FRANCESCO DIAMANTI – ELEONORA ANNA ALEXANDRA DEI CAS – SAMUEL BOLIS[1]
ITALY

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1. Aspects of substantive criminal law on confiscations.

1. 1. Criminal confiscation (and criminal confiscation covered by the Directive 42/2014/EU and by COM(2016) 819 final).

The issue of the substantive profiles of confiscation has been quite clear, at least throughout the early twentieth century: a provision (Article 240 of the Italian Penal Code), and a legal framework. However, starting in the second half of the last century, a large number of legislative interventions transformed a linear regulation into a disorganised conglomerate with a high risk of regulatory overlap[2]. So much so, that the indication of the

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[2] The most evident case – even if not the only one – is that of the direct or by equivalent confiscation of the assets constituting the profit or the product of the crime of computer fraud (Article 640 *ter* of the Italian Penal Code): this is currently regulated, if committed to the detriment of the State or another public body, by both art. 640 *quater* and art. 240 par. 2 no. 1 *bis*, as recently amended by Legislative Decree no. 202/2016, implementing Directive 42/2014/EU [for the first authoritative comment, see the italian leading expert in the field of confiscation A.M. MAUGERI, "La direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato nell'unione europea tra garanzie ed efficienza: un "work in progress", in *Dir. pen. cont.*, Riv. Trim., 1/2015, 300 et seq.]. The italian bibliography on confiscations is massive, for recent manuals see G. FIANDACA- E. MUSCO, *Diritto penale. Parte generale*, 8. ed., Turin: Zanichelli, 2019, 898 et seq, 932 et seq.; F.

issue in the singular, "confiscation", no longer serves any practical purpose within our system: it is necessary to use the plural form, *confiscations*[3].

For this reason, it seems more appropriate to follow the framework below.

We will first conduct a brief analysis of traditional confiscation pursuant to art. 240 of the Italian Penal Code. We will then highlight the problems that, over the course of the years, have led to the inclusion of the exorbitant number of confiscations now present within the Italian legal system.

The following discussion will consider the changes made by Italian Legislative Decree no. 202 of October 29, 2016, implementing Directive 201442/EU, which, incidentally, has

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PALAZZO, *Corso di diritto penale. Parte generale*, 6. ed., Turin: Giappichelli , 2018, 561 et seq., 632 et seq.; S. CANESTRARI-L. CORNACCHIA-G. DE SIMONE, *Manuale di diritto penale*, 2. ed., Bologna: Il Mulino, 2017, 967 et seq. and 978 et seq.; D. PULITANÒ, *Diritto penale,* 7. ed., Turin: Giappichelli, 2017, 508 et seq.; A. MANNA, *Corso di diritto penale*, 4. ed., Padua: Giappichelli, 2017, 712 et seq.; G. MARINUCCI-E. DOLCINI – G.L. GATTA, *Manuale di diritto penale. Parte generale*, 7. ed., Milan: Giuffré, 2018, 808 et seq. (810 et seq., see also the *schema* on page 826); and for a safety measures general in-depth analysis, see A. CADOPPI-P. VENEZIANI, *Elementi di diritto penale. Parte generale*, 7. ed., Padua: Cedam, 2018, 599 et seq. On the issue of confiscations, in addition to the important works by G. VASSALLI, "La confisca dei beni. Storia recente e profili dommatici", Padua, 1951 and ALESSANDRI A., "Confisca nel diritto penale", in *Digesto delle discipline penalistiche*, III, Turin, 1989, 39 et seq.; see also L. BARON, "Il ruolo della confisca nel contrasto alla c.d. criminalità dei profitto: uno sguardo d'insieme", in *Dir. pen. cont*., Riv. trim., 2018, 37 ss., which defines the confiscation in Italy «*strutturalmente polimorfa, finalisticamente elastica e dogmaticamente ambigua*» (the translation (not simple) could be the following: «*structurally polymorphous, elastic in purpose and dogmatically ambiguous*») see *Ibidem*, 45; M. DONINI, "Per una concezione post-riparatoria della pena. Contro la pena come raddoppio del male", in *Riv. it. dir. proc. pen*., 2013, 1162 et seq. (spec. § 3 on the topic of confiscation by equivalent and victim protection); VARIOUS AUTHORS, *Le sanzioni patrimoniali come moderno strumento di lotta contro il crimine: reciproco riconoscimento e prospettive di armonizzazione*, A.M. Maugeri *(eds)*, Milan: Giuffré, 2008 and therein also the contribution by A.M. MAUGERI, "I modelli di sanzione patrimoniale nel diritto comparato", in VARIOUS AUTHORS *(eds), Le sanzioni patrimoniali*, cit., 7 et seq.; ID., *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milan, 2001; ID., "La riforma delle sanzioni patrimoniali: verso un'actio in rem?", in O. Mazza- F. Viganò *(eds)*, *Misure urgenti in materia di sicurezza pubblica*, Turin, 2008, 135 et seq.; ID., "La direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato nell'Unione Europea tra garanzie ed efficienza: un "work in progress", in *Dir. pen. cont.*, *Riv. Trim*., 1/2015, 300 et seq.; ID., "La confisca per equivalente. ex art. 322-ter – tra obblighi di interpretazione conforme ed esigenze di razionalizzazione", in *Riv. it. dir. proc. pen*., 2011, 791 et seq.; VARIOUS AUTHORS, *Sequestro e confisca,* Turin: Giappichelli, 2017; F. MAZZACUVA, "Confisca per equivalente come sanzione penale: verso un nuovo statuto garantistico, nota a Cass. pen., sez. III, 24 settembre 2008, n. 39172", in *Cass. Pen.*, 9, 2009, 3420 et seq.; C.E. PALIERO-F. MUCCIARELLI, "Le Sezioni Unite e il profitto confiscabile: forzature semantiche e distorsioni ermeneutiche. Ancora a proposito di Cass., sez. un. pen., 30 gennaio 2014 (dep. 5 marzo 2014), n. 10561, Pres. Santacroce, Rel. Davigo, Imp. Gubert" in *Dir. pen. cont., Riv. Trim*, 4/2015; MANES V., "L'ultimo imperativo della politica criminale: 'nullum crimen sine confiscatione'", in *Riv. it. dir. proc. pen*., 2015, 1259 et seq.; ID., "La confisca senza condanna al crocevia tra Roma e Strasburgo: il nodo della presunzione di innocenza", in *Dir. pen. cont*., 13.4.2015; VENEZIANI P., "La confisca obbligatoria nel settore penale tributario", in VARIOUS AUTHORS, *Studi in onore di Mario Ronco*, Ambrosetti, E. M. *(ed)*, Turin: Giappichelli, 2017, 665 et seq. For technical reconstruction of the main problems of confiscation, see F. MENDITTO, *Le confisca di prevenzione e penale. La tutela dei terzi*, Milan: Giuffré, 2015; and the new «*Confiscation Code*» VARIOUS AUTHORS., *Codice delle confische*, Epidendio T.-Varraso G. (eds), Milan: Giuffré, 2018, *passim* (and 103 et seq. for the analysis of general profiles). For contributions in English, see also: R. FLOR- M. PANZAVOLTA, "A necessary Evil?, The Italian "non-Criminal System" of Asset Forfeiture", in Rui-Sieber *(eds)*, *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction*, Freiburg i. Br.: Duncker&Humbolt, 2015, 211 et seq.; and on the preventive confiscation in Italy, see F. MAZZACUVA, "The problematic nature of confiscation measures: recent developments of the Italian preventive confiscation", in Ligeti-Simonato (eds), *Chasing criminal money in the EU: new tools and practices?*, Oxford-Portland: Hart, 2017, 101 et seq.

[3] See Italian Const. Court. n. 29/1961, n. 46/1964, and Sez. Un., n. 26654/2008, in CED 239926. On this topic see T. EPIDENDIO, *La confisca nel diritto penale e nel sistema delle responsabilita degli enti*, Padua: Cedam, 2011; E. NICOSIA, *La confisca. Le confische*, Turin: Giappichelli, 2012.

persevered in this error by inserting additional specific scenarios relating to confiscation, and has therefore missed a great opportunity to streamline the overall framework.

Most of the problems inherent to the issue of confiscation arise from the numerous and varied limitations that have always been found in the application of art. 240 of the Italian Penal Code, so-called *traditional confiscation*.

The text of the aforementioned article states that:

> *"In the case of conviction, the judge can order the confiscation of the items that served or were used to commit the crime, and the items that constituted the product or the profit thereof. Confiscation is always ordered:*
>
> *1) for the items that constitute the price of the crime;*
> *2) for the items whose manufacture, use, carrying, possession, or disposal constitutes a crime, even if no conviction has been issued.*
>
> *The provisions of the first part and of point no. 1 of the preceding paragraph do not apply if the item belongs to a person unrelated to the crime. The provision of point no. 2 does not apply if the item belongs to a person unrelated to the crime, and if the manufacture, use, carrying, possession, or disposal of the same can be permitted by administrative authorisation."*

This definition was extended by art. 2 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU, with point no. 1-*bis*, which introduces a new scenario of mandatory, direct confiscation of the assets that constitute the profit or product of computer crimes, or confiscation by equivalent if the former is not possible.[4]

To summarise, therefore, art. 240 of the Italian Penal Code requires:

- in the case of conviction, the confiscation of the items that "*... served or were used to commit the crime, and the items that constituted the product or the profit thereof.*" Items that are, essentially, either dangerous in and of themselves, or of illegal origin.
- the mandatory confiscation of the "*price of the crime*", the assets and the IT or telematics tools that have been used to commit numerous computer crimes, and "*the items whose manufacture, use, carrying, possession, or disposal constitutes a crime, even if no conviction has been issued."*

As stated in the beginning, over time this type of confiscation has proven to be rather unsuitable for dealing with the evolution of the types of crime that are unfortunately typical of the Italian state (especially Mafia type crimes).

Several problems had already arisen in the early 1980s, among them:

[4] For example: articles 615 *ter* (*Unauthorised access to an IT system*), 615 *quater* (*Unlawful possession and dissemination of access codes for computerised or telematics systems*), 615 *quinquies* (*Dissemination of equipment, devices or computer programs aimed at damaging or interrupting computerised or telematics systems*), 617 *bis* (*Installation of equipment designed to intercept, impede or interrupt telegraph or telephone communications*), 617 *ter* (*Falsification, alteration or suppression of communications content or telegraphic or telephone conversations*), 617 *quater* (*Unlawful interception, impediment or interruption of computerised or telematics communications*), 617 *quinquies* (*Installation of equipment designed to intercept, impede or interrupt computerised or telematics communications*).

a. the institution, in both the optional and mandatory forms, presupposes a pertinent link between the *asset* and the case in point;
b. the power to issue a confiscation order, apart from an alleged crime, is subject to the issuance of a conviction;
c. the express provision of the inapplicability of the measure if the item belongs to a person unrelated to the crime complicates the removal of assets formally belonging to third parties unrelated to the crime through fictitious transfers and ownership, even if they subsequently remained fully available to the convicted person.

Such problems were enough for the Italian legislature to go beyond adding various types of confiscation, and to create a new *"strategy"* for combating crime using patrimonial measures, consisting in the provision of what have come to be known as confiscations "*of prevention*"[5] (or *ante delictum,* Italian Law no. 646 of 1982, the so-called Rognoni-La Torre Law), which were mainly intended as a tool for *combating* the Mafia. To better understand the extent of the problem, it should be noted that in Italy, to date, the *National Agency for the administration and allocation of assets seized and confiscated from organised crime*[6] – recently (and partially) reformed by art. Decree No. 113/2018, the so-called "Decreto Salvini"[7] – is administering 18,270 properties (14,099 already allocated), and 3025 companies (927 already allocated). In 2017 (the latest available data), there were 2411 properties and 7 companies allocated.[8]

Following a considerable series of legislative changes that cannot be fully summarised here, these are now embodied within the so-called "*Anti-Mafia Code"*, Italian Legislative Decree no. 159 of 6 September 2011[9], which has recently been amended (also) by italian Law 1 December 2018 no. 132[10].

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[5] E. GALLO, "Misure di prevenzione", in *Enc. giur. Treccani*, XX, 1996, 1 et seq.; G. FIANDACA, "Misure di prevenzione (profili sostanziali)", in *Dig. disc. pen*., VIII Turin, 1994, 108 et seq.; L. FILIPPI, "La confisca di prevenzione: un'anomalia tutta italiana", in *Dir. pen. e proc*., 3, 2005, 270 et seq.; F. MENDITTO, *Le misure di prevenzione personali e patrimoniali*, Milan: Giuffré, 2001; in english, among other, see A. MANNA, "Measures of Prevention: dogmatic-Exegetic Aspects and Prospects of Reform", in *European Journal of Crime, Criminal Law and Criminal Justice*, 5/3, 1997, 248 et seq.; and F. MAZZACUVA, "The problematic nature of confiscation measures", cit., 103 et seq.

[6] The "*National Agency for the administration and allocation of assets seized and confiscated from organised crime*" was established by Italian Decree-Law no. 4 of 4 February 2010, converted into law, with amendments, by Italian Law no. 50 of 31 March 2010, which has now been implemented by Italian Legislative Decree No. 159 of 6 September 2011 (the Anti-Mafia Code). The Agency is a body with legal personality under public law, vested with organisational and accounting autonomy, and is subject to the supervision of the Minister of the Interior. Its main office is located in Rome, and it has secondary offices in Reggio Calabria, Palermo, Milan and Naples.

[7] Decree No. 113 of 4 ottobre 2018, "*Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzato*", on M. VALLONE, "Riordino dell'agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata (artt. 37, 37 bis e 38 d.l. n. 113/2018, conv. con modd. da l. n. 132/2018 – artt. 110, co. 1, 112, 113 bis, d.lgs. 159/2011)", in VARIOUS AUTHORS, *Il decreto Salvini. Immigrazione e sicurezza*, Francesca Curi (ed), Pisa: Pacini, 2019, 347 et seq.

[8] See http://www.benisequestraticonfiscati.it.

[9] Massively amended by Italian Law no. 161 of 17/10/2017, O.G. 04/11/2017. For a general and current overview of the prevention measures, see *Delle pene senza delitto. Misure di prevenzione nel sistema*

The application requirements fall into two categories: *objective* and *subjective*.

The first requirement (subjective) is that the person intended to be subjected to this measure must fall within the types of "dangerous subjects" outlined by the Italian legislature:

- *persons suspected of participating in Mafia associations or associations devoted to the commission of serious crimes (so-called "qualified dangerousness")*;
- *people who live off the commission of crimes and the proceeds resulting from them (so-called "generic dangerousness").*

There is no need to ascertain crimes, but only clues indicating a *"reasonable"* probability that the subject belongs to these categories of people.

If the subject falls into one of these categories, then it is necessary to verify (and certify) his/her *social dangerousness*, which constitutes the second subjective requirement[11]. Here what is sought is the individual's predisposition for crime, as inferred from his/her personality. Mere suspicions, as well as anything that is not objectively demonstrable or verifiable, will not suffice for these purposes: it is necessary to have objectively identifiable conduct, and clear circumstances.

If the suspect falls into one of the aforementioned categories and his/her dangerousness is proven, then the asset intended to be seized and confiscated (the first objective requirement) must be directly or indirectly available to him/her. In order to "*have the asset available*", the main Italian jurisprudence deems it sufficient to prove the subject's ability to determine its allocation or use, or, in any case, that he/she is the actual *dominus*. For this objective type of investigation, the *iuris tantum* presumption hold true, almost as a general rule.

Example 1. The jurisprudence constantly makes reference to the principle by which third parties are bound to the dangerous subject by ties of kinship (spouse or children) or cohabitation: in these cases, there is a presumption of the property's indirect availability. If the children, spouses or cohabitants want to avoid confiscation, they have the burden of demonstrating the exclusive availability of the asset. If they are unable, the assets will be confiscated.

Example 2. If the suspect has fictitiously transferred or assigned assets to third parties in order to prevent their seizure and confiscation, the judge declares the relative act ineffective. The following are assumed to be fictitious (Article 26 Legislative Decree no. 159 of 6 September 2011):

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contemporaneo: dal bisogno di controllo all'imputazione del sospetto (Atti del Convegno di Milano, 18/19 novembre 2016), in *Riv. it. dir. proc. pen*., 2017, 399 et seq.

[10] See V. MARALDI, "Minimi ritocchi al d.lgs 159/2011 (c.d. Codice Antimafia). Art. 24 d.l. n. 113/2018, conv. con modd. da l. n. 132/2018 – artt. 10, 17, 19 e 67 d.lgs n. 159/2011", in VARIOUS AUTHORS, *Il decreto Salvini*, cit., 295 et seq.

[11] The revocation of the confiscation is legitimate if there is no temporal correlation between the date of purchase of the assets and the manifestation of the social dangerousness of the subject, see Cass. pen., Sez. II, No. 30974/2018.

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.

In Italy, it is naturally also the case that not all assets can be made subject to preventive confiscation, but only those in relation to which there are "*sufficient clues*" concerning their illegal origins (or re-use). Among these clues, that which is certainly most important is the disproportion between the value of the assets and the declared income or occupation. Just imagine a postman who owns a Ferrari, or a greengrocer who owns a forty-meter *yacht*.

It is also worth noting the new rule introduced in 2008, regarding the '*independence of personal (affecting the person) and material (affecting assets) prevention measures*', which delineates an entirely different situation from that of the past, when a patrimonial measure could only be requested along with a personal measure. However, in order to adopt the latter, the social dangerousness of the person in charge of the asset must still be a factor.

By rendering these measures independent, it is now possible to request only the patrimonial measure for those who are no longer considered a danger to society, but nevertheless were at a particular time in the past, when they accumulated considerable wealth. This reform has led to a significant increase in requests for preventive confiscations.

Another particular scenario is that in which the dangerous person still manages to disperse, misappropriate, conceal or devalue the assets in order to evade their seizure and confiscation, in which case it is possible to seize and confiscate other assets of legal origin (so-called *confiscation by equivalent*). The same thing happens when the assets are transferred to third parties in good faith prior to the enforcement of the seizure.

The preventive confiscation is then applied by a specialised magistrate with an extremely simple procedure that doesn't entirely overlap with penal procedure.

Finally, it should also be noted that preventive confiscation has overcome the scrutiny of the Italian Constitutional Court and the ECHR. However, the recent Grand Chamber session, with the ruling on *De Tommaso v. Italy* (ruling of 23 February 2017, no. 43395/09 ruling of 23 February 2017, no. 43395/09), held that the Italian law that regulates *personal* preventive measures is *lacking* in clarity and precision, thus resulting in excessive discretion in defining the category of generic dangerousness on the part of the judge. However, the majority of the national case-law has revealed that this criticism can, in fact, also be applied to the *patrimonial* prevention measures (and therefore also the confiscation) taken against subjects of generic dangerousness[12].

As a first approximation, one might say that the remaining critical points include:

a. the duration of the proceedings;

[12] See now Constitutional Court No. 24/19, and https://www.penalecontemporaneo.it/d/6526-due-pronunce-della-corte-costituzionale-in-tema-di-principio-di-legalita-e-misure-di-prevenzione-a.

b. the administration and allocation of the assets (especially the companies) located throughout the country and, above all, abroad;
c. the protection of third parties involved in the confiscation.

