CONFISCATION (WITHOUT CONVICTION) AND DEFENCE RIGHTS[1]

di Marco Alessandro Bartolucci
(*Assegnista di ricerca, Università di Torino*)

1. According to Article 42 of the Italian Constitution, private property is guaranteed by the State, which regulates the methods of acquisition, use, and limitations to ensure its social function.

The law provides some limitations on private property to guarantee the satisfaction of various purposes. In summary, the Italian legal system is allowed to deprive a citizen of his right to property in four ways: through a criminal conviction in a criminal trial, through a judgment of damages in a civil claim, through eminent domain with compensation by the state, and with preventive confiscation under Article 24 of the Anti-Mafia Code, which is the focus of our analysis.

Preventive confiscation is part of a range of patrimonial measures applicable to individuals considered, for various reasons, socially dangerous, and is an *ante delictum* tool aimed at avoiding and preventing the commission of crimes by said individuals[2].

It is characterized by the absence of a prior determination of the commission of a

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[2] P.V. Molinari, U. Papadia, *Le misure di prevenzione nella legge fondamentale e nelle leggi antimafia*, Milano 1994, 3. See also E. Nicosia, *La confisca, le confische*, Torino 2012, 141; A. Costantini, *La confisca nel diritto della prevenzione*, Torino 2022, 187.

crime resulting from a criminal trial; a determination that is instead required to apply criminal confiscation[3].

The prerequisites and application procedure of preventive confiscation have specific peculiarities that differentiate this measure from all others in Italy.

Before the introduction of the Zanardelli Criminal Code in 1889, in cases of death sentence or exile, the State provided for the general confiscation of all the convict's property to sanction their "patrimonial death". In the 16th century, confiscation was also applied even in the absence of a criminal conviction: in fact, historians have identified cases in which the confiscation measure was ordered by the judge, at his mere discretion, even without a trial, based solely on the notoriety of the crime[4].

In 1889, general confiscation was abolished, and special confiscation was introduced, which concerned the convicted person's assets connected and derived from the offense subject to conviction and classified as an ancillary penalty[5].

During the fascist twenty-year period, confiscation began to be instrumentalized for political purposes, and an indefinite function of punishment and preventive measure was attributed to it, aimed at countering opponents of the fascist regime more effectively[6]; therefore, confiscation became an extremely flexible tool, as it could be applied to strike – even based on a mere expression of thought aimed at activities devoid of any typicality and specificity – any kind of activity or political opinion adverse to the regime[7].

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[3] The confiscation under examination has traditionally been classified as an *ante* (or *praeter*) delictum measure, due to its peculiarity represented by the absence of a prior finding of the commission of a crime resulting from a criminal trial, which is instead required for the application of the criminal confiscations qualified as measures of asset security. Compared to these, the institute under examination has therefore always maintained an autonomous status, both in terms of legislative, substantive, and procedural discipline and in terms of constitutional and conventional guarantees of reference. S. Finocchiaro, *La confisca e il sequestro di prevenzione,* in *www.penalecontemporaneo.it*, 19.2.2019, 2.

[4] S. Finocchiaro, *La confisca "civile" dei proventi da reato. Misura di prevenzione e* civil forfeiture*: verso un nuovo modello di* non-conviction based confiscation, Milano 2018, 11 (*e-book*).

[5] In the case of Art. 36 of the Zanardelli Code provided that, in case of conviction, the judge may order the confiscation of things that served or were intended to commit the crime, and of things that are its product, provided they do not belong to persons unrelated to the crime. If it concerns things whose manufacture, use, carrying, possession, or sale constitutes a crime, their confiscation is always ordered, even if there is no conviction and even if they do not belong to the accused.

[6] Royal Decree June 18, 1931, no. 773 (Supplement to the Official Gazette, June 26, no. 146): article 181, formerly article 184 of the Consolidated Law of 1926. Furthermore, Royal Decree June 18, 1931, no. 773 provided, in article 210, that the prefect could decree the dissolution of associations, entities, or institutes that carried out activities "contrary to the established political system of the State," and that, in the same decree, could order "the confiscation of the social assets". S. Finocchiaro, *La confisca e il sequestro di prevenzione*, cit., 3.

[7] D. Petrini, *La prevenzione inutile. Illegittimità delle misure* praeter delictum*,* Napoli 1996, 134.

However, liberal influences and the difficulty of proving the connection between the asset and the crime led to the scarce use of the confiscation institution until the 1970s, when there was a real boom, not only in Italy but also abroad, in laws regulating different real ablation measures, generally defined as "confiscations", with varied nature and different application prerequisites.

Law no. 152 of May 22, 1975, known as the "Reale Law," then introduced a form of temporary suspension from the administration of personal assets, aimed at preventing the free disposal of assets that could facilitate the socially dangerous activity of individuals subject to a personal prevention measure[8].

In fact, in the 1970s, the government recognized the need for a more effective tool to combat organized crime, particularly the Mafia.

At that time, traditional law enforcement measures such as criminal prosecutions and imprisonment had limited impact, as organized crime groups could easily replace arrested members with recruits.

To address this problem, the Italian government introduced a series of measures to attack the financial resources of organized crime groups.

