

ANTI-MAFIA CONFISCATION AGAINST CORRUPTION: THE NEW FRONTIER OF HUMAN RIGHTS

*Miriam Allena**

Abstract

The Italian lawmakers have recently extended the anti-Mafia non conviction based confiscation to the persons suspected of belonging to a criminal association aimed to corruption or to the commission of various crimes against public administration. This provision, although apparently in line with the tendency increasingly widespread on a supranational level to use instruments of a broadly preventive character to fight serious crimes, raises some issues, especially in terms of compliance with human rights protection. Indeed, although these measures focus on property and not on individuals, in many cases they significantly affect the life and well being of the people involved.

After analysing the European Court of Human Right (ECtHR) case law on administrative measures having criminal nature and on Anti-Mafia non conviction based confiscation, the article investigates the legitimacy of the extension of this specific form of non-conviction based confiscation to the crimes against public administration.

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*Assistant Professor of Administrative Law, University of Milan òBocconiö.

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Se alcuni hanno sostenuto che le confische siano state un freno alle vendette e alle prepotenze private, non riflettono che, quantunque le pene producano un bene, non però sono sempre giuste, perché per esser tali debbono esser necessarie, e un'utile ingiustizia non può esser tollerata.

Cesare Beccaria, *Dei delitti e delle pene*, 1764 (reprint 1973, 66-67)

(While some have maintained that confiscations have curbed revenge and private abuse, they fail to think that, whereas penalties produce good, they are not always fair because in order for them to be fair they have to be necessary and a useful injustice cannot be tolerated)

1. Introduction: Fighting crime through prevention

With Act 161/2017, amending Legislative Decree 159/2011 (so-called “Anti-Mafia Code”), Italian lawmakers extended the application of a specific form of non-conviction-based confiscation of assets, so-called “*preventive confiscation*”, that had been traditionally used to cope with the Mafia¹, to the «*persons suspected*» of belonging to a criminal association aimed to corruption or to the commission of other crimes against public

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¹ Preventive measures against individuals were first introduced under Italian law by Act 1423/1956. Act 575/1965, repealing Act 1423/1956, extended the application of such measures to Mafia offences. Anti-Mafia preventive measures concerning property were first introduced by Act 646/1982, which amended Act 575/1965. After many legislative reforms, the new “Anti-Mafia Code” (consolidating the legislation on anti-Mafia and preventive measures concerning both individuals and property) came into force in September 2011. On the different types of confiscations under Italian law see T. Epidendio-G. Varraso (eds.), *Codice delle confische* (2018).

administration (e.g., embezzlement of public funds, extortion, undue reception of money doing damage to the State). In other words, the assets of the persons suspected of having committed, as part of an association, one or more of such offences, can now be (seized and) confiscated following a judicial order with no need for a prior criminal conviction².

Subsequent to this piece of legislation, the Anti-Mafia non-conviction based confiscation took on a primary role as an instrument to combat organized crime in Italy³: indeed, it attacks the very economic foundation of the latter using lean, fast and effective non-criminal prevention instruments. Moreover, the success of this measure seems to be fully in line with the tendency, which is increasingly widespread on a supranational level, to use such instruments as have a broadly preventive character in response to the need for security generated by phenomena such as terrorism⁴, money laundering⁵, drug trafficking, organized

² Indeed, Art. 4(1), lett. i-bis) of Legislative Decree 159/2011, as amended by art. 1(1), lett. d) of Act 161/2017, includes amongst the targets of preventive measures concerning property «*the persons suspected of the offence under Art. 640-bis [aggravated fraud aimed to obtain public funds] or of the offence under Art. 416 of the Criminal Code [criminal association], aimed to commit any of the offences under Articles 314, sub-section one [non-temporary embezzlement of public funds], 316 [embezzlement of public funds by profiting from a mistake made by others], 316-bis [misappropriation of funds doing damage to the State], 316-ter [undue reception of money doing damage to the State], 317 [extortion], 318 [corruption through the performance of duties], 319 [corruption through an act contrary to one's duties], 319-ter [judicial corruption], 319-quater [undue inducement to give or promise utilities], 320 [corruption of a person in charge of a public service], 321 [punishability of the corrupter], 322 [incitement to corruption], and 322-bis [embezzlement of public funds, extortion, undue inducement to give or promise utilities, corruption and incitement to corrupt the members of the International Criminal Court and the bodies of the European Community as well as the officers of the European Communities and foreign States]*».

³ N. Gullo, *Emergenza criminale e diritto amministrativo. L'amministrazione pubblica dei beni confiscati* (2017), 35; V. Manes, *L'ultimo imperativo della politica criminale: nullum crimen sine confiscatione*, Riv. It. Dir. e Proc. Pen. 1259 (2015).