The rise in the numerous scenarios of *direct criminal confiscation, often also applicable by equivalent*, is also the due to the numerous problems inherent to the traditional confiscation referred to under art. 240 of the Italian Penal Code.[13]

Due to space limitations, we are only able to cite a few examples:

- that concerning contraband [under art. 116 of Italian Law no. 1424 of 1940 (now art. 301 of Italian Presidential Decree 43/1973, which is even applicable against third parties under certain scenarios[14])], whose provisions, in addition to making it mandatory to confiscate the product, the profit, and the *instrumenta sceleris*, extends the confiscation of the latter to third parties as well;
- those included as 416-*bis*, paragraph 7 of the Italian Penal Code, introduced in 1982. In Italy, this type of confiscation is bound to the individual cases indicated by the legislature in this law;
- art. 466-*bis* of the Italian Penal Code, which, in the event of a conviction or plea bargain for one of the crimes relating to the counterfeiting of currency referred to under articles 453 (*Counterfeiting of 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 others*), 460 (*Counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps*) and 461 (*Fabrication or possession of watermarks or instruments used for making currency, revenue stamps or watermarked paper*), always requires *"the confiscation of the items that served or were used to commit the crime and the items that are the product, the price or the profit thereof, unless they belong to a person unrelated to the crime, or, when this is not possible, the assets available to the condemned, for a value corresponding to the profit, the product or the price of the crime*" [amendment introduced by art. 2 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU];
- under art. 55, paragraph 9-*bis* of Italian Legislative Decree no. 231 of 21 November 2007 there is another scenario of mandatory direct or by equivalent

[13] As previously stated, with the provision of art. 240 of the Italian Penal Code alone, it was very difficult to combat certain forms of significant criminal phenomena. It was, and still remains, difficult to distinguish between the concepts of the *profit* and the *price* of crime, whose definitions separate optional confiscation from mandatory confiscation. Another very serious problem relating to art. 240 of the Italian Penal Code is the identification of the causal link between the *crime committed* and the *asset*, as this form of confiscation only arises, at least in Italy, if the assets are "*... a direct consequence of the crime*." This means, firstly, that it is not only impossible to proceed with this type of confiscation for assets that have been destroyed, hidden, or disposed of to good faith buyers, but also (and perhaps above all) that the confiscation of assets is precluded in cases in which the criminal activity overlaps with a legal activity that prevents a clear determination of the proceeds obtained unlawfully. The confiscation of profits obtained from criminal activities and reinvested in legitimate business activities, pursuant to art. 240 of the Italian Penal Code, is just as complex.

[14] On this point see Italian Const. Court, n. 229 of 1974 in *Dir. prat. tribut.,* 1975, II, 59.

confiscation of the items that served or were used to commit the crime of improper use of credit or payment cards envisaged by art. 55, paragraph 9, of the same Legislative Decree, as well as the profit or product of that crime, unless they belong to a person unrelated to the crime [introduced by art. 6 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU][15].

Therefore, whenever it is not possible to apply direct confiscation, there is the possibility of *indirect confiscation by equivalent* (a.k.a. "*confiscation of value*")[16], which does not even require a pertinent relationship between the asset and the criminal offence; however, it does require evidence of the fact that the crime itself resulted in profits that are irrecoverable but can still be *quantified*.[17]

In the Italian legal system this type of confiscation is not generally envisaged[18], and is only applied in relation to a number of special and specific areas.

A number of examples are provided below:

Art. 322-*ter* of the Italian Penal Code (*corruption*); Art. 600 *septies* of the Italian Penal Code (ref. *crimes against individual freedom*); Art. 640-*quater* of the Italian Penal Code (*aggravated fraud and computer fraud*); Art. 644 of the Italian Penal Code (*usury*); Art. 2641 of the Italian Civil Code[19] (*criminal provisions relating to companies*); Art. 187 T.U. no. 58/1998 (*crimes relating to financial intermediation*); tax offences envisaged by Italian Legislative Decree no. 74/2000, with just one marginal exception pursuant to art. 10 (*the destruction/concealment of accounting records*)[20]; Art. 11 l. no. 146 of 2006[21] (*transnational*

[15] Now included by the art. 4, d.lgs 01/03/2018, n. 21 concerning "*Disposizioni di attuazione del principio di delega della riserva di codice nella materia penale a norma dell'articolo 1, comma 85, lettera q), della legge 23 giugno 2017, n. 103*", in the italian Penal Code at the Art. 493-*ter* (*Indebito utilizzo e falsificazione di carte di credito e di pagamento*). On the "*riserva di Codice in materia penale*" principle (art. 3-*bis* of the italian Penal Code), above all, see M. DONINI, "L'art. 3-bis c.p. in cerca del disegno che la riforma Orlando ha forse immaginato", in *Dir. pen. proc*., 2018, 4, 429 ss.; T. PADOVANI, "Il testimone raccolto. L'ennesima riforma alle prese con i nodi persistenti del sistema penale", in *Arch. pen*., 2018, 1s, 13 ss.; E.M. AMBROSETTI, "Ad un anno dall'entrata in vigore della legge Orlando: una riforma ancora in corso", in *Arch. pen*., 2018, 1s, 859 ss.

[16] For a recent reflection on this topic, see, among other, M. DONINI, "Per una concezione post-riparatoria della pena", cit., § 3.

[17] *Ex plurimis*, Cass. pen., Sez. III, 19 January 2016, no. 4097, in *Fisco*, 2016, 10, 973 (tax crimes, confiscation by equivalent of profit/price).

[18] The only "general" provision is in the Italian Code of Criminal Procedure, under art. 735-*bis*, concerning the enforcement of confiscation orders ordered by foreign authorities within Italy, which was introduced following our country's ratification of the Strasbourg Convention.

[19] With regard to corruption between private parties, art. 3 of Italian Legislative Decree no. 202 of 29 October 2016, which implemented Directive 2014/42/EU, states that the measure of confiscation by equivalent pursuant to art. 2641 of the Italian Civil Code cannot under any circumstances amount to a value lower than that of the utilities given or promised (the value of the tangent).

[20] On this topic, more broadly, see P. VENEZIANI, "La confisca obbligatoria", cit., 670 et seq.

[21] Special scenarios of mandatory confiscation and confiscation by equivalent "1. *For the crimes referred to under article 3 of this law, in the event that it is not possible to confiscate the items constituting the product, the profit, or the price of the crime, the judge shall order the confiscation of sums of money, assets, or other utilities available to the offender, even through a natural or legal person, for a value corresponding to that of the product, profit or price. In case of usury, the confiscation of an amount equal to the value of the interest or the other advantages or usurious compensation shall also be ordered. In such cases, the judge shall determine*

crimes); Art. 19, par. 2, of Italian Legislative Decree no. 231/2001 (*Criminal liability of legal entities*).

It should also be noted how preventive confiscation is now regularly applied to systematic, and therefore dangerous, tax evaders. To date, this has been applied as a penalty measure[22], with everything that this entails from the standpoint of the general penal principles associated with this legal qualification.

Minimal provisions on confiscation[23]

So-called *Traditional* Confiscation Art. 240 of the Italian Penal Code	*"In the case of conviction, the judge can order the confiscation of the items that served or were used to commit the crime, and the items that constituted the product or the profit thereof.* *Confiscation is always ordered:* *1) for the items that constitute the price of the crime;* *2) for the items whose manufacture, use, carrying, possession, or disposal constitutes a crime, even if no conviction has been issued.* *The provisions of the first part and of point no. 1 of the preceding paragraph do not apply if the item belongs to a person unrelated to the crime. The provision of point no. 2 does not apply if the item belongs to a person unrelated to the crime, and if the manufacture, use, carrying, possession, or disposal of the same can be permitted by administrative authorisation."* + *no. 1-bis, which introduces a new scenario of mandatory, direct confiscation of the assets that constitute the profit or product of computer crimes, or confiscation by equivalent if the former is not possible.* [introduced by Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU].
Ante delictum confiscations	- Applied prior to conviction; - Independent with respect to the *ante delictum* personal preventive measures; - *Objective* and *subjective* requirements; - It's applied by a specialised magistrate.
Other *direct* confiscations	Mere examples: - Confiscation concerning contraband under art. 116 of Italian Law no. 1424 of 1940 (now art. 301 of Italian Presidential Decree 43/1973); - those included as 416-bis, paragraph 7 of the Italian Penal Code; - art. 466-*bis* of the Italian Penal Code [amendment introduced by

the sums of money, or shall identify the assets or utilities, to be subjected to confiscation, for a value corresponding to that of the product, the profit, or the price of the crime."

[22] Cass. pen., 16 January 2004, G. NAPOLITANO, in *Foro it*., 2004, II, 685.

[23] It should be noted that the following scheme does not fully cover the complex issue of confiscations in Italy.

	art. 2 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU]; - art. 493-*ter* of the italian Penal Code.
Indirect or *by equivalent* Confiscations	- in "*general*", see Art. 240, co. 2, § 1-*bis* of the italian Penal Code[24]

1.2. Extended confiscation.

In Italy there are also scenarios of *extended confiscation* (or confiscation "by disproportion"), which eliminate the item derived (directly) from the crime committed.

Objective and *subjective* requirement are once again necessary in this case as well:

- the person must have engaged in one or more forms of criminal conduct expressly envisaged by law (this list 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 occupation and the value of the assets. On this point it should be noted that, with a recent reform in 2017, a jurisprudential principle was introduced into positive law, according to which the defendant can not justify the origins of the assets by indicating them as the reinvestment of income generated through tax evasion.

Art. 5 of Italian Legislative Decree no. 202 of 29 October 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* of Italian Decree Law no. 306 of 08 June 1992.

In particular, the new framework extends this special confiscation scenario's scope of application to include cases of conviction or plea bargaining:

- for the crime of criminal association pursuant to art. 416 of the Italian Penal Code, when the association is aimed at committing the crimes of *Counterfeiting of currency, spending and introducing counterfeit currency into the State, in conspiracy with others* (art. 453 of the Italian Penal Code), *Alteration of currency* (art. 454 of the Italian Penal Code), *Spending and introducing counterfeit currency into the State, not in conspiracy with others* (art. 455 of the Italian Penal Code), *Counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps* (art. 460 of the Italian Penal Code) and *Fabrication or possession of watermarks or instruments used*

[24] See (rightly with critical attitude) R. TARTAGLIA, "La confisca penale", *cit.*, 71; T. PADOVANI, *Misure di sicurezza e misure di prevenzione*, Pisa: Pisa University Press, 2014, 135 et seq.; A.M. MAUGERI, voce "Confisca (diritto penale)", *cit.*, 195. A missed opportunity is also related to the transposition of Council Framework Decision 2005/212/JHA of 24 February 2005, Article 2 of which provided that "*each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds*".

for making currency, revenue stamps or watermarked paper (art. 461 of the Italian Penal Code);

- for the crime of *self-laundering* envisaged by art. 648 *ter* 1 of the Italian Penal Code;
- for the crime of *bribery between private parties* envisaged by art. 2635 of the Italian Civil Code;
- for the crime of *improper use of credit or payment cards* envisaged by art. 55, paragraph 9, of Italian Legislative Decree no. 231 of 21 November 2007;
- for the *computer 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 electronic communications), 635 *bis* (Damage caused to computer information, data or programs), 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 *quater* (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.

Lastly, it is worth noting Italian Legislative Decree 21/2018, which introduced art. 240-*bis* ("*Confisca in casi particolari"*) into the Italian Penal Code[25]: this article, which concerns *extended confiscation*, establishes that, for many specific offences indicated within the text of the provision, in cases of conviction (or plea bargaining)[26] 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 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 occupation. 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.

The complete text is provided below.

Art. 240-*bis* of the Italian Penal Code

"In cases of conviction or plea bargain pursuant to article 444 of the Italian Code of Criminal Procedure, for some of the crimes envisaged by article 51, paragraph 3-bis, of the Italian Code of Criminal Procedure, by articles 314 (embezzlement), *316* (embezzlement taking advantage of other's error), *316-bis*

[25] Article 240 bis actually proposes part of a text of law already existing since 1994.

It is the well-known Art. 12-*sexies* contained in the legislative decree of 8 June 1992, No. 306, conv. with mod. in l. 7 August 1992, No. 356, concern "*Urgent amendments to the new code of criminal procedure and urgent measures to combat mafia crime*". The article has been inserted by Art. 2 of the Legislative Decree of 20 June 1994, N° 399, conv. with mod. in italian Law 8 August 1994, No. 501. See A. BERNASCONI, "La 'speciale' confisca introdotta dal d.l. 20 giugno 1994 n. 339 conv. dalla l. 8 agosto 1994 n. 501", in *Dir. pen. proc.*, 1996, 1417 et seq.

[26] For appropriate distinctions between these scenarios, see, in addition to § B, the contribution of Dr. Eleonora Dei Cas.

(embezzlement against the State), *316-ter* (misappropriation of funds against the State), *317* (extortion), *318* (bribery for the performance of an official 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 a public service employee), *322* (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 inventions or discoveries known by reason of office), *416* (criminal association), *carried out for the purpose of committing the crimes envisaged by articles 453* (counterfeiting of 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 others), *460* (counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps), *461* (fabrication or possession of watermarks or instruments used for making currency, revenue stamps or watermarked paper), *517 ter* (manufacture and sale of goods produced by usurping industrial property rights) and *517 quater* (counterfeiting of geographical indications or designations of origin of agricultural and food products), *as well as articles 452 quater* (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 paragraphs, (child pornography) 600 quater 1, (possession of pornographic material with minors) in relation 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* (usury), *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 Italian Civil Code* (corruption between private parties), *or for some of the crimes committed for the 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 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 occupation. 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 bargain 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 electronic 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 quater* (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 legitimate money, assets, and other utilities available to the offender, for an equivalent value, even through a third party."[27]

1.3. Other types of confiscation.

We shall now briefly discuss some of the different types of confiscation used in Italy. These include, among others[28]:

[27] The parentheses are ours.

[28] For examples: *agri-food confiscation*, see VARIOUS AUTHORS., *Codice delle confische*, cit., 167 et seq.

a. *administrative confiscations*;
b. confiscation relating to Labour criminal law;
c. *urban confiscation*;
d. *vehicle confiscation envisaged by the Highway Code*.

a) With regard to the former, *general administrative confiscations*, the regulatory framework is outlined by art. 20 of Italian Law no. 689 of 1981: these types of confiscations are classified as either "*mandatory*", for the product of the administrative violation, the price and the profit of the transgression; or "*optional*", being at the discretion of the administrative authority responsible for the sanction or the criminal court judge, when an administratively sanctioned violation must also be imposed. Finally, according to a widespread legal opinion, there is also a so-called "*necessary*" administrative confiscation, which is also mandatory. In order to enforce this type of confiscation, it is necessary to first have the asset seized (so-called *administrative seizure*) by the supervisory and control bodies.

b) With regard to *Labour criminal law*, there's also another type of confiscation pursuant to art. 9 of the Italian Decree Law no. 187 of 2010, which incorporated art. 20 of Italian Law no. 689/1981 previously cited (see letter a above), later converted into Law no. 217 of 2010, which, following serious or repeated violations of this type[29], requires the mandatory administrative confiscation of the items that served or were used to commit the specific violations, or the items that constituted the product, even in the absence of a payment ordinance/injunction.[30]

c) *Urban confiscation*. The subject of so-called "urban confiscation" has occupied (and continues to occupy) a significant part of the Italian debate on confiscation.

Preliminary remarks: the d.P.R. 6.6.2001 No. 380 ("*Testo Unico delle Disposizioni legislative e regolamentari in materia edilizia*", so colled "*Testo Unico dell'edilizia*") contains a series of criminal provisions to protect the proper conduct of urban and construction activities (art. 44). Among these criminal offences, at Article 44, comma 1, lett. c) there is the *unlawful site development* (*lottizzazione abusiva*). The second paragraph of Article 44 provides for a specific type of confiscation for cases in which the *unlawful site development* is ascertained: land and all structures built on it are confiscated. The *vexata quaestio* in this context is the understanding of the nature of this special type of confiscation: administrative sanction or security measure?

The point is that (only) if it is an administrative sanction it is possible:

- to apply it regardless of the outcome of the criminal trial;

[29] With regard to "repeated" violations, reference should be made to the provisions of art. 14 of Italian Legislative Decree 81/2008 and art. 8-*bis* of Italian Law no. 689/1981, from which it can be deduced that the conduct is considered to be repeated when another violation of the same nature is committed within five years following the violation ascertained by an enforcement provision (even if only one).

[30] This is an exception to art. 20 of Italian Law no. 681 of 1989, which only allows the Italian administrative authority to apply administrative penalties or criminal penalties after an order/injunction or conviction.

- to apply it also against third parties (who have become owners of the property) who are not involved in the criminal trial.

At first, Italian case-law considered it an administrative sanction, with all the consequences that this entails in relation to the two points mentioned above[31].

This choice lasted until 2008, leading to the creation of three precise rules summarized as follows: 1) urban confiscation was an administrative sanction; 2) the measure could operate on the basis of the mere material existence of the *unlawful site development*; 3) the measure could affect bona fide third party owners not involved in the criminal proceedings.

After the Sud Fondi judgements, the legal nature of urban confiscation became "punitive" as it was included in the so-called criminal matters (*matière pénale*) [32]. Italian case law reacts to Sud Fondi case law by making urban confiscation conditional on the existence of a person affected by the measure who has participated psychologically (*intentionally* or at least *through negligence*) to the *unlawful site development*.[33]. Idem for applying confiscation to third parties not involved in the criminal trial[34].

The next step – *from the Sud Fondi jurisprudence to the Varvara v. Italy of 29 October 2013 case (appeal no. 17475/09)* – takes place in terms of the operation of urban confiscation in the absence of a conviction. The Italian regulatory landscape seemed completely linear, at least on one point: apart from the case described under art. 240, paragraph 2 no. 2 of the Italian Penal Code (so-called *absolutely prohibited assets*), powers of removal could not be exercised if the accused were to be acquitted. In all other scenarios (excluding preventive confiscation), the penal legislation would therefore seem to consider the enforcement of a confiscation measure to be subject to a conviction being issued against the defendant. One part of the jurisprudence, on the other hand, found that, under certain conditions, the judge might even have such powers in cases of acquittal; powers that, in some sectors, were completely systematic in the past, and constituted a widespread "*practice*." Without rehashing the entire Italian debate on the subject[35], it should nevertheless be noted that, with the famous ruling of Varvara v. Italy, the Second Section of the European Court of Human Rights found that the application of urban confiscation in cases of acquittal by statue of limitations constitutes a violation of the principle of legality sanctioned by art. 7 ECHR. The Court deliberated on the "criminal" qualification of urban confiscation envisaged by art. 44 of Italian Legislative Decree no. 380/2001 (the Consolidated Law on Construction), with a reference to the admissibility decision of 30 August 2007 within the context of the 2009 case of *Sud Fondi s.r.l. et al. v. Italy*. The ECHR found that art. 7 is not limited to requiring a legal basis for crimes and penalties, but also implies the illegitimacy of the application of criminal sanctions for deeds... not "legitimised by a *guilty verdict*."

[31] See from Cass. pen., Sez. III, No. 16483/90, Licastro) to Constitutional Court No. 187/98. On the relationship between confiscation to the detriment of third parties and art. 27, paragraph 1 of the Italian Constitution., see, *ex plurimis*, Cass. pen., Sez. III, No. 37096/04. Than see *ex plurimis* Cass. pen., Sez. III, No. 38728/04.

[32] On this subject (*matière pénale*) the most recent italian research is contained in VARIOUS AUTHORS, *La «materia penale» tra diritto nazionale ed europeo,* M. Donini-L. Foffani *(eds)*, Turin: Giappichelli, 2018.

[33] *Ex plurimis* Cass. pen., Sez. III, n. 21188/09, n. 5857/10.

[34] *Ex multiplis*, Cass. pen., Sez. III, 42741/08.

[35] See VARIOUS AUTHORS., *Codice delle confische*, cit., 675 et seq., 679 et seq.

In the period just after the Varvara sentence, the Italian jurisprudence continuing to apply the urban confiscation even in the absence of conviction: specifically, even after the intervention of the prescription of the crime. Two orders - one from the Court of Teramo and one from the Court of cassation[36] – have raised questions of constitutional legitimacy of urban confiscation.

The Italian Constitutional Court has declared constitutional legitimacy issues inadmissible[37].

Finally, it should be noted that, on 28 June 2018, the Grand Chamber of the ECHR ruled on the case of GIEM et al. v. Italy (appeal no. 1828/06), which, years after the decision handed down in the *Varvara* case, reintroduced the question of the compatibility of ECHR Prot. 1 articles. 6, 7 and 1 with the internal provisions governing the confiscation measure following an assessment of criminal liability for the crime of unlawful property subdivision (punished by art. 44 of Italian Presidential Decree no. no. 380 of 06 June 2001). Once again the ECHR reiterated that there had been a violation of art. 7 ECHR against all the plaintiffs. The point is that art. 7 of the Convention 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; urban confiscation must essentially be understood as such, although formally of an administrative nature, in the same manner as the *Engel criteria*.

d) We can cite also the *vehicle confiscation* – whereby, for example, the owner has committed the crime of driving while intoxicated – envisaged by art. 186 par. 2 letter C) of the Highway Code, which, by way of art. 224-*ter* of Italian law no. 120 of 29 July 2010[38], has received the express qualification of an *accessory administrative sanction*[39].