Starting from that period, preventive measures have become a "safe haven" for both the legislator and the judges. Unlike punishments and security measures, which are State reactions following the commission of a crime, preventive instruments are compressions of fundamental rights that are applied to repress the social dangerousness of an individual and prevent him, thus, from committing crimes and are defined as "*praeter delictum*," that is applicable regardless of the judicial verification of the commission of a crime.

The legislator has resorted to *praeter delictum* measures to address many of the real or perceived emergencies that have marked Italy's history. Judges, on the other hand, have not been able to resist the temptation to turn to the convenient tool of prevention, in support of or in place of the more guaranteed strictly penal response, which requires more investigative efforts, and often has a narrower temporal and effective scope.[9]

This is how the *praeter delictum* system has seen its applicability increasingly expanded, progressively extending to new dangerous subjects, also very different – in terms of social background and committed crimes – from the traditional target of

[8] S. Finocchiaro, *La confisca e il sequestro di prevenzione,* cit., 4.

[9] E. Zuffada, Homo oeconomicus periculosus. *Le misure di prevenzione come strumento di contrasto della criminalità economica. Uno studio della prassi milanese*, Milano 2022, 2.

preventive intervention[10].

2. Preventive confiscation was introduced, along with preventive seizure, by the so-called Rognoni-La Torre law of 1982 (law no. 646/1982), a fundamental piece of anti-mafia legislation aimed at combating the spread of organized crime and the mafia in Italy.

The main purpose of preventive confiscation was to seize assets and property alleged of illicit origin and in the possession, directly or indirectly, of suspects belonging to the mafia.

Indeed, preventive confiscation is an asset forfeiture measure that initially consisted of the State seizing assets illegally accumulated by individuals suspected – and it should be noted, not convicted – of mafia crimes, and was applied as an accessory measure to those subjected to personal preventive measures.

The main characteristic, as will be better explained in this contribution, is that like most other confiscations, the patrimonial measure in question aims to hit the proceeds of criminal activities and the assets that constitute their reuse; but, unlike any other form of confiscation, the patrimonial ablation takes place entirely outside the criminal process. The organ that proposes the measure is often – albeit not necessarily – the public prosecutor; but the relative application procedure is not regulated by the code of criminal procedure, but by the provisions dictated by the anti-mafia code, which sketch, in their laconicism, a process far from the guarantees characteristic of criminal jurisdiction: an essentially paper-based process, without any compelling indication regarding the type of evidence that can be used, and which contemplates as the ordinary hypothesis the inversion of part of the burden of proof on the potential subject of the measure, called upon to positively demonstrate the lawful origin of the assets that the State seeks to confiscate[11].

Subsequently, the legislature gradually expanded the scope of these measures, extending their application in case of suspicion of commission of new crimes that,

[10] To obtain a fully comprehensive and complete historical reconstruction, reference should be made to O. Stradaroli, *Le misure di prevenzione*, in P. Pittaro (ed.), *Scuola Positiva e sistema penale: quale eredità*?, Trieste 2012, 119 and A. Balsamo, V. D'Agostino, *Inquadramento sistematico ed evoluzione storica delle misure di prevenzione patrimoniali*, in F. Fiorentin (ed.), *Misure di prevenzione personali e patrimoniali*, Torino 2018, 501; A. Costantini, *La confisca nel diritto della prevenzione*, Torino 2022, 187.

[11] F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione" nell'ordinamento italiano*, in C.E. Paliero, F. Viganò, F. Basile, G.L. Gatta (ets.), *La pena, ancora: fra attualità e tradizione. Studi in onore di Emilio Dolcini*, Milano, 2018, 886.

although not connected to organized crime, were indicative of the general dangerousness of the offender. Additionally, the asset forfeiture measures gradually lost their accessory function compared to personal measures, becoming more autonomous.

Over the years, the law underwent multiple amendments and expansions to broaden the range of criminal activities that could be subject to preventive confiscation and enhance the measure's effectiveness.

For instance, Law No. 356 of 1992 allowed for the confiscation of assets obtained through criminal activities, even if not directly linked to a specific offense. Subsequently, Law No. 55 of 1995 extended the scope of the measure to cover assets owned by family members or associates of the suspect.

In 2001, Law No. 300 introduced additional reforms to the preventive confiscation system.

One significant change was the establishment of the National Agency for the Administration and Destination of Assets Seized and Confiscated from Organized Crime (ANBSC), a specialized agency responsible for managing and disposing of seized assets.

In 2008 an attempt was made to overcome the incidental nature of preventive confiscation by adding paragraph 6-bis to the art. 2-*bis* of law no. 575/1965, introduced by legislative decree no. 92/2008 (so-called "Pacchetto sicurezza"), which states that «*Personal and property prevention measures may be requested and applied separately. Property measures may also be ordered in the event of the death of the subject proposed for their application. If death occurs during the proceedings, they continue against the heirs or otherwise the successors in title*»[12].

At the same time, paragraph 11 was inserted into the same article 2-*bis*, which states that «*Confiscation may be proposed, in the event of the death of the subject for whom it could be ordered, against universal or particular successors, within five years from the date of death*».

