telegraph or telephone communications), 617-sexies (falsification, alteration or suppression of the content of computer or eletronic communications), 635-bis (damage caused to computer and telematics systems), 635-ter (damage caused to computer information, data or programs utilised by the State or by another public authority, or otherwise of public utility), 635-quarter (damage caused to computerised or telematics systems), 635- quinquies (damage caused to computerised or telematics systems of public utility) when the conduct described therein affects three or more systems. In the cases described in the first paragraph, in the event that the money, assets and other utilities referred to in the same paragraph cannot be confiscated, the judge orders the confiscation of other sums of money, assets and other utilities of legitimate origin in the availability of the offender, for an equivalent value, even through a third party. ----------
- (1) Art. Inserted by art. 6, paragraph 1, legislative decree 1 March 2018, n. 21.