1.4. Third-Party Confiscation.

By express legislative provision, third-party ownership of the asset precludes the application of the confiscations set out under article 240 of the Italian Penal Code, including optional confiscation, the mandatory confiscation of the price, and that relating to *absolutely criminal* items. Moreover, this rule is also typical of other provisions relating to our *security measures*, which, by forcing the reader to respect legality as a principle, prevent the application of measures not envisaged by law, or against persons other than those contemplated by the criminal legislature[40].

[36] Court of Teramo, ord. 17.1.2014; Cass. pen., sez. III., ord. n. 20646/14.

[37] Constitutional Court No. 49/15 and No. 187/15. See V. MANES, "La 'confisca senza condanna' al crocevia tra Roma e Strasburgo: il nodo della presunzione di innocenza", in *Dir. pen. cont.,* 13 aprile 2015*, passim*.

[38] VARIOUS AUTHORS., *Codice delle confische*, cit., 422 et seq.

[39] This administrative nature, for example, allows the confiscation to operate in the cases of 131-*bis* (*esclusione della punibilità per particolare tenuità del fatto)* of the Italian Criminal Code, on this see Sez. Un., n. 13681/2016 and VARIOUS AUTHORS., *Codice delle confische*, cit., 434 et seq.

[40] A.M. MAUGERI, "Le moderne sanzioni", cit., 128.

The protection thus provided by the framework regarding the third parties can not actually be exploited by the perpetrator of the crime, who could resort to easy ploys, creating fictitious ownerships or simulated transfers of their assets. Precisely for this reason, certain exceptions can be found within our legal framework, sometimes resulting from an *express legislative option*, such as that expressed in the matter of so-called *extended* confiscation pursuant to art. 12-*sexies* d.l. 306/1992 (now partially transfused within art. 240-*bis* of the Italian Penal Code), pursuant to which confiscation affects the items owned by the convicted person, *even through a third party*, whose origins cannot be justified or that are of disproportionate value with respect to his/her income; sometimes resulting from *magistrates' formulations*, according to which (in the matter of confiscation by equivalent) 'availability' must be understood as a synonym of substantial ownership, even in the absence of the formal ownership of the asset, such that the offender acts *uti dominus* in relation to the item in question.

The national jurisprudence has also clarified how a person who did not participate in the commission of the crime, and did not even (e.g. Due to lack of awareness) have any kind of guilty association with the commission of the same (even if indirect or not punishable), should be considered 'unrelated' (see Cass. 16405/2008).

The problem of the involvement of a subject entirely unrelated to the commission of the crime has also arisen with regard to:

1. confiscation envisaged by art. 44, paragraph 2 of the Italian Presidential Decree no. 380/2001 (unlawful subdivision of land, *lottizzazione abusiva*);
2. vehicle confiscation for driving under the influence pursuant to art. 186, paragraph 2, letter c) d.lg 30.4.1992 n. 285 (the Highway Code, *Codice della strada*) [41];
3. confiscation required by art. 474-*bis* of the Italian Penal Code (trademark counterfeiting hypothesis);
4. confiscation by equivalent of the assets of the legal person in relation to tax offences that do not entail liability for the organisation;
5. confiscation by equivalent pursuant to art. 19, par. 2 of Italian Legislative Decree no. 231/2001[42].

In all of these cases, in the presence of different conditions, the admissibility of confiscation of assets owned by a third party who did not participate in the commission of the crime was at least addressed (although sometimes denied or otherwise limited by jurisprudence).

With regard to the scenario described under point 1), the national courts, acknowledging the positions taken by the jurisprudence of the ECHR, have recognised the sanctioning nature of urban confiscation pursuant to art. 44, par. 2 of Italian Presidential Decree no. 380/2001.

[41] Among other, VARIOUS AUTHORS., *Codice delle confische*, cit., 430 et seq.

[42] On *confiscation/d.lgs 231/2001* in general, see, among other, VARIOUS AUTHORS., *Codice delle confische*, cit., 957 et seq., and 963 et seq.

Consequently, urban confiscation cannot be considered applicable to those who, in good faith, have not committed any violation, such as the unaware buyers of unlawfully subdivided land (*lottizzazione abusiva*). Even if *de facto* material participants in the unlawful subdivision through their acts of purchase, it has been confirmed that these subjects can only be subject to confiscation in the event that they are found to be somehow culpable in relation to the unlawful subdivision (see Cass. 42178/2009). It seems appropriate to recall a recent ruling by the Court of Cassation, which is in stark contrast to that which has just been stated. With its ruling no. 50189/2015, the Court (even recalling one of its own precedents set by Cass. pen. 6396/2006) confirmed how the confiscation of the assets subjected to unlawful subdivision is linked to the objective illegality of the same, in such a way as to be even capable of affecting owners unrelated to the criminal proceedings. The ruling also reiterates how such an interpretation cannot be in conflict with art. 3 of the Italian Constitution "*insomuch as the subject who has committed the crime of unlawful subdivision is subject not only to confiscation (like the subject who did not commit it), but also to penal sanctions, and therefore there is no similar sanctioning treatment for objectively different situations*", nor with articles 41 and 42, par. 2 of the Italian Constitution "*taking into account the recognised social functions of property and economic initiative and the need for the primary protection and safeguarding of the territory, so that, in the conflict between the collective and private interest (...) it is rational that the former should prevail." Nor would there be any conflict with articles 24, 101 and 102 of the Italian Constitution, "because confiscation pursuant to art. 44 constitutes the conclusive measure of an overall system of sanctions with which it must nevertheless be coordinated*."

With regard to the scenario described under point 2), on the other hand, we have questioned the possibility of confiscating assets belonging to third parties with regard to the vehicle confiscation envisaged by the Highway Code, in the event that the vehicle is *leased*. It should be noted that the legislation in question expressly provides for a scenario of mandatory vehicle confiscation in the event of conviction or plea bargain, *unless the vehicle belongs to a person unrelated to the crime* (article 186, par. 2 of the Highway Code). Indeed this provision did not prevent a legal conflict in the aforementioned scenario, resulting in a debate later settled by the United Sections (Sezioni Unite) with ruling no. 144484/2012[43]. In view of the principles expressed by the Court of Strasbourg in its interpretation of art. 7 of the ECHR, the United Sections underlined how the form of confiscation under review has preventive and repressive characteristics, as it is structurally aimed at preventing the reiteration of the crime, in an intrinsically afflictive dimension. Therefore, as a substantially criminal sanction, it cannot be applied in the event that there is not found to be any element of responsibility in the conduct of the asset's owner. For this reason, it is not possible to confiscate a vehicle driven under the influence by an offender, who is using the vehicle under the conditions of a *leasing* contract, if the leasing party who owns the vehicle is unrelated to the crime. Any other interpretation of the law (even if envisageable) is to be considered detrimental to art. 7 of the ECHR and art. 1 Prot. 1 ECHR.

[43] VARIOUS AUTHORS., *Codice delle confische*, cit., 431 et seq.

The scenario described under point 3) involves the provisions of the third paragraph of art. 474 *bis* of the Italian Penal Code, concerning the counterfeiting of products or distinctive markings). The same expressly envisages a scenario of mandatory confiscation against the person unrelated to the crime, unless the same proves that he/she was unable to foresee the unlawful use of his/her assets (even occasionally) or their illegal origins, or that he/she was unaware. In this case, the intellectual connection that allows us to affirm the existence of an element of responsibility in the conduct of the subject affected by the confiscation (for the purposes of compliance with art. 7 of the ECHR) lies precisely (albeit in a somewhat nuanced form) in the foreseeability of the unlawful use or origin, and in the failure to exercise due diligence, thus avoiding a substantially objective responsibility on the part of the asset's owner.

In the scenario described under point 4) the company presents itself as a third party (i.e. a subject in its own right) with respect to the perpetrator of the tax offence (i.e. the company's director). The extraneousness is rendered even more evident by the non-inclusion of the tax offences on the list of crimes envisaged by Italian Legislative Decree no. 231/2001, with confiscation being consequently inapplicable pursuant to art. 19 of the same decree. According to the approach adopted by the United Sections (no. 10561/2014), the aggression of money, other fungible assets, or assets directly attributable to the tax offence committed by the corporate bodies may be admitted when they are *available* to that legal entity. Confiscation by equivalent against the same is not admissible, on the other hand, if the profit of the tax offence is not found, *unless the legal entity is a false screen*. The position taken by the jurisprudence (see Cass. 46797/2014) regarding the confiscation of assets conferred in a trust is the fruit of the same approach: confiscation is considered possible if it is shown that this conferment is, in fact, a situation of mere appearance, in order to have the conferring party retain the administration and full availability of the assets, thus operating as a trustee of him/herself (so-called *sham trusts*).

As for the scenario described under point 5), it is clear how third parties (or bankruptcy creditors) can suffer damage in the case of the confiscation of the bankrupt party's assets, with a consequent reduction of the total assets to which they are legitimately entitled. This results in a conflict between two interests, each with a profile of public importance: on the one hand there's the State's interest in exercising the punitive claim, and on the other hand there's the creditors' interest in respecting the dogma of generic patrimonial guarantee and the principle of *par condicio creditorum*. Indeed, the United Sections (ruling no. 11170/2015) have pointed out how these two interests are not actually in conflict with one another, as art. 19 of Italian Legislative Decree itself requires *the safeguarding of the rights of third parties acquired in good faith*, even after confiscation. The Court specifies, however, that the term *third parties* is to be understood as those who not only did not take part in the commission of the crime, but also did not gain any benefit or utility from the same; the term *in good faith*, on the other hand, is to be understood as applicable to those who, "using the diligence required of the actual situation, could not have had knowledge of the aforementioned relationship deriving from their subjective role in the crime committed by the convicted party." Moreover, the matter was already addressed by the United Sections in 2004 (ruling no. 22951/2004),

when they affirmed the bankruptcy receivership could not be considered analogous to third party ownership: in fact, the concept of ‘belonging’ (used by article 19 cit.) is broader than the concept of ‘property’. According to the judges, seizure for the purposes of confiscation would thus be insensitive to the bankruptcy proceedings.

The third party is granted various instruments of a procedural nature: precautionary measures, enforcement review, etc. (for further details, see B below).

2. Aspects of criminal procedural law.

2.1. Introduction: seizures in the Italian penal system

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

The first of these scenarios consists of conservative seizure (Articles 316-320 of the Italian Code of Criminal Procedure), which protects the patrimonial guarantees of the State and the civil party (the person to whom the offence has caused damage, who may present him/herself during the criminal trial in order to claim compensation or repayment). In this regard, it should be noted that the 1988 Italian legislature drew a distinction between the concepts of "procedure" and "trial" within the code. The term "trial" is to be understood as the judicial phase following the issuance of the indictment. This therefore includes (with the exception of the multiple special proceedings envisaged by the system: e.g. summary trial, plea bargain/application of the penalty at the request of the parties, which will be described further ahead) the preliminary hearing, the trial, and any appellate remedies. "Procedure", on the other hand, originates from a *notitia criminis* and concludes with the final judgment. It therefore also includes the phase of the preliminary investigations: the initial phase where, generally, no evidence is formed, but sources of evidence are sought that will sustain the prosecution in court[44].

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

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

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

The scenarios mentioned, however, do not provide a comprehensive overview of the cases of seizure envisaged by the system. In fact, there are additional seizure scenarios falling outside the code. For example, with regard to the administrative liability of legal entities[45], there is the possibility of imposing the preventive seizure of the same items that the decree allows to be confiscated (Art. 53 of Italian Legislative Decree no. 231 of 2001), as well as the

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

[45] Introduced, as mentioned above, with Italian Legislative Decree no. 231 of 2001.

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

Furthermore, the so-called Anti-Mafia Code allows for preventive seizure, which is instrumental for subsequent confiscation (Art. 20 of Italian Legislative Decree no. 159 of 2011). As mentioned above, the preventive measures are ordered (regardless of whether a crime has been committed) with a procedure that does not have the same guarantees as the criminal trial. In fact, the relative legal action can be taken before the Court even independently of the criminal prosecution. This procedure is characterised by the fact that the evidence, which can be used in the trial, is collected by the police and the public prosecutor in secret and without hearing the parties, with fewer defensive guarantees[46].

2.1.1. Evidentiary seizure.

Evidentiary seizure, otherwise known as criminal seizure, is a means of seeking evidence that's envisaged and regulated by Book III of the Code. Like inspections and searches, criminal seizures are "surprise" acts, for which the suspect's defender has the right to witness the execution of the act, but not to be notified in advance.

The relative provision is taken in the form of a reasoned decree ordered by the "judicial authority": this means that it can be ordered by both judicial magistrates and investigating magistrates (public prosecutors). During the preliminary investigation phase - which extends from the registration of the *notitia criminis* in the criminal records registry (Article 335 of the Italian Code of Criminal Procedure) to the issuance of the indictment - , the seizure in question is usually arranged by the public prosecutor, or else by the judge overseeing the preliminary investigations themselves[47]. During the preliminary investigation phase, the judicial police can only proceed with the seizure of evidence in cases of urgency, if a delay poses a hazard and the public prosecutor can not promptly intervene, or if the public prosecutor has not yet taken over the investigation (Article 354(2) of the Italian Code of Criminal Procedure). In these cases, the judicial police carry out the seizure and, within forty-eight hours, either return the seized items or else transmit the report to the prosecutor of the place where the seizure was carried out for validation (Article 355 of the Italian Code of Criminal Procedure). During the trial stage, on the other hand, the trial judge is responsible for ordering the seizure at the prosecutor's request.

Evidentiary seizure deals with the "body of the crime", the items upon which or via which the crime was committed and those that constitute the price, the product, or the profit[48],

[46] In this regard, see L. FILIPPI, "Il procedimento di prevenzione", in VARIOUS AUTHORS, *Procedura penale*, Turin: Giappichelli, 2017, 1029.

[47] The figure of the preliminary investigation judge was introduced by the 1988 code in place of the investigating magistrate: the preliminary investigation judge has no investigative functions, but a) intervenes during the preliminary investigation phase in order to provide a jurisdictional guarantee for interventions restricting personal freedom; b) oversees the execution of the prosecutor's activities; c) oversees the early taking of evidence.

[48] The "product" consists of that which was created, transformed, or obtained through the criminal conduct (i.e. an advantage of a financial nature or a patrimonial-type benefit obtained from the illegal activity). The "profit" consists of the goods and utilities obtained from the product of the crime, and, according to part of the jurisprudence, corresponds to the financial advantage resulting directly and immediately from the crime itself (Court of Cassation, JC, 26 June 2015, no. 31617, Lucci, in *C.e.d.*, no. 264436; Court of Cassation, JC, 27

or the "items pertinent to the crime" and necessary to ascertain the facts of the case (Article 253 of the Italian Code of Criminal Procedure). Unlike the term "body of the crime", the code does not provide a definition of "items pertinent to the crime"; this notion must therefore be inferred from the jurisprudence. According to the latter, all movable or immovable items that serve to ascertain (even indirectly) how the crime was committed, the perpetrator, and any other circumstances relevant to the case, must be considered[49]. The items to be seized, which fall under the aforementioned categories, must be indicated in the decree, unless the seizure is ordered within the context of a search.

The seizure is carried out by the judicial authority personally, or rather a judicial police officer delegated by the same decree. A copy of the provision must be handed over to the concerned party (not only the suspect or defendant, but also the person from whom the items were taken and the person entitled to their return), if present. The defender, who, as mentioned above, has the right to witness the execution of the act but not to be notified in advance, will subsequently have the right to examine the seized items at the place where they are kept.

Alongside the general legal framework, the code includes a number of *ad hoc* provisions relating to several specific scenarios.

First, special guarantees are envisaged with regard to the seizure of correspondence (Article 254 of the Italian Code of Criminal Procedure), since the freedom and secrecy of the same are considered inviolable by the Italian Constitution (Article 15 of the Constitution) and, therefore, can only be limited by a justified act on the part of the judicial authority, and with the guarantees established by the law. For this reason, the seizure of letters, envelopes, parcels, money orders, telegrams and other correspondence items, even sent electronically[50], is only permitted, from those who provide postal, telegraph, telematic, or telecommunication services, if the judicial authority has justifiable grounds to believe that the same have been sent by or are intended for the defendant (even under a different name or through a third-party), or that they may be otherwise related to the crime. If a judicial police officer decides to seize correspondence, the same must deliver that which has been seized to the judicial authority without opening or altering it, and without otherwise obtaining knowledge of its contents. Furthermore, as a guarantee of the fundamental defence function, it is not permitted to seize any correspondence between the defendant and his/her attorney, unless the judicial authority has grounds to believe that it is part of the body of the crime (Article 103(6) of the Italian Code of Criminal Procedure).

Second, with regard to the seizure of IT data from IT, telematic or telecommunication service providers, the judicial authority is permitted to the have the acquisition carried out by copying the data onto adequate media, using a procedure that ensures the inalterability of the acquired data and its consistency with the original files. The service provider is nevertheless

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March 2008, no. 26654, Fisia Italimpianti s.p.a., in *C.e.d.*, no. 239924); according to other jurisprudence, it corresponds to any other utility that is even an indirect or mediated consequence of the criminal activity (Court of Cassation, JC, 24 April 2014, no. 38343, Espenhahn et al., in *C.e.d.*, no. 261116). Finally, according to the jurisprudence the "price" is defined as the compensation given to a person as consideration for unlawful conduct.

[49] Court of Cassation, sec. III, 22 April 2009, Bortoli, in *C.e.d.*, no. 243721.

[50] Italian law no. 48 of 18 March 2008, which implemented the Council of Europe's Convention on Cybercrime, signed in Budapest on 23 November 2001, amended Article 254 of the Italian Code of Criminal Procedure to include e-mail within the category of correspondence.

ordered to properly preserve and protect the original files (Article 254 *bis* of the Italian Code of Criminal Procedure).

Furthermore, the judicial authority is permitted to seize documents, securities, values, sums deposited into bank/postal accounts and all other items, even if contained in safe-deposit boxes, when it has grounds to believe that they are pertinent to the crime, even if they do not belong to the defendant or are not registered in his/her name (Article 255 of the Italian Code of Criminal Procedure).

Getting back to the general legal framework of the scenario in question, in order to obtain the evidentiary seizure of an asset, a *fumus commissi delicti* is required. This does not mean that the judicial authority must prove a subject's criminal liability within the seizure order itself, but only that a crime has been committed[51]. Within the jurisprudence there is an open debate as to whether the existence of the evidential function of the criminal seizure needs to be justified in relation to the body of the crime as well: according to part of the jurisprudence, the evidentiary requirement, with reference to the *corpus delicti*, would be *in re ipsa*[52], while for the other part - which now constitutes the majority - the existence of evidentiary purposes can not be presumed even for the body of the crime[53]. This assumption has recently been reaffirmed by the Joint Chambers of the Court of Cassation, which have affirmed that an evidentiary seizure decree, even if pertaining to items that constitute the body of the crime, must contain a specific justification regarding the objective pursued for the assessment of the facts[54].

The evidential function affects the duration of the seizure: in fact, the constraint of unavailability can not be maintained beyond the time strictly necessary to complete the investigations for which it was ordered[55]. Therefore, if the seizure no longer appears to be necessary for evidentiary purposes, the seized items are returned to those entitled to them, even before the sentence is issued. After the final judgment, the restitution of the seized items is ordered, unless their confiscation is ordered. For assets that don't have to be the subject of a confiscation order, therefore, the limit of the evidentiary seizure coincides with the irrevocable sentence. However, if the evidentiary requirements are no longer valid, the evidential seizure can be converted into a conservative seizure, if the public prosecutor or the civil party requests it (Article 262 of the Italian Code of Criminal Procedure). Otherwise, if there is danger that the free availability of the asset can prolong the consequences of the crime or facilitate the commission of other offences, the judge may decide not to return the asset and to maintain the seizure for preventive purposes.