Law no. 94/2009 amended the first sentence of the aforementioned paragraph 6-*bis*, providing that «*Personal and property prevention measures may be requested and applied separately, and for property prevention measures, regardless of the social dangerousness of the subject proposed for their application at the time of the request for*

[12] G. Linares, G. Annicchiarico, F. Messina, *La confisca di prevenzione: tra finalità preventive, effetti neutralizzatori ed esigenze ripristinatorie,* in *www.sistemapenale.it*, 9/2020, 42.

the prevention measure»[13].

Preventive confiscation was then included in the Anti-Mafia Code of 2011 (Legislative Decree September 6, 2011, no. 159), a legislative decree aimed at standardizing the anti-organized crime legislation, which had been the subject of emergency and often confusing legislation[14].

The measures that had originated as emergency and temporary measures were stabilized within the legal system without being modified in their essential features[15].

3. Preventive confiscation, as previously mentioned, is a measure that involves the deprivation of property rights and, like any other form of confiscation provided for by the Italian legal system, results in the permanent transfer of assets belonging to the affected individual – or over which they have effective control – to the State.

Its primary purpose is to remove from the economic cycle assets that have been acquired through illegal means and it is not dependent on a conviction in criminal proceedings (in international parlance, it is referred to as "non-conviction-based confiscation")[16].

From a subjective point of view, all those individuals who are believed (based on circumstantial evidence) to have committed one of the criminal activities identified by law, specifically by Article 4 of the Anti-Mafia Code, can be subject to preventive confiscation[17][18].

In particular, the following individuals can be subject to this preventive measure:

a) Individuals suspected of belonging to mafia-style associations, as described in Article 416-bis of the Criminal Code;
b) Individuals suspected of a serious crime, such as crimes related to the mafia, crimes of criminal association, as well as crimes of reduction to slavery, association for drug trafficking, terrorism, and child pornography;
c) Individuals who have been part of associations aimed at the reconstitution

[13] G. Francolini, *La prova nel procedimento di prevenzione: identità, alterità o somiglianza con il processo penale?*, in *www.sistemapenale.it*, 10/2020, 18.
[14] F. Menditto, *La riforma delle misure di prevenzione*, in *Libro dell'anno del diritto Treccani*, Roma 2013, 659.
[15] The 'anti-mafia code' has undergone several subsequent modifications, first with Legislative Decree no. 218 of 2012 and then with Law no. 228 of 2012. Further intervention was carried out by Law no. 161 of October 17, 2017, and more recently, by Legislative Decree no. 113 of October 4, 2018, which was converted with modifications into Law no. 132 of December 1, 2018. See S. Finocchiaro, *La confisca e il sequestro di prevenzione*, cit., 5.
[16] F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione"*, cit., 891.
[17] G. Linares, G. Annicchiarico, F. Messina, *La confisca di prevenzione*, cit., 50.
[18] F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione"*, cit., 889.

of the Italian fascist party in the past and who continue to engage in activities similar to those previously carried out;

d) Individuals who perform objectively relevant preparatory acts or direct execution towards the reconstitution of the fascist party under Article 1 of Law no. 645 of 1952, particularly through the exaltation or practice of violence;
e) Individuals suspected of having participated in, or at least facilitated, crimes that endanger public order and safety, or the safety of individuals during sports events;
f) Individuals suspected of having associated (under Article 416 of the Criminal Code) to commit crimes against public administration, such as embezzlement, corruption, and extortion.
g) Individuals suspected of the crimes of domestic violence and stalking.

From a subjective point of view, as shown in the list, four types of recipients of preventive measures emerge:

i. subjects who demonstrate qualified social dangerousness connected to Mafia-style organized crime;
ii. subjects who demonstrate common dangerousness, those who, based on factual evidence, are habitually involved in criminal activities, meaning that for their conduct and standard of living, it must be assumed, based on factual evidence, that they regularly live, at least in part, on the proceeds of criminal activities, tax evaders, individuals who have committed crimes that harm the physical or moral integrity of minors;
iii. subjects who have engaged in subversive and terrorist activities[19];
iv. "violent antisocial" individuals in sports activities.

The subject's belonging to one of these specific categories must be deduced from certain, identifiable, and verifiable factual elements, and there is no room for suspicion

[19] They shall be considered to be those who, acting in groups or individually, carry out objectively significant preparatory acts aimed at overthrowing the state system by committing one of the crimes provided for in Chapter I, Title VI of Book II of the Criminal Code or by Articles 284, 285, 286, 306, 438, 439, 605 and 630 of the Criminal Code, as well as those who have been members of political associations dissolved pursuant to Law no. 645/1992, in respect of whom it must be considered, according to their subsequent conduct, that they continue to carry out activities similar to those previously carried out. They also include those who carry out objectively significant preparatory acts aimed at the reconstitution of the fascist party under Article 1 of Law no. 645/1952, particularly through the exaltation or practice of violence, those who have been convicted of one of the crimes provided for by laws on weapons, when it must be considered, according to their subsequent behavior, that they are inclined to commit a crime of the same nature, and instigators, instigators and financiers of the aforementioned crimes.

and conjecture. The social dangerousness of the individual must be evaluated globally and confirmed only in case of persistent antisocial behaviors that demonstrate habitual and current social dangerousness.