⁴ See G. della Cananea, *Administrative Due Process in Liberal Democracies: A Post 9/11 World*, 2 IJPL 195 (2011); A.T.H. Smith, *Balancing Liberty and Security? A Legal Analysis of the United Kingdom Anti-Terrorist Legislation*, 13 Eur. J. Crim. Pol'y & Res., 73 (2007); L. Zedner, *Terrorizing Criminal Law*, 8 Criminal Law and Philosophy 99 (2014).

⁵ G. Stessens, *Money Laundering. A New International Enforcement Model* (2000).

transnational crime and corruption. Still, it should be borne in mind that administrative preventive measures can be, like traditional punishments, particularly afflictive. Besides, in many cases, there is a fine line between such instruments as are actually preventive and those which, instead, are more or less clearly punitive⁶.

The inclusion of the anti-Mafia “*preventive confiscation*” under preventive measures has always been – despite the name – a matter of debate among Italian scholars⁷. However, so far the domestic well-established case law has acknowledged its preventive character⁸.

The broader picture of this article therefore addresses the question of what sort of procedural protection the anti-Mafia “*preventive confiscation*” should have. In particular, the aim of the article is to analyse the compatibility of the anti-Mafia “*preventive confiscation*” with the (criminal and civil) procedural guarantees provided for by the European Convention on Human Rights (ECHR) each time that a measure by public authorities is capable of affecting individual rights. The article argues that the extension of the scope of application of the anti-Mafia “*preventive confiscation*” to a broad series of crimes against public administration makes its lack of substantial due process protection even more controversial.

Drawing on the above, this article is structured as follows. After describing the traits of anti-Mafia non-conviction based confiscation (Section 2), it explains the weaknesses of its classification as a preventive measure in the light of the guarantee

⁶ In general on this topic A. Ashworth, L. Zedner, and P. Tomlin (edited by), *Prevention and the Limits of the Criminal Law* (2013); see also J. Simon, *Governing Through Crime*, (2007), arguing that in the US the war on crime has transformed government.

⁷ G. Corso, *Profili costituzionali delle misure di prevenzione: aspetti teorici e prospettive di riforma*, in G. Fiandaca, S. Costantino (eds.), *La legge antimafia tre anni dopo. Bilancio di un'esperienza applicativa* (1986), 125, 137.

⁸ See Italian Supreme Court (*Corte di Cassazione*), Plenary Session, judgement no. 4880, 26 June 26, 2014, *Spinelli*, which ruled out the criminal character of the anti-Mafia preventive confiscation acknowledging its preventive character instead in light of the ‘objective dangerousness’ of the assets unlawfully acquired. In particular, in the Court’s view, the latter could lead the holder to commit further crimes besides contaminating the market through their circulation.

parameters set out by the Strasbourg case law *vis-à-vis* other measures (including confiscation ones) that provide for prevention as well as more or less explicit punitive purposes (Section 3). Then the article will move on to show how the broadly deferential attitude of the ECtHR in relation to non-conviction based confiscation (Sections 4 and 5) is doomed to eventually find itself in difficulties given the broad extension of the scope of application of the anti-Mafia confiscation by Italian lawmakers in 2017 (Section 6).

The red thread of the analysis is the need to prevent the concept of prevention – which has always been central in both administrative and criminal law – from eventually taking on poorly supervised meanings to the detriment of the very foundation of the Rule of Law⁹.

2. Distinctive traits of the Anti-Mafia non-conviction based confiscation

The Italian non-conviction based confiscation is, in many regards, unique in the international scenario of the different forms of property confiscation in that it combines a number of distinctive traits that can hardly be found, all together, in other forms of confiscation provided for in liberal democracies¹⁰.

Firstly, despite its name (which expressly refers to a preventive measure) it provides for the confiscation of the property allegedly acquired through criminal activities which the person concerned is suspected of having already committed in the past. The underlying rationale is therefore one of after-the-fact reaction (also but not only) to formally criminal offences rather than one of before-the-fact prevention.

Secondly, the measure under examination can entail the deprivation of the availability of the entire property and corporate assets, without it being necessary for the prosecutor to

⁹ A. Ashworth and L. Zedner, *Preventive Justice*, Oxford University Press (2014). See also L. Ferrajoli, *Teoria del garantismo penale* (1989).