Once five years have elapsed from the date of the sentence no longer subject to appeal, the sums of money seized are devolved to the State, provided that no confiscation has been ordered and no one claiming entitlement has requested their restitution.

2.1.2. Conservative seizure.

[51] In this regard, see Court of Cassation, sec. III, 13 June 2007, Vitali, in *C.e.d.*, no. 237021.

[52] Among many, Court of Cassation, JC, 11 February 1994, P.m. in c. Carella et al., in *C.e.d.*, no. 196261.

[53] Court of Cassation, JC, 28 January 2004, P.c. Ferazzi in c. Bevilacqua, in *C.e.d.*, no. 226711; Court of Cassation, JC, 18 June 1991, Raccah, in *C.e.d.*, no. 187861.

[54] Court of Cassation, JC, 19 April 2018, no. 36072, P.m. in c. B.A. and others.

[55] Court of Cassation, sec. IV, 22 November 2012, Genovese, in *C.e.d.*, no. 255077.

Conservative seizure is ordered by the judge at the request of the public prosecutor whenever there are "reasonable grounds to believe that the guarantees for the payment of the pecuniary penalties, court costs, or any other sums owed to the Treasury of the State are lacking or will be dispersed" (Article 316 of the Italian Code of Criminal Procedure). In the presence of these conditions, the public prosecutor is obliged to ask the judge to apply this precautionary measure.

A civil party may also request the judge to order a conservative seizure in order to guarantee the civil obligations arising from a crime. Whatever the case, the conservative seizure ordered at the request of the public prosecutor also benefits the civil party.

The above also applies with regard to the administrative liability of legal entities: in fact, in recalling several provisions of the Code of Criminal Procedure[56], Italian Legislative Decree no. 231 of 2001 allows for conservative seizure if there is good reason to believe that the guarantees for the payment of the pecuniary sanction, the court costs, and any other sums owed to the Treasury of the State are lacking or will be dispersed. In this case, the public prosecutor requests the seizure of the entity's movable and immovable assets or the sums or items owed to the State. Contrary to the Code of Criminal Procedure's provisions in relation to natural persons, during a trial against a legal entity only the public prosecutor (and not a civil party) can request the judge to impose the conservative seizure provision.

Unlike the other cases of seizure envisaged by the code, conservative seizure is only applicable during the proceedings on the merit of the case ("during any stage and instance of the proceedings on the merit of the case"), not during the preliminary investigations nor during the trial before the Court of Cassation.

The defendant can avoid the application of the measure by offering a suitable collateral to guarantee the credits held by the State or the civil party, consisting of a sum of money that, if deemed appropriate, triggers the revocation of the conservative seizure order or the non-enforcement of the same.

In terms of duration, the conservative seizure ceases to have effect once a judgment of dismissal or no grounds to proceed, no longer subject to appeal, is issued. The conservative seizure is automatically converted into a foreclosure when the sentence to pay a pecuniary penalty becomes irrevocable, or when the sentence requiring the defendant to pay compensation for damages to the civil party becomes enforceable.

A *fumus commissi delicti* is also necessary to order a conservative seizure: in this case, however (unlike the other cases of seizure), since the seizure can only be requested during the preliminary hearing or the trial, and therefore after the indictment has been issued, the *fumus* required consists of the existence of the indictment, and not, according to the jurisprudence, the likelihood of a conviction[57]. *Periculum in mora* is also necessary: a concrete risk that the assets guaranteeing the credit will be squandered or taken away, based on real and non-hypothetical data[58]. Likewise, in trials against legal entities, the *fumus* is implicit in the

[56] Art. 54 of the decree in question expressly states: "The provisions of articles 316, paragraph 4, 317, 318, 319 and 320 of the Italian Code of criminal procedure shall be observed, as applicable."

[57] Court of Cassation, sec. IV, 17 May 1994, Corti, in *C.e.d.*, no. 198681.

[58] With regard to *periculum in mora* in conservative seizure, Court of Cassation, sec. II, 13 November 1997, Airaldi, in *C.e.d.*, no. 209599.

accusation brought against the organisation, and the *periculum* consists of well-founded reasons to believe that the patrimonial guarantees could end up missing or lost, based on concrete and specific evidence.

2.1.3. Preventive seizure.

Preventive seizure is ordered with a motivated decree by the judge, who, at the request (*ne procedat iudex ex officio*) of the public prosecutor, proceeds when there is a risk that the free availability of an asset pertinent to the crime could aggravate or prolong the consequences of the crime itself, or facilitate the commission of other crimes (so-called impeditive preventive seizure, pursuant to Article 321(1) of the Italian Code of Criminal Procedure). If the conditions envisaged by law have been met, the seizure is mandatory[59].

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

The judge can also order the seizure of assets that are allowed to be confiscated, even by equivalent (in this latter case, the seizure is optional) (Article 321(2) of the Italian Code of Criminal Procedure). The request for the preventive seizure of assets for which confiscation is permitted is, on the other hand, mandatory in proceedings concerning certain crimes against the public administration by public officials[60].

With regard to preventive seizure during the trial of a legal entity, Article 53 of Italian Legislative Decree no. 231 of 2001 provides for the possibility of seizing the assets that the same decree (Article 19) allows to be confiscated, in order to prevent the dispersion of the entity's assets and to allow for their future confiscation, even by equivalent.

Unlike conservative seizure, preventive seizure can also be ordered during preliminary investigations. If it is not possible to wait for the judge's preliminary ruling due to particular urgency, the seizure is ordered with a motivated decree by the public prosecutor. In the same emergency situations, the seizure can also be carried out by judicial police officers and agents, who must transmit the seizure report to the public prosecutor of the place where the provision was taken within the subsequent forty-eight hours. After having verified that the asset does not have to be returned to the owner, the public prosecutor asks the judge to validate the seizure and to issue a motivated decree of preventive seizure within forty-eight hours, starting from the time of the seizure, if ordered by the public prosecutor, or from the time at which the report was received, if carried out by the judicial police.

See also Court of Cassation, sec. VI, 7 January 2015, no. 14065, Baldetti, in *C.e.d.*, no. 262951.

[59] With regard to this notice, in the case law, see N. TRIGGIANI, "The measure aimed at preventing the repetition of the crime or the exacerbation of its effects", in M. MONTAGNA (ed.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 143.

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

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

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

With regard to the former, *fumus commissi delicti* and *periculum in mora* are necessary to order a preventive seizure. In terms of the *fumus*, there is no need for serious evidence of guilt (which is required to apply a personal precautionary measure, such as custody in prison). For the purposes of preventive seizure, however, the jurisprudence is satisfied with the consistency between the hypothesised legal situation and the actual situation, and does not require that the case be proven at this stage of the proceedings[61], nor does it require the elements from which the commission of the crime is deduced to be indicated[62]. The *periculum in mora* consists of the concrete and actual possibility (deduced from the nature of the asset and all the circumstances of the case) that the asset could be instrumental to aggravating or prolonging the consequences of the crime, or to facilitating the commission of other crimes. In fact, the pertinence must be excluded if there is only a casual relationship between the asset and the crime[63].

With regard to preventive seizure aimed at confiscation (Article 321(2) of the Italian Code of Criminal Procedure), the possibility of confiscating the asset was considered sufficient. Within this context, however, the Joint Chambers of the Court of Cassation clarified that, while the evidence does not necessarily concern the responsibility of the suspect, it must always refer to the existence of a concrete crime[64]. In the case at hand, according to the jurisprudence, the *fumus commissi delicti* would consist of the abstract possibility of the deed being subsumed within the commission of a crime[65], that is the possibility of framing the concrete deed within a hypothetical criminal offence envisaged by the legislature. From the standpoint of *periculum in mora*, seizure for confiscation purposes would require an assessment of the asset's dangerousness and its association with the crime, in the sense that the asset must have an instrumental link to the crime, and not merely a casual

[61] In this regard, see P. TONINI, "Manuale breve di diritto processuale penale", Milan: Giuffrè, 2015, 346.
[62] Among many, Court of Cassation, sec. V, 15 July 2008, Cecchi Gori, in *C.e.d.*, no. 241632.
[63] Court of Cassation, sec. V, 30 October 2014, no 52251, Bianchi, in *C.e.d.*, no. 262164.
[64] Court of Cassation, JC, 31 March 2016, Capasso, in *Cass. pen.*, 2016, 3149-3150.
[65] Court of Cassation, sec. II, 30 September 2015, no. 40401.

association[66]. The asset can be considered "instrumental", for example, if it has undergone any structural changes in order to render it useful for the commission of the crime (e.g.: a car that has been modified in order to conceal drug trafficking).

Otherwise, in the case of seizure for the purposes of confiscation by equivalent or extended confiscation, in which there is no link between the assets to be seized and the crime itself, the prerequisite for applying the measure is the presence of serious clues as to the existence of the conditions required for the application of confiscation[67], in addition to the abstract possibility that a crime has been committed in relation to which the measure is permitted.

With regard to preventive seizure against legal entities (Article 53 of Italian Legislative Decree no. 231 of 2001), on the other hand, several authors believe that the abstract possibility that the entity has committed the crime is sufficient, without the need for any serious clues as to the entity's responsibility; it is also not believed to be necessary to assess the existence of a *periculum in mora*, which is presumed by the law because relative to assets that are subject to confiscation[68].

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

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

In cases of urgency, there is the possibility of the seizure being carried out "in advance" with respect to the hearing. In this case, if there is a real danger that the assets intended to be confiscated will be lost, removed or alienated, the Public Prosecutor at the court of the capital city of the district where the person lives, the Public Prosecutor at the court in whose district the person resides, the national anti-Mafia and counter-terrorism Prosecutor, the chief of police, or the director of the anti-Mafia investigative directorate may, upon submitting the proposal, ask the president of the court responsible for applying the preventive measure to order the seizure of the assets before the date of the hearing has been set. The president of the court arranges for this with a motivated decree within five days of the request. The ordered seizure ceases to be effective if not validated by the court within thirty days of the proposal.

Moreover, during the course of the proceedings, in cases of particular urgency, the seizure is ordered by the president of the court with a motivated decree, and ceases to be effective if not validated by the court within the next thirty days (Article 22 of Italian Legislative Decree no. 159 of 2011) .

[66] Court of Cassation, sec. V, 28 February 2014, no. 21882, Policarp, in *C.e.d.*, no. 260001.

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

[68] In this regard, see G. GARUTI, "La procedura per accertare la responsabilità degli enti", in VARIOUS AUTHORS, *Procedura penale*, Turin: Giappichelli, 2017, 716.

Finally, there is also the possibility of "subsequent" seizure and confiscation, which can even be adopted after the application of a personal prevention measure, at the request of the legitimised subjects (Article 24(3) of Italian Legislative Decree no. 159 of 2011).

In order to subject an asset to seizure for prevention purposes, its current direct or indirect availability to the subject undergoing the prevention procedure must be proven. The *fumus* consists of the presence of a link between the asset and the illegal activity, deduced from *"sufficient clues"* indicating that the asset is or constitutes the re-use of the fruit of illegal activities. With regard to a disproportion with respect to the subject's declared income or occupation, the jurisprudence has clarified that reference to the ISTAT indexes is not sufficient, as it is necessary to verify the inadequacy of the income obtained by the family unit with respect to the value of the acquisitions, based on the established data[69].

In terms of duration, the seizure for prevention purposes ceases to be effective if the court does not file the confiscation decree within one year and six months from the date upon which the assets came into the judicial administrator's possession. In the case of complex investigations, this deadline may be extended for six-month periods by court decree (Article 24(2) of Italian Legislative Decree no. 159 of 2011).

The seizure for prevention purposes is revoked by the court when it is determined that it is targeting assets of legitimate origins or assets that could not have been directly or indirectly available to the suspect, or in any other case in which the proposal for the application of the patrimonial prevention measure is rejected. The court orders the resulting transcripts and annotations to be entered into the public registers, the corporate books, and the business register.

2.1.5. The process of challenging seizures and the absence of a procedural remedy in the case of an injunction found to be unjustified.

Only certain appellate remedies are common to each type of seizure envisaged by the code: in particular, the re-examination applies to all forms of seizure (Article 324 of the Italian Code of Criminal Procedure, to which the provisions regarding evidentiary seizure and precautionary measures on property refer). Furthermore, in opposition to the re-examination provisions (and appeals, where provided), an appeal before the Court of Cassation for violation of the law is permitted (Article 325 of the Italian Code of Criminal Procedure). As an alternative to the request for re-examination, the original seizure provision can be directly challenged before the Court of Cassation, through a *per saltum* appeal.

For preventive seizure alone, on the other hand, there is the possibility of appealing (Article 322 *bis* of the Italian Code of Criminal Procedure) the provisions that can not be challenged by re-examination (e.g. the rejection of the request for restitution, or the refusal to grant or revoke the measure).

A ruling on the appellate remedy must be made by the collegiate Court of the provincial capital where the judge who issued the contested provision is located.

With regard to the re-examination, pursuant to Article 324 of the Italian Code of Criminal Procedure (which is also applicable to evidentiary seizure, pursuant to Article 257 of

[69] Court of Cassation, sec. V, 4 February 2016, no. 14047, Fiammetta, in *C.e.d.*, no. 266426.

the Italian Code of Criminal Procedure), the request must be submitted within ten days of executing or obtaining knowledge of the seizure. This request does not have the effect of suspending the enforcement of the provision.

With regard to the liability of legal entities, on the topic of preventive seizure, the decree refers - as applicable - to Articles 322 and 322 *bis* of the Italian Code of Criminal Procedure; similarly, in art. 54, regarding conservative seizure, reference is made to the legal framework of the re-examination.

It is permitted, on the other hand, to challenge the proposal of the provision that provides for seizure for prevention purposes, which takes place before the same judge who ordered the seizure with the enforcement proceedings, as well as the appeal before the Court of Cassation[70].

In contrast, the instrument for monitoring the restitution provision, as well as for resolving any disputes arising during the enforcement of the seizure, is the enforcement hearing pursuant to Article 676 of the Italian Code of Criminal Procedure. In the event of a dispute concerning the ownership of the asset, on the other hand, the civil court has jurisdiction.

Scholars have highlighted how the prolonged seizure of assets could jeopardise their value and efficiency. The damage that a seizure order without a fixed duration causes to the concerned party can be considerable. However, the Italian penal system does not provide for compensatory measures in the event of a seizure order later found to be unjustified: in fact, the code of law only envisages reparations for unjustified detention (Articles 314-315 of the Italian Code of Criminal Procedure), which does not extend, *de iure condito*, to precautionary measures on property[71].

2.2. Procedural aspects of confiscations: judge competent to order mandatory or optional confiscation.

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 can or must be ordered by the trial judge who pronounces the sentence of conviction, or by the enforcement judge[72], 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 [73].

As stated earlier, optional confiscation 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

[70] M.F. CORTESI, "Il sequestro e la confisca nel procedimento di prevenzione", in M. MONTAGNA (ed.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 500.

[71] From a critical perspective, see G. SPANGHER, "Considerazioni sul processo "criminale" italiano", Turin: Giappichelli, 2015, 114-116.

[72] The latter is 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.

[73] Court of Cassation, sec. III, 10 September 2015, no. 43397, Lombardo, in *C.e.d.*, no. 265093.

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 our 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[74] 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 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 (2, no. 1 *bis*) of the Italian Penal Code).

With regard to extended confiscation, which is currently governed by Article 240 *bis* of the Italian Penal Code, since the criminal trial's 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 accepted by the legislature, first with Italian Law no. 161 of 2017 (Article 12 sexies (4 *sexies*) of Decree Law no. 306 of 1992) and later with Italian Legislative Decree no. 21 of 2018, which transposed the contents of the Italian Code of Criminal Procedure's implementing provisions (Article 183 *quater* DISP. ATT. of the Italian Code of Criminal Procedure, titled "Execution of confiscation in special cases")[75]. 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 (Article 667 (4) of the Italian Code of Criminal Procedure). This informal procedure allows the provision to be taken without hearing the parties. Opposition can be raised, however, 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 (Article 666 of the Italian Code of Criminal Procedure) and the provision adopted can be appealed to the Court of Cassation. In the event of the death of the subject in relation to whom

[74] Article 445(1) of the Italian Code of Criminal Procedure: "When the penalty imposed does not exceed two years of imprisonment, whether alone or in conjunction with a fine, the sentence envisaged by article 444, paragraph 2 does not entail the obligation to pay the costs of the proceedings nor the application of accessory penalties and security measures, with the exception of confiscation in the cases envisaged by article 240 of the penal code".

[75] In this regard, see A.M. MAUGERI, "La riforma della confisca (d.lgs. 202/2016). Lo statuto della confisca allargata *ex* art. 240-*bis* c.p.: spada di Damocle *sine die* sottratta alla prescrizione (dalla l. 161/2017 al d.lgs. n. 21/2018)", in *www.archiviopenale.it*, 20.

the confiscation was ordered with a final judgment, the relative proceedings shall begin or continue against his/her heirs or assignees (Article 183 *quater* (2) DISP. ATT.).

With regard to the administrative liability of legal entities, in addition to the conviction, the confiscation of the price or the profit of the crime[76] is always ordered, except for the part that can be returned to the damaged party and without prejudice to the rights acquired by third parties in good faith (Article 19 of Italian Legislative Decree no. 231 of 2001). It may even be ordered by equivalent[77]. In addition to this main scenario covering sanctions, the decree also includes criminal provisions with confiscation scenarios for various purposes. In particular: a) in the case of the entity's acquittal for having effectively adopted an organisational model, it is permitted to confiscate the profit that the entity gained from the crime (even by equivalent) (Art. 6 (5) of Italian Legislative Decree no. 231 of 2001); b) it is also permitted to confiscate the profit generated during the continuation of the activity through a judicial commissioner (Art. 15 (4) of Italian Legislative Decree no. 231 of 2001); c) it is permitted to confiscate the profit in the case of the failure to respect the prohibitive penalties (Art. 23 (2) of Italian Legislative Decree no. 231 of 2001).

Preventive confiscation is ordered by the Court for seized property whose origins are unable to be justified by the defendant, 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 occupation, as well as any assets that are or constitute the re-use of the fruits of illegal activities. Whatever the case, the defendant can not justify the legitimate origins of the assets if it is found that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion[78] (Article 24 of Italian Legislative Decree no. 159 of 2011).

2.2.1. Non-conviction-based confiscation.

As previously mentioned, Article 240 (2, no. 2) of the Italian Penal Code permits the confiscation of "*intrinsically dangerous*" assets (i.e. assets whose manufacture, use, carrying, possession, or disposal constitutes a crime), even in the case of acquittal.

Aside from the scenario cited above, the compatibility of confiscation with a judgment of non prosecution due to a cause of extinguishment of the offence (e.g. if the offence is time-barred) is a question that has led to a legal debate[79]. As is well known, the European Court of

[76] In the sense that the profit that can be confiscated is "the financial advantage resulting directly and immediately from the crime itself": Court of Cassation, JC, 27 March 2008, no. 26654, Fisia Italimpianti s.p.a., cit.

See also Court of Cassation, JC, 31 January 2013, no. 18374, Adami et al., in *C.e.d.*, no. 255036, in the sense that the profit consists of any financial advantage, including cost savings. For the broad definition of confiscable profit, including every benefit that's even an indirect or mediated consequence of the criminal activity, see: Court of Cassation, JC, 24 April 2014, no. 38343, Espenhahn, in *C.e.d.*, no. 261116. From the opposing perspective, see Court of Cassation, sec. VI, 22 April 2016, Giglio et al., in *C.e.d.*, no. 267065.

[77] On this point, see Court of Cassation, JC, 25 September 2014, no. 11170, Uniland s.p.a. et al., in *C.e.d.*, no. 263680.

[78] The above now also refers to extended confiscation: see P. CORVI, "La confisca in casi particolari, *alias* la confisca "allargata"", in A. GIARDA, F. GIUNTA, G. VARRASO (eds.), *Dai decreti attuativi della legge "Orlando" alle novelle di fine legislatura*, Milan: Wolters Kluwer Cedam, 2018, 43.