From an objective point of view, preventive confiscation concerns all those assets that are the result of illegal activities or constitute their reuse and can even extend to all assets that the subject has direct or indirect control over, which are disproportionate to their declared income or economic activity and for which they cannot justify the legitimate source.

In conclusion, the basis of preventive confiscation is a presumption of illicit accumulation of assets, supported by a condition of past or present dangerousness; the object of the judgment, therefore, is not a demonstrative fact of enrichment but the main verification of the subject's dangerousness status, even in the absence of a connection with the assets subject to preventive confiscation[20].

4. At the procedural level, preventive confiscation also has quite distinctive traits; the asset-prevention action is completely autonomous and prevails over criminal proceedings.

The entire regulation of the procedure can be found in the Anti-Mafia Code, in articles 17 and following, and is, moreover, very sparse compared to the detailed descriptions of the procedures that are usually carried out by the Italian legislature[21].

The paradigm followed is not always entirely functional to the characteristics of the prevention procedure itself, which requires the judge to make detailed verifications, hear many witnesses, and carry out investigations that often date back in time.[22].

In contrast to ordinary criminal law, a specialized section of the court in the capital of the district in which the "proposed" person lives has jurisdiction, and the proceedings can be initiated by the quaestor, the national Anti-Mafia Prosecutor, and other authorities identified by the Anti-Mafia law; they investigate the individual, the companies that can be traced back to him or her, and all persons connected by family

[20] The more the confiscation aims to target assets disconnected from an underlying unlawful activity, valorizing asymptomatic data on the substantive side and presumptive automatism on the procedural one, the more the measure risks appearing 'blind' even with respect to that subjective dangerousness which constitutes – *de lege lata* (see Articles 2 and 6 of Legislative Decree No. 159/2011) – the only requirement capable of endowing a measure with some reasonableness that otherwise risks remaining completely devoid of it. See E. Squillaci, *La prevenzione illusoria. Uno studio sui rapporti tra diritto penale e diritto penale 'reale'*, Napoli 2020, 255.
[21] F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione"*, cit., 889.
[22] G. Francolini, *La prova nel procedimento di prevenzione*, cit., 7.

or personal relationships[23].

Having done so, they file the request with the competent court to order the seizure of assets that, based on sufficient evidence, appear to be connected to illegal activities and, in any case, of those whose value is disproportionate to the declared income or economic activity carried out.

Almost all requests are filed with "urgency," a circumstance that allows the execution of the seizure decree without hearing the proposed subject.

After the seizure, a functional hearing is set for confiscation; once the confiscation is approved, the assets irrevocably enter the State's assets and are used for social purposes.

The preventive seizure and confiscation procedure is unique in the international arena; it is ordered in the absence of a formal finding on the fact of crime and a conviction and is based on the mere suspicion of the commission of illicit or, at any rate, on the mere finding of assets that cannot be justified about the individual's activity.

5. Once the application methods and characteristic features of preventive confiscation have been clarified, it is necessary to focus on its legal nature.

A confiscation of criminal proceeds not based on a criminal conviction – an institution with few correspondences in the legislation of Western European countries – can only raise a fundamental question about its legal nature and its constitutional and conventional status[24].

The path followed by Italian case law is to qualify this patrimonial measure as a preventive measure, admitting the possibility of applying the preventive confiscation retroactively and excluding the application of the main principles of the Italian criminal system[25] [26].

Even the ECtHR, which has always been sensitive to the protection of subjects involved in a criminal trial, has focused its attention on preventive confiscation and

[23] Article 17, paragraph 1 of the Anti-Mafia Code: Public administrations, companies, and public or private entities that carry out activities of public interest, as well as companies that have benefited from public funding or subsidies, are required to demonstrate, with appropriate documentation, that the origin and the legitimacy of the assets used in the performance of their activities are lawful.

[24] See F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione"*, cit., 891.

[25] F. Menditto, *Le Sezioni Unite verso lo "statuto" della confisca di prevenzione: la natura giuridica, la retroattività e la correlazione temporale",* in *www.penalecontemporaneo.it*, 26.5.2014, 9.

[26] Cass. S.U. 26.6.2014 n. 4880, *Spinelli*; see F. Mazzacuva, *Le Sezioni Unite sulla natura della confisca di prevenzione: un'altra occasione persa per un chiarimento sulle reali finalità della misura*, in *DPenCont*, 4/2015, 321.

has agreed with the position taken by domestic case law; applying the so-called "Engel criteria,", the three criteria established by the same court in Engel v. Netherlands in 1976 the ECtHR[27] (Raimondo v. Italy in 1994, Prisco v. Italy in 1999 and Bongiorno v. Italy in 2010), said that the earnings of mafia associations in Italy and their power were reaching too high levels and so the tools used to face this economic power, among which is confiscation, may be necessary to actually fight it.

The ECtHR states that since preventive confiscation is not a criminal penalty, it must comply only with the due process principles that apply to civil rights and obligations disputes, as set in Article 6.