[79] The Joint Chambers of the Court of Cassation have deemed the direct confiscation of the price or profit of the crime to be applicable with the issuance of a sentence of acquittal by statute of limitations, provided that

Human Rights has deliberated several times on the possibility of ordering confiscation in the absence of a sentence of conviction, ruling that, under penalty of violating of Article 7 ECHR, among others, confiscation cannot be ordered without an actual conviction[80].

Confiscation by equivalent, however, was not considered acceptable by the jurisprudence in the event of dismissal for extinguishment of the offence [81].

With regard to extended confiscation, Article 578 *bis* of the Italian Code of Criminal Procedure, introduced by Italian Legislative Decree no. 21 of 2018 and amended by Italian Law no. 3 of 2019, states that when confiscation has been ordered in special cases pursuant to Article 240 *bis* of the Italian Penal Code and other legal provisions or pursuant to Article 322 *ter* of the Italian Penal Code, 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 the accused[82]. It follows that, in order to apply the provision in question, the judge must have already ordered the confiscation before the offence is extinguished; in the end, if the confiscation has not already been ordered, it will still be possible to initiate the prevention proceedings for the purposes of applying confiscation as a patrimonial prevention measure[83].

2.2.2. Rights and guarantees.

Since confiscations are 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. An appeal against the rulings of the enforcement judge may be filed with the Court of Cassation[84].

The same does not hold true for the preventive confiscation applied at the outcome of an inquisitorial proceeding, where the rights of the accused are less guaranteed. The accused will have the right to challenge the decree applying the patrimonial measure (Article 27 of Italian Legislative Decree no. 159 of 2011, which recalls Article 10 of the same decree,

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the relative ruling is preceded by a comprehensive determination of liability, and expressly excluding the possibility of the same solution being applicable for confiscation by equivalent: Court of Cassation, JC, 26 June 2015, no. 31617, Lucci, in *C.e.d.*, no. 264434.

The most prominent jurisprudence was of the opposing view: Court of Cassation, JC, 10 July 2008, no. 38834, De Maio, in *C.e.d.*, no. 240565; Court of Cassation, JC, 25 March 1993, no. 5, Carlea et al., in *C.e.d.*, no. 193119.

In the opposite sense, with regard to the confiscation of land for the crime of unlawful subdivision, see Court of Cassation, sec. III, 30 April 2009, no. 21188, Casasanta et al., in *C.e.d.*, no. 243630.

[80] In the case law, ECtHR, G.C., *G.I.E.M. s.r.l. and Others v Italy*, 28.06.2018, in *www.echr.coe.int*; ECtHR, sec. II, *Varvara v Italy*, 29.10.2013, in *www.echr.coe.int*; ECtHR, sec. II, *Sud Fondi v Italy*, 20.01.2009, in *www.echr.coe.int*; Constitutional Court, no. 49 of 26 March 2015.

[81] Court of Cassation, JC, 26 June 2015, no. 31617, Lucci, cit.

[82] According to P. CORVI, "La confisca in casi particolari, *alias* la confisca "allargata"", op. cit., 46, this provision seems contrary to Directive 2014/42/EU.

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

[84] A.M. MAUGERI, "La riforma della confisca (d.lgs. 202/2016). Lo statuto della confisca allargata *ex* art. 240-*bis* c.p.: spada di Damocle *sine die* sottratta alla prescrizione (dalla l. 161/2017 al d.lgs. n. 21/2018)", op. cit., 22.

regarding the formalities for challenging personal preventive measures) by appeal before the Court of Cassation "for violation of the law" (challenges that have a suspensive effect with regard to confiscation) and, in the presence of the conditions envisaged by law, to request its revocation.

2.2.3. Evidentiary standard required for confiscation.

For the purposes of optional confiscation (Article 240(1) of the Italian Penal Code), the judge must indicate the link between the asset and the crime as justification, in the sense that the asset must have an instrumental link to the crime, and not merely a casual association[85].

In the case of confiscation by equivalent, according to part of the jurisprudence, the judge only has to verify that the assets fall within the categories of things objectively subject to confiscation, without assessing the *periculum in mora* or the pertinence of the assets[86].

With regard to extended confiscation, according to the jurisprudence it is not necessary for there to be a pertinent link between the asset and the crime, nor do the assets to be confiscated need to be derived from the crime in question, nor do they need to originate from the convicted party's illegal activities[87]. With regard to the disproportion between the assets and the income or occupation of the convicted party, the ascertained imbalance gives rise to a presumption of illegal accumulation of assets[88], which can only be overcome by the subject justifying the origins of his/her financial resources. According to the most prominent thesis, since the concerned party was formerly asked to prove the legitimate origins of his/her assets, the burden of proof was reversed; the jurisprudence now considers this to be a burden of allegation[89]. Instead, it is the prosecution's duty to prove ownership of the assets. In the event that the asset is indirectly available to the convicted party, the burden of proving the existence of circumstances that reveal the divergence between the formal ownership and the actual availability of the asset lies with the prosecutor[90].

Preventive confiscation requires complete and rigorous proof of the link between the asset and the illegal activity, since the "sufficient clues" necessary for the application of the relative seizure are not deemed suitable. Furthermore, both the illegal origins and the disproportion must be ascertained by the prosecution in relation to each individual asset, and with reference to their time of purchase, under penalty of violating the property right constitutionally guaranteed by Article 42 of the Constitution[91].

As we have seen, for the patrimonial prevention measures, the jurisprudence no longer requires the verification of the subject's current dangerousness, provided that it can be shown that he/she was dangerous upon assuming ownership of the asset subject to the provision[92].

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[85] Court of Cassation, sec. VI, 5 March 2013, no. 13049, Spinelli, in *C.e.d.*, no. 254881.

[86] Court of Cassation, sec. III, 15 April 2015, no. 20887, Aumenta, in *C.e.d.*, no. 263408.

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

[88] Imbalance to be verified with regard to the time of the individual assets' acquisition: on the point, see Constitutional Court, no. 33 of 21 February 2018.

[89] Court of Cassation, sec. VI, 3 April 2003, Prudentino et al., in *C.e.d.*, no. 225920. Constitutional Court, no. 33 of 21 February 2018, cit.

[90] Court of Cassation, sec. I, 24 October 2012, no. 44534, Ascone et al., in *C.e.d.*, no. 254699.

[91] Court of Cassation, sec. I, 13 May 2008, no. 21357, Esposito, in *C.e.d.*, no. 240091.

[92] Court of Cassation, sec. one, 26 June 2014, no. 4880, Spinelli et al., in *C.e.d.*, no. 262604-262605.

This is not a reversal of the burden of proof: however, the accused's inability to meet the burden of allegation on the points pertinent to the investigations has circumstantial value[93].

2.2.4. The remedies.

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[94].

With regard to preventive confiscation, 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 State.

2.3. 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 crime[95] 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 offences[96].

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

[93] Court of Cassation, sec. VI, 3 April 1995, no. 1265, Annunziata, in *C.e.d.*, no. 202310.

[94] Court of Cassation, sec. I, 2 February 2016, Violino et al., in *C.e.d.*, no. 266624.

[95] On the issue of third party protection, see F. MENDITTO, "Le confische di prevenzione e penali. La tutela dei terzi", Milan: Giuffrè, 2015.

[96] In this regard, see L. CAPRARO, "Disponibilità della res e tutela del terzo estraneo", in M. MONTAGNA (ed.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 335-336.

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 others[97], with the exception of cases in which the third party has innocently benefited from the crime in good faith[98]. 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.

The confiscation ordered against the legal entity (Article 19 of Italian Legislative Decree no. 231 of 2001) is also ordered without prejudice to the rights acquired by third parties 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, 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* 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).

[97] Court of Cassation, JC, 25 September 2014, no. 11170, Uniland s.p.a. et al., in *Cass. pen.*, 2016, 2893.

[98] T.E. EPIDENDIO, "La confisca nel diritto penale e nel sistema delle responsabilità degli enti", Padua: Cedam, 2011, 164-165.

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[99].

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 confiscation. For these 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. 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.

2.3.1. 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).

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

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

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 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[100], nor to challenge the portion of the criminal sentence regarding the confiscation[101] (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[102]. 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[103]. 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[104]. 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).

The above mentioned system for the protection of third parties, provided for by the Legislative Decree no. 159 of 2011, has been extended to confiscation *ex* Article 240 *bis* of the Italian Penal Code [105] 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)[106].

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[100] Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, in *C.e.d.*, no. 262283.

[101] Court of Cassation, sec. I, 14 January 2016, no. 8317.

[102] Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, cit.

[103] 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.

[104] Court of Cassation, JC, 22 February 2018, no. 39608.

[105] In this regard, see P. CORVI, "La confisca in casi particolari, *alias* la confisca "allargata"", op. cit., 53-55.

[106] Amended by Italian Legislative Decree no. 14 of 2019. See M. BONTEMPELLI, R. PAESE, "La tutela dei creditori di fronte al sequestro e alla confisca", *Dir. pen. cont.*, 2, 2019, 123.

3. Mutual recognition aspects.

The European Union aims to implement effective forms of legal cooperation in this area, using two main instruments: the mutual recognition of criminal rulings and the harmonisation of criminal law within the national legislation of the various Member States[107]. In other words, harmonisation is pursued by establishing minimum standards for the promotion of mutual trust and effective cross-border cooperation. These standards must also establish the indispensable guarantees required for mutual trust, upon which mutual recognition must be based, so that a Member State will recognise and domestically enforce the rulings issued by competent criminal courts in other Member States.

The European Union has therefore also adopted multiple legal instruments with regard to seizure and confiscation as well, which are mandatory in varying degrees, and are aimed at doing away with the conventional assistance system based on letters rogatory, and moving towards one based on the direct circulation of seizure and confiscation orders between judicial authorities.

Starting with the framework decisions adopted in the area of "freedom, justice and security", when it was still referred to as the "third pillar", we have: the Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; Council Framework Decision 2003/577/JHA of 22 July 2003 the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property; Council Framework Decision 2006/783/JHA of 8 October 2006 on the application of the principle of mutual recognition to confiscation orders.

The more recent instruments, adopted after the communitarisation of the third pillar, are represented by Regulation 2018/1805/EU of the Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders and by Directive 2014/42/EU of the Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which replaces several, but not all, of the provisions of the aforementioned Framework Decisions 2001/500/JHA and 2005/212/JHA. Similarly, Directive 2014/41/EU of the Parliament and of the Council of 3 April 2014 on the European Investigation Order only partially replaced and repealed Framework Decision 2003/577/JHA, exclusively with regard to evidentiary seizure (with the exception of Ireland and Denmark, for which the old instrument will remain in force): this latter framework decision therefore remains in force precisely with regard to preventive seizure for the purposes of confiscation.

The objective was well-clarified in the Stockholm programme, adopted by the European Council on 10-11 December 2009, which calls for the creation of a comprehensive legal system, based on the principle of mutual recognition, to replace all existing instruments in this specific sector. Well before that, in fact, and specifically in the conclusions of the Tampere European Council of 15-16 October 1999, it was confirmed that there was a need, on the one hand , "to apply mutual recognition, as well as the final rulings, even of the ordinances that

[107] On this topic, see C. AMALFITANO, "Sub art. 82", in A. TIZZANO (eds.), *Trattati dell'Unione Europea,* Milan: Giuffrè, 2014, p. 866 et seq., and the bibliographical references cited therein.

allow the competent authorities to seize evidence and confiscate easily transferable assets", and, on the other hand, to take "concrete initiatives to track down, seize, and confiscate the proceeds of crime."

And that's why, soon after, a project was launched, already with the aforementioned Council Framework Decision 2001/500/JHA, that aimed to require Member States to eliminate the reservations indicated in articles 2 and 6 of the Strasbourg Convention of 1990 on laundering and the confiscation of the proceeds from crime, and introduced rules permitting the confiscation of value "in both domestic proceedings and those held at the request of a Member State", "at least in cases where the proceeds of crime can not be traced." The stated objective is to establish a harmonised framework where "the requests submitted by other Member States regarding the identification, tracing, freezing, seizure and confiscation of the proceeds of crime are treated with the same level of priority afforded to the same measures within the context of domestic procedures."

But the challenging policy objectives of the EU's highest policy-making body have never been received in a timely manner by the Italian legislature, which has never been very willing to incorporate the main decisions in the AFSJ area by the foreseen deadlines. Finally, Italy's legislature has recently taken it upon itself to acquire, during the downturn, the tools for mutual recognition and for the harmonisation of the confiscation tools. The stimulus could perhaps come from the expiration of the 5-year transitional period since the entry into force of the Treaty of Lisbon, which expired on 1 December 2014, whereupon the non-transposed framework decisions effectively became the law of the Union, and therefore infringement proceedings could have been launched against Italy.

3.1. The legal framework for the mutual recognition of seizure orders.

Framework Decision 2003/577/JHA was transposed into Italy's legal system by Italian Legislative Decree no. 35 of 15 February 2016[108], and therefore with a delay of over ten years with respect to the deadline of 2 August 2005. This legislation allows the principle of mutual recognition to be applied to the pre-trial measures for the freezing of assets or the seizure of evidence. Since the Euro-Unitary legislation often makes reference to the terms "blockage" and "freezing", which don't have specific references within the Italian legal system[109], the transposing law sought to clarify the exact scope of application: "any provision adopted by the judicial authority of the issuing State in order to temporarily prevent any operation aimed at destroying, transforming, moving, transferring or disposing of assets envisaged as the body of the crime, or assets pertinent to the crime, that could be confiscated in the cases and within the limits envisaged by art. 240 of the Italian Penal Code." The reference to the cases and

[108] For further information, see A. MANGIARACINA, "L'esecuzione nell'U.E. dei provvedimenti di blocco dei beni e di sequestro", in M. MONTAGNA (eds.), *Sequestro e confisca*, Turin: Giappichelli, 2017, p. 551 et seq.; G. DARAIO, "L'attuazione della d.q. 577/2003 sul reciproco riconoscimento dei provvedimenti di sequestro a fini di prova o di confisca", *Dir. pen. proc*., 2016, p. 1133 et seq.

[109] As noted by F. VERGINE, "Il d.lgs. 29 ottobre 2016, n. 202: un ulteriore ampliamento della confisca di estrazione europea, tra le 'solite' novità e i mancati adeguamenti", *Proc. pen. giust.*, 2017, p. 512, freezing represents something different than seizure, which is why the Italian legislature could have intervened with a specific legal framework on the topic, rather than "incorporating the freezing of assets within the much more close-knit framework of seizure."

limits envisaged by art. 240 of the Italian Penal Code - entitled "confiscation" - might lead us to believe that so-called confiscation by equivalent is excluded from the scope of the implementing legislation; however, the reference to the equivalent of the value of the product of the crime as an asset potentially subject to a seizure order – pursuant to art. 2 letter d) of Italian Legislative Decree no. 35 of 15 February 2016 – reveals a clear *voluntas legis* not to limit the framework decision's transposition to scenarios of direct confiscation only.

The provision must, however, be adopted "within the context of a criminal proceeding", thereby excluding seizure measures requested within the context of different types of proceedings, such as the Italian preventive seizure measure, or the Anglo-Saxon *actio in rem*[110].

The Italian legislature has substantially transposed the limited number of cases indicated in the framework decision for which double incrimination has been abolished and mutual recognition has been established, provided, however, that they are punished with a term of imprisonment of no less than three years. In the transposing law, however, the text of certain cases envisaged within the framework decision has been slightly limited, and despite the greater degree of specificity provided, they remain substantially unaltered: the broader case of fire was included in place of voluntary fire, which appears on the list; with regard to the crime of facilitating illegal entry and residence, is makes reference to non-EU citizens; the implementing decree uses the term criminal association instead of participation in a criminal organisation, and sexual violence instead of the term rape.

Whatever the case, mutual recognition is also permitted for cases that are punished as a criminal offences by Italian law, regardless of the constituent elements or legal qualification identified by the law of the issuing State, provided that preventive seizure for the purpose of confiscation is also permitted by the Italian legal system.

3.1.1. The authorities responsible for proceeding with the enforcement of the seizure request.

The judicial authority identified as having jurisdiction upon receiving the freeze or seizure order is the Public Prosecutor at the court where the asset is located. It should be noted, however, that operational confusion can arise since, in cases where the request for preventive seizure for the purpose of confiscation was initiated by a foreign judicial authority through letters rogatory within the context of mutual assistance on criminal matters, rather than through the procedure in question, the jurisdiction is transferred to the Public Prosecutor at the district court of the Court of Appeal, despite the justified calls for the legislature to unify the jurisdiction on these matters[111].

[110] For further information, see A.M. MAUGERI, "L'*actio in rem* assurge a modello di 'confisca europea' nel rispetto delle garanzie CEDU?", *Dir. pen. cont. – Riv. trim.*, 3/2013, p. 252 et seq.; ID., "Dall'*actio in rem* alla responsabilità da reato delle persone giuridiche: un'unica strategia politico-criminale contro l'infiltrazione criminale nell'economia?", in G. FIANDACA, C. VISCONTI (eds.), *Scenari di mafia. Orizzonte criminologico e innovazioni normative,* Turin: Giappichelli, 2010, p. 268 et seq.; ID., "La legittimità della confisca di prevenzione come modello di 'processo' al patrimonio tra tendenze espansive e sollecitazioni sovrannazionali", *Riv. it. dir. proc. pen.*, 2017, p. 559 et seq.

[111] In its own resolution of 20 January 2016, the Supreme Judicial Council envisaged the opportunity to coordinate the provisions of the legislative decree implementing Framework Decision 2003/577/JHA with those of Italian Legislative Decree no. 149 of 3 October 2017 pending approval concerning the ratification and

If the provision issued by the issuing State concerns assets located in more than one Court district, the jurisdiction lies with the Prosecutor of the place where the greatest number of assets are located, or, in the case of an equal numbers, the judicial authority that first received the provision. If a Prosecutor should receive a provision that he/she believes must be carried out by the Public Prosecutor of a different Court, he/she shall immediately transmit the request and notify the authority of the issuing State.

The enforcement of the request is then assigned to the competent magistrate, according to the criteria established by the Italian code of criminal procedure. Therefore, if the issuing body requests a seizure for evidentiary purposes[112], the same Public Prosecutor identified above shall be responsible for the relative enforcement and shall proceed with the decree; if, on the other hand, a preventive seizure for the purpose of confiscation is requested, the Prosecutor submits a request to the preliminary investigation Judge of the Court, who issues the relative order.

For the determination of the territorial prosecutor's office, if multiple assets are indicated to be seized, the location of the asset of greatest value shall prevail, or, if the number or value is equal, the judicial authority that first received the seizure order to be enforced. In the event of a negative conflict of jurisdiction, if no court is deemed to be territorially competent, the Court of Cassation is responsible for resolving the dispute.

In order to guarantee the investigative coordination functions in cases where serious crimes have occurred (e.g. Mafia-like criminal association or criminal association involving drug trafficking, terrorism, human trafficking, kidnapping for the purpose of extortion, etc.), the request it is also transmitted, for information purposes, to the National Anti-Mafia and Counter-Terrorism Prosecutor's Office and to the General Prosecutor at the competent Court of Appeals.

The competent judicial authority promptly recognises the freeze or seizure provision by ordering its immediate enforcement. The suggestion to include a deadline to proceed within 24 hours of receiving the provision, contained in art. 5 par. 3 of the Framework Decision, was therefore not accepted by the Italian legislature.

With regard to the methods of enforcing provisions issued for preventive seizure purposes, as well as any additional measures necessary, compliance with the *lex loci* enforcement provisions is required[113].

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execution of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, finalised in Brussels on 29 May 2000. The suggestion, which wasn't accepted, consisted of concentrating the jurisdiction for receiving the request for the recognition and enforcement of the freezing or seizure order within the Office of the General Prosecutor, or rather the Office of the Public Prosecutor located in the district capital. The letters rogatory procedure is now regulated by art. 724 of the Italian Code of Criminal Procedure, while the mutual recognition procedure is regulated by art. 5 of Italian Legislative Decree no. 35 of 15 February 2016.

[112] As mentioned above, a seizure request for evidentiary purposes can now be submitted within the context of the European Investigation Order pursuant to Directive 2014/41/EU of the Parliament and of the Council of 3 April 2014, which has already been transposed within Italy with Italian Legislative Decree no. 108 of 21 June 2017. On this point, see G. DE AMICIS, "Dalle rogatorie all'ordine europeo di indagine: verso un nuovo diritto della cooperazione giudiziaria penale", *Cass. Pen.*, 2018, p. 22.

[113] This deviates from the way in which evidentiary seizure provisions are enforced, which instead requires compliance with the *lex fori* provisions of the issuing State, without prejudice to the fundamental principles of the internal legal system of the enforcing State. This provision, which requires compliance with the

3.1.2. Reasons for not recognising or for postponing the enforcement of the freeze and seizure order.

As previously mentioned, the characteristic feature of the mutual recognition principle is "mutual trust" between the jurisdictions. However, while ideally aimed at ensuring automatic recognition of foreign provisions, this context also includes cases in which the enforcement of the requested provision can be refused by the enforcing State. In this specific case, Italy has not introduced any grounds for refusal beyond those indicated in the Framework Decision; moreover, it has maintained their optional and non-mandatory, nature[114].

The optional scenarios for refusing to recognise or enforce the requested provision therefore arise if:

- the certificate has not been transmitted, is incomplete, or is clearly not consistent with the confiscation order. In this regard it should be noted that the issuing State must transmit both the judicial title to be enforced and a certificate drawn up according to a standard format; however, a defect inherent in such documents is of a formal nature, and can be remedied, since the judicial authority may impose a deadline for the issuing State to produce the complete or correct certificate, or another equivalent document;
- the subject against whom the measure is to be enforced has immunities that restrict legal action from being exercised or pursued. In this sense, in the absence of a Euro-Unitary definition of immunity, the definition of immunity recognised by the Italian State applies;
- there is a clear violation of the *ne bis in idem* trial prohibition;
- the offence for which the enforcement request is made is not included on the list of crimes for which double punishability is excluded. In this case, however, the foreign seizure request for the purpose of confiscation can only be recognised and enforced in Italy if it regards an act constituting a crime for which preventive seizure is permitted.

There is a relevant exception to the rule of double punishability with regard to tax offences: in fact, if the seizure provision is issued in relation to tax, customs or currency violations, the enforcement can not be refused on the grounds that the law does not impose the same types of taxes, or that the Italian legislation on tax, currency and customs is different from that of the issuing State[115].

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formalities and procedures expressly indicated by the authority of the issuing State, is aimed at facilitating the introduction of evidence obtained in a country other than that where the trial will be held.

[114] The framework decisions implemented after the establishment of the European arrest warrant no longer distinguish between mandatory and optional grounds for refusal. On this point, see C. AMALFITANO, *Unione europea e principio del reciproco riconoscimento delle decisioni penali*, in H. BELLUTA, M.C. GASTALDO (eds.), *L'ordine europeo di protezione. La tutela delle vitture di reato come motore della cooperazione giudiziaria,* Turin: Giappichelli, 2016, p. 46.

[115] It has been observed, however, that the conjunction "nevertheless", with which this exception begins within the text of the law, can "be understood in the sense that it will always be necessary to find incriminating rules within the Italian legal system covering taxes substantially similar to foreign taxes in terms of taxable persons, basis of assessment, and purpose of the tax, regardless of the differences in the denomination of the tax

There remains a gap in the internal transposition legislation, however, as the certificate received from the issuing State does not have to be translated into Italian, while in the case of an active request it is expressly required for the certificate to be translated from Italian into the official language of the enforcing State. This gap flies in the face of both domestic Italian law and Euro-Unitary law: in fact, on the domestic level, requests from foreign authorities, as well as their relative acts and documents, must be accompanied by Italian translations[116]; on the European level, it is the framework decision itself (which takes care to establish all the constituent elements of the certificate, so that they are common to all Member States) that requires the certificate to be translated into the language of the enforcing State.

There are three circumstances, on the other hand, that allow the seizure order's enforcement to be postponed. In such cases, the enforcing authority immediately notifies the requesting authority, indicating the reasons for the postponement and, if possible, its duration, and later "promptly" enacts the enforcement measures as soon as the reason for the postponement has ceased.

The first case consists of the absence or incompleteness of the certificate: in this case, the Judicial Authority can impose a deadline for the Authority of the issuing State to produce the certificate.

The second case consists of circumstances in which the enforcement of the order could compromise the investigations within the context of other criminal proceedings already in progress; in this case, the "reasonable" duration of the postponement indicated by the framework decision has been limited by the implementing decree to a maximum period of 6 months.

Finally, the third case consists of circumstances in which the assets have already been frozen or seized within the context of other criminal proceedings; in this case, the postponement remains in effect until the seizure order is withdrawn. Under these circumstances, the enforcement is postponed until the provision in question ceases to have effect.

Finally, it may become objectively impossible to enforce the provision in the event that, for example, the asset to be confiscated has disappeared or been destroyed, or is not found to be in its indicated location. This latter situation, which must be promptly communicated to the issuing State's authorities, is that which occurs most often, as the seizure order must always be accompanied by the indication of the asset's exact location, since it is not possible to request the enforcing State to conduct further investigations aimed at tracking it down: such requests must be submitted specifically in the form of a European Investigation Order, in accordance with the procedures envisaged by Directive 2014/41/EU. This situation significantly limits the effectiveness of the seizure order, since the asset could go missing in

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and the detailed legal framework". On this point, see I. PALMA, *Blocco dei beni e sequestro probatorio. Il mutuo riconoscimento delle decisioni giudiziarie in Europa*, *Il penalista,* 15 March 2016.

[116] Art. 201 of the implementing laws of the Italian code of criminal procedure requires all requests from foreign authorities, as well as their relative acts and documents, to be accompanied by Italian translations. However, according to a single Supreme Court precedent (ref. Court of Cassation, sec. VI, 18 March 2008, no. 18704 in *C.e.d*., no. 239678.), the omission of translations for the documents sent by the requesting State does not preclude the Italian judicial authority from resorting to the use of an interpreter in order to resolve the matter of the omitted translations of the documents required for the decision to be taken.

the time that elapses between its identification via an instrument of cooperation and investigative coordination[117] and the issuance of a seizure order.

3.1.3. The challenge process and the protection of third parties.

The process of challenging the recognition and enforcement of the provision is similar to the Italian process regarding real precautionary measures. Nevertheless, there are those in the case law[118] who have noted that, in view of the text of the art. 9 of the transposing legislative decree, only the decree recognising and enforcing the freeze and seizure order can be appealed, and not the subsequent order issued to the preliminary investigation judge, thus seriously compromising the rights of defence.

All the parties concerned (the suspect or defendant, his/her defender, the person from whom the asset is seized and the person entitled to its return, including third parties acting in good faith) are entitled to appeal for the review of the seizure provision, and the resulting orders issued can be subsequently appealed before the Court of Cassation for violation of the law. The appeal is not of a suspensory nature and, as previously mentioned, it is not permitted to object to the substantive grounds upon which the provision is based, which can only be appealed to the authority of the issuing State.

The notice of the challenge and the date of the relative hearing is promptly communicated to the judicial authority of the issuing State, so that it can present its own observations.

Although not expressly envisaged in the implementing law, the subject from whom the assets are seized must be granted the right to be assisted by a lawyer and an interpreter, with the right to interpretation and translation in criminal proceedings envisaged by other Euro-Unitary legislation being extended to this context as well[119].

In the event that the Italian State is found liable for damages caused during the enforcement of a seizure order, the Minister of Justice promptly requests the reimbursement of the amounts paid out to the parties as compensation from the issuing State, unless the damage is due exclusively to the conduct of the Italian State in its capacity as the enforcing State.

3.2. The legal framework for the mutual recognition of confiscation orders.

In order to achieve mutual recognition of confiscation measures, it is necessary for a uniform system of guarantees (e.g.: fair and impartial judge, opposition, effectiveness of appeal) to be ensured in the area of freedom, justice and security, and from a different standpoint than the harmonisation of the various confiscation models present within the

[117] For an overview of the numerous cooperation tools available, see G. DE AMICIS, "Organismi europei di cooperazione e coordinamento investigativo – I Parte", *Cass. Pen.,* 2016, p. 4586; ID., "Organismi europei di cooperazione e coordinamento investigativo – II Parte", *Cass. Pen.,* 2017, p. 804.

[118] This is due to a strict application of the principle of legal certainty, hypothesised by G. DE AMICIS, "I decreti legislativi di attuazione della normativa europea sul reciproco riconoscimento delle decisioni penali", *Cass. Pen., suppl.* no. 5/2016, p. 5 et seq.

[119] This right was introduced by Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010, implemented in Italy by Italian Legislative Decree no. 32 of 04 March 2014.

Member States' individual legal systems. In this sense, the aim is to overcome the model of traditional legal assistance in criminal matters, which leaves ample room for the refusal to recognise the provision and, even in the case of its acceptance, allows for broad discretion in choosing the enforcement methods.

In other words, a procedural stabilisation must be ensured in order to obtain an effective model of cooperation, or rather an adequate standard of protection that does not compromise any of the fundamental principles guaranteed at the conventional level or resulting from the Member States' common constitutional traditions.

It is in this context of harmonisation that Framework Decision 2006/783/JHA was implemented in the Italian legal system (albeit with a delay of approximately seven years) with Italian Legislative Decree no. 137 of 7 August 2015[120].

Mutual recognition concerns the confiscation scenarios harmonised by Framework Decision 2005/212/JHA and Directive 2014/42/EU Directive (the latter having already been implemented in Italy with Italian Legislative Decree no. 202 of 29 October 2016), and therefore direct confiscation, confiscation by equivalent, and extended confiscation. These confiscation provisions can be taken in relation to a wide range of seizure measures, given the breadth of the domestic legislation of reference[121]: not only within the context of a final ruling (the "final sanction or measure" referred to under art. 2 § 1 letter c of Framework Decision 2006/783/JHA), but also imposed by the enforcement judge pursuant to art. 240 *bis* of the Italian Penal Code (extended confiscation), as well as within the context of the anti-Mafia prevention procedure (articles 24 and 34 of Italian Legislative Decree No. 159 of 6 September 2011). In fact, with these latest projections the legislature has anticipated the implementation of the part of Directive 2014/42/EU[122] that envisages the introduction of certain forms of confiscation without conviction, such as that which can be ordered in cases in which a proceeding cannot be concluded with a conviction criminal law (art. 4 par. 2 of the aforementioned directive) in the event that the subject is suffering from an illness or has escaped. With the Regulation 2018/1805/EU of the Parliament and of the Council of 14 November 2018 on mutual recognition of confiscating orders[123], the European Commission expands these cases of confiscation without conviction to include cases of immunity, statutory limitation, inability to identify the perpetrator of the crime, or other cases in which the criminal justice authority can confiscate assets without conviction if it has decided that such

[120] For further information, see B. PIATTOLI, "L'esecuzione nell'U.E. delle decisioni di confisca, in M. MONTAGNA (eds.), *Sequestro e confisca*, Turin: Giappichelli, 2017, p. 573 et seq.; M. MONTAGNA, "Il d.lgs. 7 agosto 2015, n.137: il principio del mutuo riconoscimento per le decisioni di confisca", *Proc. pen. giust.,* 2016, p. 110 et seq.

[121] See art. 1, par. 3, letter *d*) of Italian Legislative Decree no. 137 of 07 August 2015.

[122] For further information, see A.M. MAUGERI, "La direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato nell'Unione Europea tra garanzie ed efficienza: un 'work in progress'", *Dir. pen. cont. – Riv. trim.,* 1/2015, p. 300 et seq.; A. MARANDOLA, "Congelamento e confisca dei beni strumentali e dei proventi da reato nell'Unione europea: la 'nuova' direttiva 2014/42/UE", *Arch. pen*., 2016, p. 11 et seq., ID., "Considerazioni minime sulla Dir. 2014/42/UE relativa al congelamento ed alla confisca dei beni strumentali e dei proventi da reato fra gli Stati della UE*"*, *Dir. pen. proc., 2016,* p. 125 et seq.

[123] For further information, see A.M. MAUGERI, "Il regolamento (UE) 2018/1805 per il reciproco riconoscimento dei provvedimenti di congelamento e di confisca: una pietra angolare per la cooperazione e l'efficienza", *Dir. pen. cont.*, *16 January 2019;* about the previous proposal of regulation COM(2016)819 of 21 December 2016 of the Parliament and the Council see always A.M. MAUGERI, "Prime osservazioni sulla nuova proposta di regolamento del parlamento europeo e del consiglio relativa al riconoscimento reciproco dei provvedimenti di congelamento e confisca*"*, *Dir. pen. cont. – Riv. trim.*, 2/2017, p. 231 et seq.

assets constitute the proceeds of a crime; however, in order to fall within the scope of the regulation, these types of confiscation orders must be issued within the context of criminal proceedings, meaning that all the guarantees applicable to these proceedings must be respected in the issuing State.

3.2.1. The authorities responsible for proceeding with the enforcement of the confiscation request.

The authority responsible for the receipt of the confiscation order is the territorially competent Court of Appeals, which can be assigned either directly or through the Ministry of Justice, which therefore retains an optional administrative coordination function. The Court decides with a formal chamber proceeding (art. 127 of the Italian Penal Code), and transmits the eventual decision of recognition to the Public Prosecutor's Office at the Court of Appeals for its enforcement.

While the Court's territorial jurisdiction is rooted in the place where the asset is located, if the object of the confiscation is a sum of money, the place where the natural person or legal entity has assets or income is considered instead. If this latter place is not known, jurisdiction is determined by the place of the natural person's residence or the legal entity's registered office.

It should be noted that the national transposition law has established specific methods for enforcing confiscations based on the types of assets to be confiscated:

a) Movable assets and credits entail the methods prescribed by the Italian code of civil procedure for garnishment from the debtor or third parties, where applicable;
b) Registered movable or immovable assets entail the registration of the provision with the competent offices;
c) Corporate assets organised for conducting business activities entail transfer to the possession of the director appointed by the judicial authority that ordered the confiscation, or, failing that, appointed by the Court of Appeals itself, with the provision being registered with business registry in which the company is registered;
d) Company shares and stocks must be annotated in the corporate books and registered with the business register;
e) Dematerialised financial instruments must be registered in the appropriate account held by the intermediary.

If any difficulties should arise with regard to the material apprehension of the asset, the enforcement authority shall proceed with the help of public law enforcement.

With regard to the allocation of the confiscated assets, in addition to what will be discussed in the following chapter, only 50% of the sum of € 10,000 is transferred to the issuing State, while the remaining portion is held in Italy and is paid into the Single Justice Fund. This law must, however, be harmonised with art. 14 of the United Nations Convention against Transnational Organised Crime, signed during the Palermo Conference of 12 - 15 December 2000, art. 14 of which states that "States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate

owners." This problem is nowadays solved by Article 30 of the Regulation 2018/1805/EU of the Parliament and of the Council of 14 November 2018 on mutual recognition of confiscating orders that contains disposal of confiscated property or money obtained after selling such property, but only since 19 December 2020.

Furthermore, if the confiscation request concerns a specific asset, the competent domestic authorities and the issuing authorities can arrange for the confiscation to be carried out in the form of a payment corresponding to the value of the asset itself. This method reverses the ordinary procedure followed in the confiscation procedure, which usually entails direct confiscation by priority, with the confiscation of value only being used in cases in which the asset has gone missing or can no longer be located.

Finally, the exemption granting the right not to sell or return the specific asset to which the confiscation order refers when it constitutes a cultural asset belonging to the national cultural heritage has been implemented.

3.2.2. Reasons for not recognising or for postponing the enforcement of the confiscation order.

For the series of serious offences indicated in the framework decision (all of which have been transposed by Italy) double criminality for confiscation orders following convictions is excluded when they are punished in the issuing State with a prison sentence of no less than the maximum of three years. For other offences, Italy only allows for the recognition and enforcement of confiscation if the circumstances for which they have been requested constitute a crime within Italy, and the crime in question allows for confiscation under Italy's internal legislation.

The Italian legislature has merely decided to re-propose the list of the category of crimes for which there is no verification of double criminality, without reformulating the individual scenarios, thereby raising doubts in terms of compliance with the principle of legality due to lack of certainty[124]. With the transposition, the faculty to introduce certain limitations to the principle of mutual recognition, as envisaged by the framework decision, was adopted: in fact, in Italy's legal system, the optional hypotheses of refusal of recognition have been adopted in the event that:

- the certificate has not been transmitted, is incomplete, or is clearly not consistent with the confiscation order. In fact, the certificate must contain certain elements (issuing authority, offences for which the confiscation has been requested, type of confiscation, assets to be subjected to the measure and their location, indication of the natural person or legal entity to whom the asset is available), and must be translated into Italian, be signed by the issuing authority, and certify that the all elements contained therein are accurate. This document must also specify whether the asset to be subjected to confiscation constitutes an instrument of the crime,

[124] As was the case, on the other hand, with the internal provision for the implementation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, for which additional can be found in L. PICOTTI, "Il mandato d'arresto europeo tra principio di legalità e doppia incriminazione", M. BARGIS, E. SELVAGGI (eds.), *Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna*, Turin: Giappichelli, 2005, p. 41 et seq.

proceeds of the crime (or the relative equivalent), an asset of unjustified origin, or, finally, an asset acquired by third parties who have recognised relationships with the convicted party. The refusal to recognise the confiscation order is promptly communicated to the issuing State. The Court of Appeals may only impose a time limit for the issuing authority to produce the certificate in the event of refusal;

- there is a clear violation of the *ne bis in idem* trial prohibition;
- the confiscation order concerns events (beyond the scope of the cases for which double criminality is not verified) that do not constitute a crime for the internal legal system, with the exception of events concerning taxes, duties, customs, and foreign exchange;
- the subject against whom the measure is to be enforced has immunities recognised by the Italian State that restrict legal action from being exercised or pursued;
- the transmitted certificate shows that the concerned party never personally appeared and was not represented by a lawyer at the proceedings[125];
- the rights of the concerned parties, including third parties in good faith, make it impossible to enforce the confiscation order according to the law of the Italian State;
- the confiscation order concerns crimes that Italian law considers to be wholly or partially committed within the territory of the Italian State or committed outside the territory of the issuing State, for which reason articles 7 et seq. of the Italian Penal Code do not apply. This is an application of the *principle of territoriality*, already used also in the so-called European arrest warrant, for which a prevalence of national jurisdiction is recognised;
- the confiscation order concerns an extended confiscation ordered by an issuing State that, on the condition of reciprocity, does not provide for the recognition and enforcement of extended confiscation orders issued by the Italian authority.

The cases in which the Court of Appeals can postpone the enforcement of the provision with its own motivated decree, on the other hand, are the following:

- the order regards a sum of money so great that its confiscation would result in the amount specified in the provision to be enforced being exceeded due to simultaneous enforcement in more than one Member State;
- an appeal has been filed with the Court of Cassation; in this case, the postponement can only last until the final ruling;
- enforcement could jeopardise a criminal provision already in progress; in this case, due to the uncertainty of the framework decision, which indicated the postponement time using the adjective "reasonable", the Italian legislature indicated in six months as the maximum duration of the postponement;
- the asset in relation to which the provision is to be enforced has already been subjected to domestic confiscation, even of a preventive nature.

[125] The concerned party's non-participation in the proceedings that led to the issuance of the confiscation order, in the absence of a technical defence, is considered an important factor, provided that his/her absence is not due to a conscious choice. Directive 2009/299/JHA of 26 February 2009 (implemented in Italy by Italian Legislative Decree no. 31 of 15 February 2015), which strengthens the procedural rights of individuals, and promotes the application of the principle of the mutual recognition of the decisions made in the absence of the person concerned in the process, is applicable in this context.

Once the reason for the postponement ceases to exist, the Court of Appeals promptly adopts the measures necessary for the confiscation order's enforcement.