The mentioned "three Engel criteria," established by the ECtHR in the Engel v. Netherlands decision of 1976, are:

i. the internal legal qualification of the measure;
ii. the nature of the sanction applied;
iii. the severity and afflictive nature of the sanction.

For the Court, the preventive confiscation measure has a distinct function and nature compared to criminal sanctions; while the latter aims to punish the violation of a criminal norm and is subject to the establishment of a crime and the guilt of the accused, the preventive measure does not presuppose a crime and aims to prevent its commission by individuals deemed dangerous[28].

The anti-Mafia confiscation falls within those measures (not necessarily of a criminal nature) necessary and appropriate for the protection of the public interest. It cannot be compared to a criminal sanction according to the three criteria identified by the Court to determine whether a measure is criminal under the Convention[29].

In 2019, after ECtHR De Tommaso vs Italy Case[30], the Italian Constitutional Court affirmed again the restorative nature of preventive confiscation, which is only aimed at removing assets and money of illicit origin.

In particular, the ECtHR, in the De Tommaso vs Italy decision, focused on the

[27] In this sentence, the court establishes three criteria through which it is possible to determine which measures have a substantially criminal nature and, as such, entail the guarantees associated with them for the parties involved. These criteria, which in the Engel case are referred to in the context of military law, are made general and consolidated by the jurisprudence of the same Court in the Öztürk v. Germany case of February 21, 1984.
[28] F. Menditto, *"Le Sezioni Unite verso lo "statuto" della confisca di prevenzione*, cit., 8.
[29] A.M. Maugeri, *"La confisca misura di prevenzione ha natura "oggettivamente sanzionatoria" e si applica il principio di irretroattività: una sentenza "storica"?*, in *DPenCont*, 4/2013, 54; F. Menditto, *La sentenza De Tommaso c. Italia: verso la piena modernizzazione e la compatibilità convenzionale del sistema della prevenzione*, in *DPenCont*, 4/2017, 142.
[30] European Court of Human Rights, 23.2.2017, Application no. 43395/09, *De Tommaso v. Italy*.

compatibility of preventive measures with the ECHR.

However, recognizing confiscation's "preventive" nature is not enough to describe its true nature. Indeed, punishment also has preventive purposes (general and special prevention), but this does not mean that it cannot be considered afflictive, with the consequent application of all the principles established to safeguard the involved subject[31].

What distinguishes preventive measures from afflictive ones is that the former are inevitably connected to the current dangerousness of the subject to whom they are applied.

In the case of preventive confiscation, Article 18 of the Anti-Mafia Code establishes that «*personal and property prevention measures can be requested and applied separately, and for property prevention measures, independently of the social dangerousness of the subject proposed for their application at the time of the request for the prevention measure*», admitting, in the second paragraph, the possibility of applying such measures even in the event of the death of the subject "proposed" for their application, establishing that, in this case, the process must continue against the heirs of the *de cuius* regardless of a judgment on their social dangerousness.

From this, it can be inferred that social dangerousness is no longer the prerequisite for the application of preventive confiscation.

Consequently, preventive confiscation inevitably takes on the characteristics of a substantially punitive measure, applied based on past facts, for which there has not been a full judicial determination, but which form the basis of the confiscation measure based on mere indications.

The subjective requirements listed in Article 4 of the Anti-Mafia Code identify only "abstract circumstances" (*Tatbestände*, in legal German)[32] that require probative and circumstantial evidence in the specific case, capable of convincing the judge that the subject has likely committed the act in the past.

All the above helps us to focus on the discussion of the protection of rights issues that inevitably arise from preventive confiscation. The Italian criminal justice system is based on the absolute recognition of guaranteed protections for individuals undergoing criminal proceedings.

The Constitution recognizes certain fundamental principles, which cannot be

[31] F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione"*, cit., 893.
[32] *Ibid.*

derogated, set to protect citizens, and provides for a strict regulatory framework aimed at guaranteeing and reinforcing respect for these principles. These principles are the presumption of innocence, the prohibition of retroactive application of unfavorable criminal law, and the principle of legality.

In some situations, however, exceptions to general principles are allowed using expedients to meet criminal policy needs.

One of the methods used has been defined as "label fraud"[33] by EU case law; "playing" on the formal qualification of the institutes, they are removed from the application of the protections provided under criminal law. Preventive confiscation, formally qualified as preventive, is characterized by an afflictive and punitive dimension, and as noted above, lacks the protections typical of criminal law.

6. Many decidedly delicate and controversial aspects are hidden behind preventive confiscation; depending on the definition attributed to this measure, various perspectives emerge, and new and controversial "sides" are revealed.

In fact, the lack of certainty regarding the legal nature of preventive confiscation contributes to the problems that arise concerning it.

6.1. Firstly, it is worth noting that the Italian legal system – supported by Community jurisprudence – recognizes the great importance of the passage of time. The most important tool in this regard is the statute of limitations, a law establishing the maximum time to reach a final conviction from the date of the hypothetical offense.

However, as far as preventive confiscation is concerned, the law does not provide for a time limit within which the State can proceed with preventive confiscation. The judicial evaluation aimed at preventive confiscation, in fact, can be carried out at any time, without any "maximum term" within which the State can exercise its right of confiscation[34].

Moreover, the law does not even provide a limit within which the evaluation of the individual's assets and purchases can be made.

The Court of Cassation has repeatedly emphasized the need to establish a temporal correlation between social danger and illicit enrichment of the subject[35], proceeding to confiscate the assets that entered the subject's property at the temporal moment

[33] A. Manna, F.P. Lasalvia, *"Le pene senza delitto": sull'inaccettabile "truffa delle etichette"*, in *AP*, 1/2017, 23.
[34] E. Squillaci, *La prevenzione illusoria*, cit., 258
[35] Cass. S.U. 26.6.2014 n. 4880, cit.

when he or she, presumably, committed the facts that make the application of preventive confiscation possible.

Otherwise, if it were possible to attack the proposed assets indiscriminately, regardless of any "pertinential" and temporal relationship with the danger, the confiscatory tool would inevitably take on the characteristics of a true and proper sanction. Such a measure would, therefore, be difficult to reconcile with the constitutional parameters regarding the protection of economic initiative and private property, as set out in Articles 41 and 42 of the Constitution, as well as with the conventional principles[36] [37].

In addition, the Court of Cassation has highlighted (albeit not entirely expressly), as already affirmed in doctrine, that this requirement makes the form of confiscation in question more compatible with the presumption of innocence and the right to defense, since its verification makes the burden of proof of the accusation more compelling and the counter-proof of the lawful origin of one's assets less onerous for the owner, avoiding placing on him a sort of diabolical proof regarding the lawful origin of all assets acquired at any time[38].

Italian judges have stated that the identification of a precise chronological context within which preventive confiscation can be carried out makes the exercise of the right of defense much easier, as well as fulfilling inescapable requirements of general guarantee. From this, it emerges that the absence of a temporal limit on the judge's scrutiny and the absence of a legislative provision that imposes a necessary temporal correlation between social danger and illicit enrichment of the subject inevitably result in obstacles to the right to defense, guaranteed internally by Article 24 of the Italian Constitution[39].

However, more recent jurisprudence[40] has partially departed from the principles affirmed in 2014 by the Court of Cassation, admitting confiscation not only of assets acquired during the temporal period of the subject's "dangerousness" but also of those

[36] *Ibid.*

[37] A.M. Maugeri, *Un ulteriore sforzo della suprema corte per promuovere uno statuto di garanzie nell'applicazione di forme di confisca allargata: art. 240-bis c.p., irretroattività e divieto di addurre l'evasione fiscale nell'accertamento della sproporzione*, in *www.sistemapenale.it*, 4/2020, 211.

[38] A. M. Maugeri, P. Pinto de Albuquerque, *La confisca di prevenzione nella tutela costituzionale multilivello: tra istanze di tassatività e ragionevolezza, se ne afferma la natura ripristinatoria (c. Cost. 24/2019),* in *www.sistemapenale.it*, 29.11.2019, 66.

[39] S. Finocchiaro, *La confisca "civile" dei proventi da reato*, cit., 140.

[40] Cass. sez. II 13.3.2018 n. 14165, *Alma e a.*; see D. Albanese, *Confisca di prevenzione: smussato il requisito della 'correlazione temporale',* in *www.penalecontemporaneo.it*, 19.4.2018.

subsequently entered his or her property, which is believed to be in some way connected to the period in which the subject's social danger was current.

Instead of the "temporal correlation" between property and social danger, a "reasonable temporal connection" is preferred, which involves a reduction in the guaranteed standard regarding the ascertainment of the confiscability of assets in preventive proceedings[41].

The recipient of preventive confiscation is often required to provide a *probatio diabolica* since he or she is required to "reverse" a presumption by giving adequate proof of facts that may be very old in time.

Moreover, the subject must then prove that a particular asset entered lawfully into his or her property during a temporal period – which may be very far back in time – in which he or she could not be judged "socially dangerous".

This is a double obstacle that is significantly relevant, considering that the more distant the evaluation in time, the more difficult it will be to provide adequate proof[42].

6.2. Secondly, another practical problem concerning preventive confiscation is the absence of a legislative definition of "disproportionate assets".

Article 24 of Legislative Decree 159/2011 provides two parameters for assessing illicit enrichment.

The first is when there is a pertinential link between the assets and the illicit activity that the subject is believed to have carried out; this parameter has a high level of precision and is easily demonstrable.

The second parameter concerns disproportionality; in this case, as previously mentioned, preventive confiscation can extend to all assets over which the subject has direct or indirect control that are disproportionate to his or her declared income or economic activity and for which he or she cannot justify the legitimate origin[43].

This requirement is less difficult for the prosecutor to prove in court, and therefore, in preventive confiscation proceedings, the prosecution tends to avoid proving the pertinential link between the assets and the illicit activity, highlighting only the disproportionality of the subject's assets[44].

[41] S. Finocchiaro, *La confisca "civile" dei proventi da reato*, cit., 152.
[42] E. Squillaci, *La prevenzione illusoria*, cit., 259.
[43] M. Di Lello Finuoli, *La torsione della confisca di prevenzione per la soluzione del problema dell'evasione fiscale*, in *DPenCont*, 1/2015, 287.
[44] E. Squillaci, *La prevenzione illusoria*, cit., 271.