The confiscation order is then recognised by the Court of Appeals, which "promptly" adopts all the measures necessary for its enforcement, without taking any other formalities. The provision is then sent by the Court of Appeals to the General Prosecutor's office, which enforces it immediately.

3.2.3. The challenge process and the protection of third parties.

The sentence issued for recognition can be challenged by appeal with the Court of Cassation, and the sentence is suspended with the appeal being filed.

Within ten days of receiving legal notice of the provision, this appeal can be legitimately filed by the general prosecutor with the enforcing Court of Appeals, by the person against whom the confiscation order was issued, by the person from whom the assets were confiscated and who would be entitled to their return, and their defenders.

Like with seizure orders, in this case it is also only possible to raise objections on grounds of legitimacy and not on issues of merit, which can only be raised by challenging the confiscation order of the issuing State, for which recognition is being sought in Italy.

The Court of Cassation rules within 30 days, allowing the parties to file written briefs up to 5 days prior to the hearing, which is held within the context of a chamber proceeding. In the event that the Court of Appeals' decision is nullified, the referring court rules within 20 days of receiving the documents, and promptly notifies the competent authority of the issuing State.

Like with the procedure for enforcing seizure requests, in the event that the Italian State is found liable for damages caused during the enforcement of a confiscation order, the Minister of Justice promptly requests the reimbursement of the amounts paid out to the parties as compensation from the issuing State, unless the damage is due exclusively to the conduct of the Italian State in its capacity as the enforcing State.

The rights of third parties are guaranteed in the forms and according to the methods envisaged by the internal legal system, as described in the second chapter.

4. Management and disposal aspects.

Article 10 of Directive 42/2014/EU calls upon Member States to take the necessary measures to ensure the proper administration of seized assets, and to ensure that they are allocated for public and social purposes once their confiscation is definitive. The same directive clarifies[126] that, pending their definitive confiscation, the seized assets must be managed appropriately in order to ensure that they don't lose their value, and that, once definitive confiscation is obtained, they can be used for crime fighting and prevention projects, and other projects of public interest and social utility, while at the same time preventing any criminal attempts to repossess them.

[126] In this regard see *whereas* 32 and 24 of Directive 42/2014/EU.

In order to achieve these objectives, Member States are urged to establish administrative structures specialised in the administration and management of seized and confiscated assets, as well as to adopt appropriate procedural mechanisms, the details of which are left to the discretion of the Member States themselves.

But article 10 of the Directive was not incorporated into the Italian law of transposition, as the domestic law already provided for similar institutions, which, having been adopted in 1996 within the limited context of preventive administrative patrimonial confiscations to be used against people dangerous to society, was also eventually extended to cover criminal confiscations. In fact, it is precisely within the context of Anti-Mafia Policy that, over time, a patrimonial type of crime fighting arose, in which the management and allocation of confiscated assets plays on a central role[127].

4.1. The custody and dynamic management of assets subject to preventive seizure.

The length of criminal trials and proceedings amplifies the problems inherent to the management of seized assets, because in the time that elapses between the preventive seizure of the asset, its confiscation, and its allocation and final delivery to an asset manager in order to initiate a re-use project, the asset can become depleted to the point of rendering any use unprofitable and any attempt at social re-purposing useless.

The detention and management methods naturally differ based on the nature of the assets subject to preventive seizure, which can be divided into the following categories[128]: movable assets and credits; dematerialised financial instruments; registered real estate or movable property; corporate assets organised for operating a business; corporate stocks and shares.

In fact, certain assets are of a static nature, since, pending the definitive sentence ordering their confiscation, they can be passively guarded by merely carrying out sporadic activities simply aimed at preventing their dispersion or deterioration. Other assets, on the other hand, such as businesses or certain real estate properties, have a dynamic nature that demands active administration, or rather the performance of complex management activities aimed at preserving and, if possible, increasing their value[129].

4.1.1. The Single Justice Fund.

A considerable portion of assets seized and allocated for confiscation consists of cash or cash equivalents (checks, bank account deposits). This can be the fruit of that which has

[127] See the Garofoli commission's report for the drafting of proposals on crime fighting, even of a patrimonial nature, established by the President of the Council of Ministers by decree on 7 June 2013, titled "Per una moderna politica antimafia. Analisi del fenomeno e proposte di intervento e di riforma", *Dir. pen. cont.*, 20 February 2014.

[128] The assets in relation to which a preventive seizure can be enforced are listed under art. 104 of Italian Legislative Decree no. 271 of 28 July 1989 that contains the enforcement provisions of the Italian code of criminal procedure. For further information, see T. BENE, "L'esecuzione del sequestro preventivo e l'amministrazione dei beni sequestrati", M. MONTAGNA (eds), *Sequestro e confisca*, Turin: Giappichellli, 2017, p. 259 et seq.

[129] See M. TORIELLO, "L'amministrazione dell'azienda sottoposta a sequestro preventivo, tra prassi applicative e prospettive di riforma", *Cass. pen.,* 2017, p. 3416.

already been found in relation to the suspect within the context of a search, or else derived from the sale of seized assets that cannot be detained without danger of deterioration or without significant expenditure[130], as well as assets that can be easily sold without their value deteriorating (e.g. gold or financial securities) during the preliminary investigation phase and that do not pose any critical detention issues, do not deteriorate over time, and can simply be kept pending the final assumption of the assets' ownership by the State, in the case of definitive confiscation, or else their return to their rightful holder in the event of the precautionary measure's forfeiture.

It is nevertheless evident that such passive detention is, in fact, wasteful, as it precludes an increase in the value of the seized money. For this reason, in 2008 the Single Justice Fund[131] was established, which essentially consists of a current account managed by Equitalia Giustizia Spa (a 100% public company) into which the cash and cash equivalents seized in each individual criminal, administrative, or civil proceeding (e.g. the assets acquired in corporate bankruptcies awaiting distribution) flows. The amounts are deposited into this account in a non-interest bearing capacity for their original owners, but are subsequently managed dynamically by making prudent investments in low-risk financial instruments; the profits thus obtained are retained by the State in order to increase the funding for the improvement of the justice system and public security.

4.1.2. The actors of the administration.

In the past, the methods for preserving assets subject to both evidentiary and preventive seizure were defined by a single regulatory framework. The seized assets were therefore concentrated within dedicated evidence offices established at the courts or the law enforcement agencies, sent to "public depositories" (e.g. specifically entrusted with custody of motor vehicles), or, as a final option, entrusted to judicial custody.

However, with the introduction of confiscations "by disproportion" and "by equivalent", the state began to seize assets of considerable complexity, which not only needed to be guarded, but also needed to be dynamically managed: this resulted in the need to establish specific figures responsible for their management.

4.1.2.1. The judicial custodian.

As previously mentioned, the custody of seized assets that do not need to be actively managed is generally entrusted to the records office of the judicial authority that ordered the provision. Whenever this is not possible (e.g. due to the voluminous nature of the assets themselves or their immovability), the judicial authority may entrust their custody to a

[130] This right is granted to the magistrate carrying the procedure forward by art. 260 of the Italian Code of Criminal Procedure, and is specifically regulated by art. 151 par. 3 of Italian Presidential Decree no. 115 of 30 May 2002, the consolidated text of the legislative and regulatory provisions on judiciary expenses, as well as by art. 40 par. 5 *ter* and *quater* of the Anti-Mafia Code.

[131] Established by art. 2 of Italian Decree Law no. 143 of 16 September 2008, converted with amendments into Law No. 181 of 13 November 2008; amounts subject to administrative or civil confiscation are also deposited into this fund. The payment obligation is imposed by art. 61 par. 23 of Italian Decree Law no. 112/2008, converted into Law no. 133 of 06 August 2008.

different subject, known as the judicial custodian, who is tasked with particular duties, such as the obligation to preserve the assets and to present them whenever requested by the judicial authority.

The judicial custodian may also be the owner of the asset itself, who may even be granted the right to use the seized asset, provided that this does not result in its economic deterioration and that the provision does not consist of a so-called impeditive seizure. In this manner, the application of the precautionary measure is not very invasive, as the various needs of the preventive seizure are met, as are those of the subject upon whom the non-definitive precautionary measure is imposed.

4.1.2.2. The National Agency for the management and administration of assets seized and confiscated during the seizure phase.

In order to resolve the critical issues relating to the management of confiscated assets, various administrative solutions have been proposed and subsequently modified over time. The evolutionary stages of this pathway date back to 1999, with the establishment of a permanent observatory[132] on the management of these assets, which, that same year, was immediately transformed into the office of the Special Commissioner[133], tasked with ensuring operational coordination and monitoring. The figure of the Special Commissioner was abolished in 2003, and the relative duties were entrusted to the State Property Agency[134] until 2007, at which time the figure of the Commissioner was reinstated[135] with much more extensive powers relating to both the seizure and confiscation phases. This evolution culminated with the establishment of the National Agency for the management and administration of seized and confiscated assets (henceforth the ANBSC) in 2010[136], to which new responsibilities have been subsequently attributed[137] with regard to the management of the assets during the various phases of the removal and definitive acquisition procedures, the provision of advice and assistance to the court and the delegated judge, and the direct administration and custody of the assets themselves. The Agency has legal personality under public law, as well as organisational and accounting autonomy, and is subject to the supervision of the Ministry of the Interior and the control of the Court of Auditors[138].

[132] By Decree of the Minister of Finance on 3 February 1999.

[133] With Italian Presidential Decree no. 510 of 28 July 1999, published in *Off. Gaz.* of 1 September 1999.

[134] The Agency is an autonomous department of the Ministry of Finance tasked with the management of State buildings. The function of managing confiscated assets was attributed by Ministerial Decree on 23 December 2003.

[135] With Italian Presidential Decree 06 November 2007.

[136] The Agency was established with Italian Decree Law no.4 of 4 February 2010, converted into Law no. 50 of 31 March 2010; its functionality is currently regulated by articles 110 et seq. of Italian Legislative Decree no. 159 of 6 September 2011, the code of the Anti-Mafia laws prevention measures. For more information on the legal nature of this body, see M. MAZZAMUTO, "Gestione e destinazione dei beni sequestrati e confiscati tra giurisdizione ed amministrazione", *Giur. It.,* 2013, 2, p. 477 et seq.

[137] The legislative interventions aimed at resolving the critical issues that emerged in the operational practices are contained in Italian Legislative Decree no. 218 of 15 November 2012, Law no. 228 of 24 December 2012, Law no. 208 of 28 December 2015, Law no. 161 of 17 October 2017.

[138] The latest audit conducted by the Court of Auditors' central control section on the management of State administrations dates back to resolution no. 5/2016/G of 23 June 2016, titled "The administration of assets seized and confiscated from organised crime and the activities of the national agency (ANBSC)".

The Agency, which was initially created to manage the assets confiscated within the context of the patrimonial prevention measures, is now capable of assisting the judicial authority with the administration and custody of the assets seized in relation to a wide range of crimes, up until the time of the confiscation order issued by the Court of Appeals[139]. This reveals the two-fold nature of the Agency (administrative on the one hand, and as a jurisdictional auxiliary on the other), whose distinction, which is essential for defining the nature of the actions taken in one form or the other, is not always easy to define[140].

During the seizure phase, the Agency can ask the Court to revoke or amend the administrative provisions adopted by the delegated judge whenever it believes that they could compromise the allocation or assignment of the asset, and can recommend that the Court adopt all the measures necessary to ensure the best use of the asset, in consideration of its allocation or assignment.

It also plays a significant role with regard to the judicial administrator, as it "promotes agreements with the judicial authority in order to ensure (through transparency criteria) the rotation of positions, the coincidence of the professional profiles and the seized assets, and the publication of the compensations", "it assists the judicial administrator", it receives the "periodic report on the administration", and can recommend that the Court revoke the judicial administrator's position "in the event of serious irregularities or inability."

4.1.2.3. The judicial administrator.

In the event that the preventive seizure concerns companies, businesses, or assets for which proper administration must be ensured, the judicial authority appoints a judicial administrator from among the individuals enrolled in a special register made up of professionals with specific managerial and management skills[141]. This figure was first introduced to the Italian legal system for the administration of assets confiscated within the context of anti-Mafia prevention measures, and has also been used within context of ordinary confiscations since 2009[142]. This professional figure, and his/her assistants, are remunerated

[139] This regards the particular situation of extended confiscation adopted pursuant to art. 240 bis of the Italian Penal Code, as well as those indicated under art. 51 par. 3 *bis* of the Italian Code of Criminal Procedure pertaining to the anti-Mafia and counter-terrorism district prosecutors offices.

[140] On this topic, see M. MAZZAMUTO, *"*L'Agenzia nazionale per l'amministrazione e la gestione dei beni sequestrati e confiscati alla criminalità organizzata*"*, *Dir. pen. cont.,* 11 December 2015, p. 4 et seq. The Agency's dual (administrative and jurisdictional) nature can also be inferred by the composition of its bodies: the director is appointed from among the prefects, while the board of directors also includes two magistrates, one appointed by the minister of justice and one by the national anti-Mafia prosecutor, as well as two experts on company and property management.

[141] The most suitable professional figures are typically chartered accountants and accounting experts. Over time, the relative trade association (the National Council of Chartered Accountants and Accounting Experts) has drafted a series of extremely useful documents, including the following: *"*Linee guida in materia di amministrazione giudiziaria dei beni sequestrati e confiscati*",* October 2015; "La riforma del d.lgs. n. 159/2011. Antimafia, corruzione e nuovi mezzi di contrasto", 5 December 2017; "La riforma del codice antimafia: le problematiche applicative e il ruolo del professionista post riforma"*,* March 2018.

[142] Art. 2, par. 9, letter b) of Law no. 94 of 15 July 2009 introduced art. 194 *bis* to the implementing, coordinating, and transitional rules of the Italian Code of Criminal Procedure. The article is titled "amministrazione dei beni sottoposti a sequestro preventivo e a sequestro e confisca in casi particolari. Tutela dei terzi nel giudizio"and has recently been amended by Law no. 161 of 17 October 2017, and by Italian Legislative Decree no. 21 of 01 March 2018.

according to specific rate tables[143] that take into account the complexity of the seized assets and the activity to be carried out; if the resources of the proceedings aren't sufficient to cover these fees, the necessary amounts are advanced by the State, without the right to recovery.

The provisions of the anti-Mafia code are also applied to cases of seizure for the purpose of extended confiscation[144], as well as those issued within the context of proceedings for crimes pertaining to the anti-Mafia and counter-terrorism district prosecutor. The judicial administrator (who can even make use of additional assistants for the management of particularly complex technical aspects) automatically takes over the management of the company for the person affected by the seizure, as he/she is capable of performing all the ordinary administrative duties necessary for its management, while acts of extraordinary administration[145] require specific authorisation on the part of the judicial authority; whatever the case, the judicial administrator in charge of the company's entire complex of assets does not become the company's legal representative[146].

According to the criminal provisions, the transfer of possession to the judicial administrator (which, if necessary, can be carried out by the judicial police) allows the latter to exercise the necessary managerial powers, while at the same time highlighting the fact that the previous administrator has not lost his/her position, but is only deprived of the company to be administered as a result of the seizure. The corporate bodies therefore remain intact, even when all of the company's shareholdings are seized, and the director against whom the shareholdings seizure provision was ordered likewise remains in charge, although his/her functions of managing the corporate assets are basically suspended.

While on the one hand the administrator phase allows for a significant detachment of the company from the criminal context in which it arose (as well as other "problematic" assets, such as certain properties, as previously mentioned), on the other hand it can have a devastating impact upon the fate of the company itself.

This phenomenon is known as the "legalisation" crisis of a criminal enterprise, and consists of the emergence of significant costs that the judicial administrator must deal with, and which were previously hidden, insomuch as they were unlawfully repressed. The most considerable costs are naturally those resulting from the legitimisation of employees hired "under the table", the payment of back taxes, and the adaptation of the work environments to meet the health standards; it is sometimes even necessary to submit new requests for the licenses and authorisations needed to perform activities previously carried out illegally, or else to perform repair work upon buildings constructed without the necessary permits. In order to reduce the expenses in this respect, and simultaneously provide adequate protection,

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[143] Regulated with Italian Presidential Decree no. 177 of 07 October 2015.

[144] The extended confiscation referred to under art. 5 of Directive 42/2014/EU is ordered in cases where the assets belonging to subjects convicted of certain serious crimes are found to be disproportionate to their declared income. This form of confiscation is regulated by art. 240 *bis* of the Italian Penal Code, which contains the mandatory list of offences for whose conviction entails confiscation.

[145] By way of example, extraordinary administration consists of standing trial, taking out mortgages, conducting transactions, stipulating arbitration agreements, taking out sureties, granting mortgages, and selling property.

[146] See F. FIMMANÒ, R. RANUCCI, "Sequestro penale dell'azienda e rappresentanza legale della società: la convivenza 'di fatto' di amministratori giudiziari delle 'res' e amministratori volontari delle persone giuridiche", *Diritto penale dell'impresa,* 21 October 2015, p. 1 et seq.; ID., "Sequestro penale d'azienda, spossessamento cautelare e rappresentanza legale della società", *Riv. not.*, 2015, p. 632.

the State Prosecutor can assume the representation and defence of the judicial administrator for any disputes that may arise regarding the reports relating to the seized assets.

The hidden costs of the legalisation process are compounded by additional costs resulting from the start of the seizure procedure itself. Just think of the obvious damage caused to the company's reputation following the criminal judiciary intervention, which in turn can lead to further problems, such as the discontinuity of bank credit and investment support. Even if the State has allocated a special fund to financially sustain a portion of the legalisation costs in order to mitigate this specific problem, more than 90% of the companies seized still end up going bankrupt[147], while for the remaining companies it is necessary to decide whether it makes sense to continue their business activities, or to instead opt for liquidation, which in many cases is rendered necessary, such as when the confiscated company's equity has been completely eroded.

The costs necessary or useful for the preservation and administration of the assets are sustained by the judicial administrator by withdrawing amounts collected for any reason, or rather amounts seized, confiscated, or otherwise available for the purposes of the proceedings.

The other administrative procedures devised by the Italian legal system are also worth summarising in this section.

As previously mentioned, the business activities should be continued by companies in which the distortions resulting from criminal infiltration have an impact upon production structures capable of generating illegal income. Therefore, within six months of his/her assignment, the judicial administrator must submit a detailed report on the actual make up of the corporate assets subject to precautionary seizure, and a detailed analysis regarding any concrete possibilities for the continuation or recovery of the business activities; based on this assessment, the delegated judge approves the programme with a motivated decree; if the judgement is negative, the company's liquidation is ordered.

In fact, the appointment of a judicial administrator may not be enough to disconnect the company from the criminal economic fabric if the relics of the previous management that bind it to the obligations assumed in the past continue to persist. The contracts in progress are suspended in order to definitively sever ties with the past, with the administrator's decision of whether to continue with or terminate the supply contract being postponed to a later stage: there is nevertheless the possibility of allowing the provisional execution of the previous relationships, if authorised by the delegated judge, in the event that the company would suffer serious damage as a result of the contract's suspension.

In order to support the continuation of the seized companies' business activities, qualified technical support is provided, which, under the coordination of the Prefectures (territorial government offices), entails the establishment of a "permanent provincial round table" made up of various representatives of the institutions, for the purpose of assisting the judicial administrator. And that's not all: since the seized companies often operate in highly specialised economic sectors, the delegated judge and the ANBSC have been given the possibility of obtaining free technical support from business owners operating in the same sector as the seized company itself.

[147] According to an estimate by the National Institute of Judicial Administrators.

Since confiscation entails the acquisition of assets "free of charges and burdens" by the State, civil enforcement actions are suspended, and creditors are able to assert their rights within the limits and according to the methods established by the laws of the anti-Mafia code, by petitioning the judge who ordered the preventive measures, and the assets subject to enforcement are taken over by the judicial administrator.

With regard to assets allocated abroad whose seizure or confiscation has been ordered by an Italian court, the assets are seized and managed by letters rogatory, but they are not managed by the Italian judicial administrator because their transfer of possession does not take place. After receiving the provisions from the foreign judicial authority and the enforcement documents from the collateral police, the judicial administrator is kept up-to-date on both the judicial developments of the proceedings abroad (by consulting the enforcement file) and all the elements that, in the absence of an appraisal (if not ordered), will allow for the value of the assets to be promptly estimated.

4.2. Management and allocation of confiscated assets.

The *aim* of these forms of confiscation is to definitively eliminate the assets of unlawful origin from their economic circuit of origin, and to insert them within another circuit devoid of criminal influence[148]. But in addition to this, a "symbolic" function of their allocation, consisting of a virtuous use of the assets themselves, has emerged over time. In addition to preventing the risk of the assets being "recaptured" by criminals, there is also the possibility of funding civil organisations dedicated to combating serious forms of crime, or otherwise maintaining the employment status of the seized companies' employees. In fact, the return of the illegally acquired economic resources to the local communities that have borne the highest cost of the criminal activity is fundamental for counteracting the activity itself, as it aims to weaken the social roots of these organisations and to promote broader and more widespread public approval of the State's repressive intervention to restore lawfulness.

The management and allocation of the assets themselves thus become the crime fighting tools, and represent a continuation of the jurisdiction's specific prevention goals. In fact, the asset's use for social purposes of greater symbolic value prevents the risk of further criminal infiltration.

4.2.1. The social allocation of confiscated assets.

The use of confiscated assets for social purposes is an essential tool for asserting the legality and solidarity of a constitutional State over the abuse and injustice of crime. The Italian legislature was aware of this as far back as 1996[149], when it introduced specific guidelines for the management of confiscated assets, with their allocation being bound to specific uses of highly symbolic value.

However, the original text of article 10 of Directive 42/2014/EU did not include any obligation for the social allocation of assets definitively acquired by the State. The proposal to

[148] See Constitutional Court, 30/09/1996 – 08/10/1996, no. 335, in *Off. Gaz.* no. 42 of 16 October 1996.
[149] With Law no. 109 of 07 March 1996.

modify the original text with certain amendments that explicitly provided for the "possibility of using the confiscated assets for social purposes" (a possibility that, first and foremost, should be safeguarded through the far-sighted and prudent management of the seized assets themselves) was made by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE)[150]; in fact, the justification for this amendment emphasises the opportunity for the Member States to better define "the management of the assets, even after the confiscation order, through their use for social purposes."

4.2.2. The National Agency for the management and administration of assets seized and confiscated during the confiscation phase.

After their definitive confiscation, the assets' ownership is transferred to the State, free of any charges or burdens, without prejudice to the protection of the rights of third parties, which will be illustrated below. The definitive confiscation order is communicated by the records office of the judicial office that issued the order to the ANBSC, which in turn initiates the allocation procedure, which must be completed within ninety days, with the possibility of being extended for another ninety days. Despite this, there are typically considerable delays in the communication of the measure to the ANBSC: the Court of Auditors found that, given a sample of more than a thousand judicial procedures, the average delay is approximately 470 days.

The Agency pays the previously mentioned Single Justice Fund the sums of confiscated money that don't need to be used for the management of other confiscated assets, or that don't need to be used to compensate the victims of Mafia-type offences; the proceeds resulting from the sale of confiscated movable assets (even registered), even through private negotiations, including securities and corporate shareholdings, net of the proceeds from the sale of assets aimed at compensating the victims of Mafia-type offences; the sums resulting from the recovery of personal credits; the proceeds resulting from the dynamic management of corporate assets by the judicial administrator.

If the recovery procedure is unprofitable, or rather the debtor is found to be insolvent after verifying the his/her creditworthiness, even through the police, the credit is cancelled with a provision issued by the Agency's director.

4.2.3. Criteria for the distribution of confiscated assets to beneficiaries.

The guidelines for the allocation of assets subject to definitive confiscation are somewhat confusing, as they vary depending on the types of assets and the beneficiaries[151]. These guidelines, which cover a wide range of cases, must therefore be simplified by taking the macro-categories of confiscated assets into consideration.

[150] For an overview of the amendments made by the LIBE Committee to the text of the proposal of the 42/2014/EU Directive, see A.M. MAUGERI, "L'*actio in rem* assurge a modello di "confisca europea" nel rispetto delle garanzie CEDU?", *Dir. pen. cont. – Riv. trim.,* 3/2013, p. 252 et seq.

[151] On this point, see M. MAZZAMUTO, "L'Agenzia nazionale per l'amministrazione e la gestione dei beni sequestrati e confiscati alla criminalità organizzata", *cit.*, p. 20 et seq.

One first set of provisions is specifically dedicated to sums of money: these are allocated, on a priority basis, first to the ANBSC itself, in order to sustain the management costs, and then to compensate the victims of the crime. The remaining sums are paid into the Single Justice Fund, where they are then distributed among ministries mentioned above.

The allocation of immovable assets is more complex, because their sale is rendered indispensable due to the inability to allocate them for useful purposes, and only serves to compensate the victims of mafia-type crimes. In fact, priority is given to maintaining State ownership of buildings for general purposes, which primarily consist of justice, public order, or civil protection purposes, and, as a secondary option, for the institutional activities of other government administrations (universities, cultural institutions, tax agencies). However, immovable assets can also be allocated to the ANBSC for economic purposes, while their proceeds are reallocated for the upgrading of the same Agency. A third type of allocation entails the transfer of the immovable assets to the local authorities for institutional purposes (with priority being given to the Municipality where the property is located). In this case the Agency regulates the ways in which the asset is utilised, and may even revoke the transfer if these requirements are not observed.

Finally, corporate assets are subject to three types of allocation: rental, sale or liquidation. They can be rented for consideration to public or private businesses or companies, or else free of charge to co-operatives consisting of the confiscated company's employees. In order to prevent the company from once again falling under the influence of the criminal context from which it was removed, its entrustment is expressly forbidden if the cooperative's members include a relative, spouse, cohabiting partner, or any other person with close ties to subject of the confiscation order. A sale is only carried out if it is believed that the proceeds will be more useful for the public good, or because it will help compensate the victims of the crime. The liquidation option is selected, on the other hand, if the company's facilities are clearly lacking in unity and functionality.

4.2.4. Special hypotheses regarding the assignment of confiscated assets to police forces.

Certain assets can be specifically allocated to improve the prevention and suppression of certain categories of crime. The *rationale* underlying this decision is to provide police forces with the same tools (mainly vehicles, boats, and electronic equipment) used by criminals to commit crimes, thus reducing the technological gaps that are not always able to be quickly overcome by purchasing these assets on the free market through ordinary administrative procurement procedures.

The Italian legal system currently includes four cases of special allocation: in cases of smuggling, the administrative confiscation of the registered movable assets (vehicles, boats, aircraft) equipped with hidden double-floors is permitted (art. 301 *bis* of Italian Presidential Decree no. 43 of 23 January 1973); in drug-related cases, for the assets seized or confiscated as a result of anti-drug operations (art. 100 of Italian Presidential Decree no. 309 of 9 October 1990); within the context of the road traffic regulations, the registered movable assets seized or confiscated from subjects caught driving under the influence of drugs or alcohol (art. 214 *ter* of Italian Legislative Decree no. 285 of 30 April 1992); with regard to the legislation on

foreign subjects, the confiscation of the registered movable assets seized during the course of police operations aimed at preventing and suppressing illegal immigration has recently been introduced (art. 12 par. 8 of Italian Legislative Decree no. 286 of 25 July 1998).

These vehicles are placed in judicial custody with the law enforcement bodies that request them or, in certain circumstances, with other government bodies for purposes of justice, civil protection, or environmental protection, as early as the seizure phase. Once their definitive confiscation has been ordered, they are definitively assigned to the body that used them temporarily during the seizure phase, but only if expressly requested: if this is not the case (because they have deteriorated with use, for example), the vehicles are destroyed.

With specific regard to the assets seized in violation of contraband and immigration laws, the burden of proof is reversed because the vehicle's owner must prove that he/she could not have foreseen the illegal use of the vehicle, even occasionally, and did not fail to exercise proper supervision. In other cases, the system of protecting third parties in good faith requires that they be summoned by the judicial authority in order to make their cases and to request any elements useful for the purposes of restitution.

4.3. The protection of third parties.

The administration of the seized asset requires the resolution of any issues relating to credit claims asserted by third parties with real or personal usage rights, as well as real guarantee rights in relation to the seized assets. Likewise, the final allocation of the seized assets requires the resolution of any issues through which the third party tends to reduce the value of the asset itself.

The innovative system of third party protection contained within the anti-Mafia code for preventive confiscations has also recently been expanded[152] to include extended confiscation pursuant to art. 240 *bis* of the Italian Penal Code, and confiscations ordered in relation to serious crimes pertaining to the anti-Mafia district prosecutors' offices. The other confiscation models remain outside the scope of this protection system.

Whatever the case, to this day, only third-party creditors in good faith receive full protection, as this category exclusively consists of those who are able to prove the certainty of the credits claimed and the underlying relationship's unrelatedness to the illegal activities conducted by the accused.

The anti-Mafia code (which, as previously noted, applies in this case) has granted a specific protection to third parties, with the handling of the verification procedures being entrusted to the judge ordering the preventive measures. The legislative mechanism developed

[152] Italian Legislative Decree no. 21 of 6 April 2018 inserted paragraph 1 *quater* into art. 104 *bis* of the implementing, coordinating and transitional provisions of the Italian Code of Criminal Procedure, which allow for the comprehensive application of title IV of the anti-Mafia code, titled *tutela dei terzi ed i rapporti con le procedure concorsuali* ("protection of third parties and relations with insolvency proceedings"), even in cases of preventive seizure and extended confiscation. This resulted in a jurisprudential contrast, which, over time, altered the application of these forms of protection formerly guaranteed to third parties affected by anti-Mafia preventive confiscations. The extension of the protection to cover third parties holding real guarantee rights, on the other hand, was introduced by art. 5 par. 7 of Law no. 161 of 17 October 2017, in art. 23 of the anti-Mafia code, and therefore, given the aforementioned reference, it also applies to preventive seizures and criminal confiscations. For a complete overview of this topic, see F. MENDITTO, *Le confische di prevenzione e penali – La tutela dei terzi*, Milan: Giuffrè, 2015.

consisted of an almost complete transposition of the framework contained in the bankruptcy law[153] for the relationships in progress at the time of bankruptcy, and for the makeup of the liabilities.

Prior to the start of the credit verification sub-proceeding, the judicial administrator must prepare the list of credits. This list accompanies the first report submitted to the judge (attached to the first report presented to the judge by the judicial administration – that referred to above evaluating whether it makes sense to continue the business activities), or one of the subsequent periodic reports, and consists of two sub-groups of lists, namely:

a) The list containing the names of creditors, with an indication of the credits and their relative due dates;
b) The list containing the names of those claiming real guarantee or usage rights, or personal usage rights, to the assets, with the indication of the assets concerned and bases for the rights claimed.

The list of credits must show the sources of the obligation, including any balance sheet items deemed to be false, and the positions of the creditors not indicated in the accounting records, but whose claims are justified in the correspondence.

The admission of third parties is granted following the verification of certain specific requirements, which have been well clarified jurisprudentially by the Constitutional Court[154]: the requirement of the non-instrumentality of the credit, unless the creditor is able to demonstrate his/her unawareness of such a link (credits resulting from services linked to the illegal activity or the reuse of its proceeds are therefore excluded); the requirement of the "non-abstractness" of the credit and its certain anteriority with respect to the seizure (in order to prevent the accused from being able to evade the effects of the confiscation by establishing prior creditorial positions of convenience or simulating their existence retrospectively); the requirement of unsuccessful prior payment for the other assets belonging to the accused (in order to prevent the person subjected to the proceeding from benefiting from the proceeds of the illegal activities in order to "liberate" his/her remaining personal assets from the assets subject to seizure or confiscation).

As previously noted, the State (following the rightful extinction of the burdens and charges registered or transcribed prior to the preventive confiscation measure) acquires an asset no longer as a derivative, but free of any charges and burdens, despite being registered or transcribed prior the preventive measure itself. Third parties of good faith, holding real usage or guarantee rights, can be granted a form of compensatory protection, with the relative request being made through a special judicial/administrative procedure, which entails the intervention of the criminal enforcement judge for the recognition of the claim, and the ANBSC for liquidation. While these categories of third parties can find protection within the context of the proceedings in question, the asset guarantee, notwithstanding art. 2740 of the Italian Civil Code, is met by the State within the limit of 60% of the value of the seized or confiscated assets, as indicated on the estimate prepared by the administrator, or resulting from any lower amount obtained from the sale of the assets themselves. As a consequence of

[153] See C. FORTE, "Il codice delle leggi antimafia e la crisi dell'impresa sottoposta a misure di prevenzione patrimoniali: analisi della nuova disciplina dei rapporti tra gli strumenti di intervento ablativo statuale e le procedure concorsuali", *Diritto penale dell'impresa*, 10 February 2013.

[154] See Constitutional Court, 11/02/2015 – 28/05/2015, no. 94, in *Off. Gaz.* no. 22 of 03 June 2015.

this provision, the State applies a sort of "sanction" to each creditor exclusively for having done business with a convicted person, even in good faith, effectively reducing the amount owed for the credit by 40%.

4.4. The management and administration of assets located abroad.

The allocation of illicit assets abroad continues to pose problems, and only a small number of these are able to be resolved by the current regulatory framework, especially with regard to the administration and management of companies, which often have considerable economic value.

During the preventive seizure phase, in consideration of possible confiscation at a later time, article 10 of Directive 42/2014/EU requires Member States to guarantee the adequate management of the assets subject to seizure.

During the phase of the mutual recognition of confiscation orders, the procedure for the allocation of confiscated assets abroad is regulated by art. 16 of Council Framework Decision 2006/783/JHA of 6 October 2006, which requires any sums of money directly recovered or resulting from the sale of the confiscated items and certain movable assets to be transferred to Italy. If the asset cannot be sold or transferred, it is allocated in a different manner, in accordance with the national legislation of the Country in which it is located. Only assets whose management does not pose any critical issues (such as money and movable assets) can be transferred to Italy from abroad, after having been identified, in accordance with the rules defined by the framework decision; this regulation, however, doesn't provide a framework for the so-called dynamic management of seized assets awaiting confiscation, which can therefore encounter considerable implementation limits in countries that don't have administrative tools like those previously described.

This might justify the fact that fewer foreign companies are present among the total number of companies with confiscated assets[155].

4.5. Statistics.

The statistical reports concerning the seizures and confiscations conducted are complicated by the confusing nature of the legislation and the sectoral nature of the communication obligations. Although the importance of statistical data for monitoring the suppression of economic crime and the steering of the administrative policy choices for the management of confiscated assets is well recognised, there is only partial data available in this sector.

This is due to various critical issues such as, for example, the lack of uniform IT platforms for collecting and processing data; the sectoral nature of the communication obligations; and the large number of actors involved.

Consistent analytical monitoring only exists in relation to assets seized within the context of prevention procedures, and assets subject to preventive seizure for the purpose of

[155] Only 11 out of the 822 definitively confiscated assets, and only 52 out of the 1095 under management, are located abroad (source, Court of Auditors, resolution of 23 June 2016, cit.).

extended confiscation pursuant to art. 240 *bis* of the Italian Penal Code, as well as the more serious crimes pertaining to the anti-Mafia and counter-terrorism district prosecutors' offices: those subject to seizure and confiscation within the context ordinary criminal proceedings therefore aren't included.

Due to the technical limitations of the IT systems available to the Ministry of Justice and the ANBSC, the automation dynamics of the information flows already required by law have not yet been fully implemented[156]. Consequently, the data contained within the national statistical reporting is unfortunately neither complete nor reliable. It is however useful to report these official data, which, despite being partial, nevertheless allow an order of magnitude to be attributed to the established procedures or those in the process of being implemented.

The last semi-annual report presented to Parliament by the Ministry of Justice[157] showed that, as of 31/12/2017, the number of assets subject to non-definitive confiscation amounted to 36,196, the number of assets subject to definitive confiscation amounted to 27,529, and the number of final allocation decrees issued by the ANBSC amounted to 7,080. In addition to these assets, the ANBS's central database also keeps track of assets seized for possible confiscation, but later returned to those entitled due to cancellation or revocation, which amounted to a total of 177,906 assets[158].

Assets seized and confiscated	No.	
Released	55,552	
Proposed for seizure/confiscation, awaiting a decision	34,907	
Seizure	16,642	
Non-definitive confiscations	36,196	
Definitive confiscations	27,529	
of which companies		1,500
of which financial		2,670
of which Immovable		8,412
of which Movable		3,738
of which Registered movable		11,209
Confiscations with allocations	7,080	
to the State		1,115
to Municipalities and Local Authorities		5,965
Total assets	177,906	

[156] Monitoring initially imposed by art. 3 of Law no. 109 of 7 March 1996 and implemented with the regulation contained in Ministry of Justice decree no. 73 of 24 February 1997. The data collection framework is now contained within articles 49 and 110 of the anti-Mafia code, whose implementing regulation was implemented with Italian Presidential Decree no. 233 of 15 January 2011.

[157] Published on the Ministry of Justice's website, www.giustizia.it.

[158] See, in particular, table no. 7 attached to the semi-annual report, containing the analytical reporting of the macro-areas to which the 177,906 confiscated assets belong.

The total number of assets seized and confiscated abroad constitutes a residual portion of the total number of seizures and confiscations conducted as a whole.
Finally, the data communicated by the ANBSC to the Ministry of Justice[159] show that there are 42 assets subject to seizure or confiscation measures abroad (the EU, as well as Switzerland, the USA, Panama, Liberia, Costa Rica, China and Brazil), including 27 companies and 15 properties. Most of these measures were taken within the context of prevention procedures, while a lessor number were taken within the context of proceedings pursuant to art. 240 *bis* of the Italian Penal Code. With regard to the seizure and confiscation proceedings in progress abroad (both inside and outside the EU), the data reported by the National Anti-Mafia Directorate to the Ministry of Justice are as follows: 11 assets confiscated in 2016 (for a total value of € 13,908,106) and 5 in 2017 (for a total value of € 51,026,697); 90 assets seized abroad in 2016 (for a total value of € 38,557,680) and 23 in 2017 (for a total value of € 31,288,757).

The statistical reporting[160] of the sums of money seized and deposited into the Single Justice Fund is certainly more complete and reliable, which as of 31/12/2017 amounted to a total of:

Nature of the resource	Total amount €	Partial €
Total liquid resources	1,709,730,611	
of which already advanced to the State		667,550,000
Total non-liquid resources	3,019,538,692	
of which securities deposits		1,578,072,206
of which asset management		84,573,328
of which collective management of savings		132,137,337
of which insurance contracts		213,630,551
of which trustee mandates		960,462,888
of which other relationships		50,662,381
SJF Total	4,729,269,302	

Since the date of its establishment, the Single Justice Fund has paid the State Treasury € 1,588,288,862, including € 126,144,219 by way of profits generated from the management of the seized financial assets, € 794,594,643 following final confiscation, and € 667,550,000 by way of advances on future confiscations.

Payments to the State made by Equitalia Giustizia (in Euros)

[159] Data communicated on 31 May 2018 to the Ministry of Justice, Department of Justice Affairs, Directorate General of Criminal Justice, Office I – Department of Statistical Data and Monitoring.
[160] The statistical reporting can be found at www.giustizia.it/giustizia/it/mg_2_9_1.page#r1c .

Year	Judicial provisions (confiscation and transfers of ownership to the State)	Advances of seized sums to the State	Profit from financial management	Total
2009	26,845,189	-		26,845,189
2010	40,285,408	-	3,924,892	44,210,300
2011	59,733,274	343,000,000	6,340,935	409,074,209
2012	82,478,224	72,280,000	14,422,102	169,180,326
2013	75,026,387	-	23,058,806	98,085,193
2014	91,547,505	78,900,000	22,199,974	192,647,479
2015	97,888,052	105,840,000	21,011,240	224,739,292
2016	134,902,852	67,530,000	18,863,879	221,296,731
2017	130,131,748	-	16,322,391	146,454,140
2018 (as of 31 March)	55,756,004	-	-	55,756,004
TOTAL	794,594,643	667,550,000	126,144,219	1,588,288,862