It is therefore the task (burden) of the defense of the subject receiving the preventive measure to refute the presumption of illicit origin inherent in the disproportionality[45].

Since there is no requirement for a pertinential link between the assets subject to confiscation and the crime for which the subject is suspected, the recipient will be called upon to justify the legitimate origin of the assets in a general manner[46].

As mentioned before, the law does not provide for a minimum limit above which the subject's assets can be considered "disproportionate" to his or her economic activity. The Court of Cassation has tried to delimit and define the investigation that must be carried out to prove the disproportionality of the assets, reiterating that disproportionality cannot be understood as any discrepancy between earnings and capitalization but only when an incongruous balance between them can be concretely ascertained, to be evaluated according to common experience[47].

Furthermore, it must be referred not to the overall property but to the sum of the individual assets considered at the specific temporal moment under analysis[48] [49].

On top of that, if considered in isolation, disproportionality does not indicate anything about the illicit derivation of the assets under analysis. The requirement of disproportionality only demonstrates that the subject is living beyond his or her economic means, but this could result, for example, from support from family members or from taking on debt. The presumption of illicit origin of a disproportionate asset about the legitimately produced income may be deemed acceptable if articulated against a subject recognized as socially dangerous based on effective criteria and, in any case, cannot ignore the assessment of the pertinential link between the disproportionate assets and the illicit activity[50].

However, at present, it is not unambiguously clarified what should be meant by disproportionality. This means that, on the one hand, judges have very wide discretionary margins, being able to consider any variation, even minimal, between the assets possessed and the declared income relevant for confiscation.

Secondly, even minimal disproportionality of assets will result in even more

[45] *Ibid.*
[46] M. Di Lello Finuoli, *La torsione della confisca di prevenzione*, cit., 288.
[47] A. M. Maugeri, *Un ulteriore sforzo della suprema corte*, cit., 210; S. Finocchiaro, *La confisca "civile" dei proventi da reato*, cit., 131.
[48] R. Piccirillo, *Titolo VII — Confisca per sproporzione*, in R. Tartaglia (ed.), *Codice delle confische e dei sequestri*, Roma 2012, 398.
[49] S. Finocchiaro, *La corte costituzionale sulla ragionevolezza della confisca allargata. Verso una rivalutazione del concetto di sproporzione?*, in *DPenCont*, 2/2018, 139.
[50] M. Di Lello Finuoli, *La torsione della confisca di prevenzione*, cit., 287.

significant probative difficulties, considering that the recipient of the preventive confiscation will have to provide complex and decidedly challenging evidence.

These circumstances cause circumvention of the guarantees of certainty and proportionality of the ablation intervention. Making a univocal prognostic judgment is impossible, and there is a clear risk of confiscating disproportionate but not illicit assets[51].

In other branches of law, the law often provides for "tolerance" limits. For example, in Italian tax law, limits of unlawful enrichment are provided for, which the law considers irrelevant to the application of the penalty. However, such a circumstance is not reproduced in the procedure for the application of preventive confiscation, which generally applies in cases of asset disproportionality. Yet, a threshold of tolerance of asset disproportionality established by law could eliminate the significant applicative uncertainty of the preventive confiscation measure.

6.3. Another interesting point is the autonomy of the preventive procedure with respect to the criminal procedure.

This autonomy inevitably derives from the fact that in the preventive proceeding, overall conduct significant of social dangerousness is judged, while in the criminal proceeding, individual facts are judged to be related to typical models of unlawfulness[52] [53].

Article 29 of Legislative Decree no. 159/2011 (Anti-Mafia Code) itself establishes that «*the preventive action may also be exercised independently of the exercise of the criminal action*». This provision thus outlines what some have described as a new "double track", even more clearly as a "third track", at high speed[54].

The first direct effect that stems from this autonomy is that established case law[55] does not consider the constitutional statute of "fair criminal process" applicable to the preventive procedure.

The main finding emerging from studies on topic [56] is that often, preventive

[51] E. Squillaci, *La prevenzione illusoria*, cit., 208.
[52] A. Occhipinti, *Sul diritto penale della prevenzione: nuovi orizzonti e limiti applicativi*, in *Giur. pen. web*, 12/2019, 4.
[53] F. Menditto, *Presente e futuro delle misure di prevenzione (personali e patrimoniali): da misure di polizia a prevenzione della criminalità da profitto,* in *www.penalecontemporaneo.it*, 23.5.2016, 42.
[54] S. Finocchiaro, *La confisca "civile"*, cit., 176; F. Basile, *Brevi considerazioni introduttive sulle misure di prevenzione*, in *GI* 2015, 1520.
[55] Cass. sez. V 17.2.2022 n. 5741; Cass. sez. I 11.3.2016 n. 27147.
[56] E. Zuffada, Homo oeconomicus periculosus, cit., 33.

confiscation legitimizes the application of a "penalty" in cases where it has become impossible to provide proof of the criminal offense, and the State is interested in exercising its punitive function in any case[57].

In this case, very little remains of the preventive function and the *ante delictum* logic of the prevention system, fueling a dangerous 'race to the bottom' that risks shifting the systematic center of sanctioning options towards logics of anticipated intervention, in a vicarious capacity with respect to a criminal model considered uncertain, ineffective, and structurally inadequate to combat those forms of deviance that require an anticipated intervention and against which it is often difficult to obtain a conviction in criminal proceedings.

The fact that it is easier to reach a positive outcome in the preventive procedure than in the criminal one must be attributed to the differences in the evidentiary standard required in the two proceedings.

From the aforementioned principle of autonomy of preventive action with respect to the criminal proceeding, it follows, for example, the possibility of applying preventive measures despite acquittal in criminal proceedings for the facts assumed as signs of dangerousness in the preventive stage, or the possibility that confiscatory, precautionary or final measures overlap in the two proceedings.[58]

Although the evidentiary standard required for preventive measures can be considered undoubtedly higher today than in the past, the case law of legitimacy continues to emphasize the profound differences compared to the criminal process due to the exegetical evolution of recent years.

Firstly, indirect, or circumstantial evidence in the preventive procedure does not need to have the characteristics prescribed by Article 192, paragraph 2, of the Italian Code of Criminal Procedure (i.e., gravity, precision, and concordance).

Calls for co-perpetration or complicity do not require the ordinary external corroboration required by Article 192, paragraph 3, of the Italian Code of Criminal Procedure.

Furthermore, elements resulting from the criminal trial concluded with a plea agreement may also be evaluated, which, although not establishing the responsibility of the defendant, does not constitute an acquittal and allows the judge of the preventive procedure to autonomously evaluate the facts ascertained in the criminal

[57] E. Squillaci, *La prevenzione illusoria*, cit., 44.
[58] S. Finocchiaro, *La confisca "civile" dei proventi da reato*, cit., 177.

proceedings that did not lead to a conviction, in the presence of pronouncements of acquittal other than acquittal on the merits.

For example, in the case of a judgment of non-proceeding or a judgment of acquittal for prescription, amnesty, or pardon, containing in the reasoning an assessment of the existence of the fact and its commission by that subject, where the fact is sufficiently clear or can be autonomously derived from the acts[59].

7. The importance of preventive measures and confiscation in the fight against organized crime has clearly emerged in this brief contribution.

Preventive measures have always been called upon to do the "dirty work" that criminal law couldn't guarantee[60].

However, a continuous conflict inevitably arises between preventive measures and the constitutionally guaranteed rights of individuals.

Despite the efforts of case law (both at the community and domestic level) and doctrine aimed at providing a constitutionally compatible interpretation, this conflict has proven difficult to resolve.

Nevertheless, it doesn't seem likely that the legislator can abandon the system of preventive measures, rediscovered to address the extremely serious emergency of the spread of organized crime and adapted over time to a variety of different crimes. Currently, in Italy, there exists a so-called fear of crime, which has led to the establishment of a series of *ante delictum* measures aimed at preventing and anticipating the commission of crimes[61].

The current situation necessitates the continued use of these measures, even if it means a reduction in the guarantees recognized by the Italian Constitution and international law. For this reason, preventive measures will continue to be used and will maintain their decisive importance.

However, it is essential to revise the system of asset prevention, giving more importance to an aspect that has often been neglected by legislative developments and case law.

The subjective dangerousness of the individual against whom an asset measure is applied has often been overlooked.

However, the determination of dangerousness is the foundation that legitimizes the

[59] G. Francolini, *La prova nel procedimento di prevenzione*, cit., 32.
[60] F. Palazzo, *Per un ripensamento radicale del sistema di prevenzione* ante delictum, in *DisCrimen*, 12.9.2018, 2.
[61] S. Finocchiaro, *La confisca "civile" dei proventi da reato*, cit., 415.

existence of asset preventive measures, which, although not related to the determination of a crime in criminal proceedings, remain compatible with the Constitution only if connected to an actual and concrete determination by the judge of the prerequisites for their grant.

In addition, social dangerousness must be certain and, above all, current, and cannot be based on mere presumptions or outdated data.

Furthermore, it is necessary to clearly define the legal qualification of preventive confiscation, without resorting to mere doctrinal classifications detached from actual reality.

Achieving a balance between the need to prevent and combat organized crime and the protection of individual rights is essential. This balance can be attained by refining the system of preventive measures, considering the individual's dangerousness, and ensuring that the measures are based on a solid and objective evaluation by the judge. The development of a more nuanced and rigorous system of preventive measures is crucial to uphold the fundamental principles of the Italian Constitution and international law, while effectively combating organized crime. This requires a shift towards a more targeted and evidence-based approach, where preventive measures are only applied to individuals who pose a genuine risk to society, rather than being based on mere presumptions or outdated data. Ultimately, it is only through such a balanced and nuanced approach that the Italian legal system can effectively protect both individual rights and the wider societal interest in preventing and combating organized crime.

Only by doing so is it possible to identify the constitutional and international principles and rights to apply, to consistently assess the legitimacy of the legislator's choices.

As highlighted, the practical uncertainties regarding preventive confiscation have serious implications for the defense guarantees of the subjects targeted by the preventive proceedings, and the Italian legal system can no longer accept such a compromise[62].

[62] F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione"*, cit., 917.