¹⁰ See F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca “di prevenzione” nell’ordinamento italiano*, 2 Riv. It. Dir. e Proc. Pen. 610 (2018); S. Milone, *On the Borders of Criminal Law. A Tentative Assessment of Italian “Non-Conviction” based extended confiscation*, 8(2) New Journal of European Criminal Law 150 (2017).

demonstrate that the assets are the proceeds from the assumed offences. In particular, it is sufficient that the assets at issue appear disproportionate to the income or the business activity of the targeted person and that the latter is unable to justify their lawful origin. Therefore, the disproportion between assets and income, as ascertained outside criminal proceedings, assumes an “unlawful build up” or “unlawful origin” and justifies the non-existence of a link between the assumed offence and the asset being confiscated. Moreover, also when confiscation is ordered, as may be the case, of assets that are considered to be the fruit of illegal activities, the prosecutor is not required to prove the unlawfulness of the assets according to the standards of evidence applied in the criminal proceeding¹¹.

Thirdly, as a result of this measure, the assets concerned are finally removed, there being no particular requirements in terms of urgency or contingency and as it is permanent, save that the court of appeal can revoke the decision where «*the original defect of the assumptions for its application*»¹² is proven.

Finally, and this is one of the elements that raise most perplexities, it is particularly vague in describing the assumptions and reasons that may underlie its infliction. Indeed, the law refers to the «*persons suspected*» of having committed specified offences against the civil service but in no way specifies what this means in practice. The only thing that is clear is that “something less” is required compared to what is required to ascertain, including only as a matter of precaution, the criminal liability (indeed, it is not required to prove that the two typical prerequisites of interim measures, i.e. “*fumus boni iuris*” and “*periculum in mora*” have been met). Still, this “something less” is ultimately evanescent and it is not by accident that oftentimes its application is a matter of controversy in case law. In any case, it is significant that in order for the measure at issue to be inflicted, according to the prevailing

¹¹ See Art. 24(1) of Legislative decree 159/2011, whereby confiscation is not only in respect of «*the assets that turn out to be the fruit of unlawful activities or are a reuse of the latter*» but, more in general, in respect of all «*the assets of which the person vis-à-vis whom the proceedings were started is not able to justify the lawful origin and of which, including through an individual or legal entity, turns out to be the owner or to have availability of the same in a value that is disproportionate to the declared income (...) or business activity*».

¹² See Art. 28 of Legislative Decree 159/2011.

case law, it is sufficient to register the person whose assets are referred to in the register of the persons under investigation or, in any case, to initiate criminal proceedings against such person in order for this measure to be inflicted.

Therefore, on the one hand the court has broad discretion in the determination of the conditions that justify the application of the *preventive confiscation*, i.e., in identifying the de facto prerequisites and conditions which, when met, allow to deem that the person is «suspected» of committing one of the offences under discussion and hence confiscate its assets. On the other hand, this measure is ordered outside criminal proceedings and the related guarantees¹³.

The strongly afflictive character of the confiscation (potentially extended to the entire estate and being permanent) which is inflicted subsequent to a mere circumstantial ascertainment (and as such, is partial and incomplete) of the liability for committing the offences that have already been committed, raises doubts as to whether its nature is in fact intrinsically criminal and even that it is a “penalty based on suspicion”, that is to say that the “*preventive confiscation*” is at times required (and obtained) when for the prosecutor it is not possible, due to the lack of evidentiary findings, to react by using the instrument of criminal repression.

As stated above, a number of weaknesses of this institution emerge especially in light of the procedural guarantees established by the Strasbourg case law in relation to other broadly preventive measures adopted by the various Member States of the Council of Europe. Indeed, in the ECtHR’s view, the anti-Mafia “*preventive confiscation*” does not entail application of the criminal-head guarantees of Art. 6 §§ 2 and 3 ECHR (i.e., the presumption of innocence and the rights of defence). At the same time, the civil-head guarantees of Art. 6 ECHR do not apply with their full stringency¹⁴. Moreover, the principle of legality under Art. 1 First Protocol ECHR tends to be less stringent.

¹³ The procedure for applying the measures is governed by the anti-Mafia Code under Article 16 and following.

¹⁴ The only aspect that determined a condemnation of Italy for a violation of the civil limb of Article 6 ECHR has been the lack of the possibility to request a public hearing: see Decision ECtHR, no 399/02, *Boccellari and Rizza v. Italy*, 13 November 2007, §§ 39-41; no 4514/07 *Bongiorno v. Italy*, 5 January 2010, §§ 37-

This is the topic in focus below.

Before addressing it, it is worth recalling that the theme of compliance with the ECHR procedural guarantees by the Italian law is far from irrelevant: indeed, the conventional rights (i.e., the rights enshrined in the ECHR) impacted by this particular non conviction based confiscation (i.e., the right to property, the right to a fair trial and, in case it is classified under criminal law, the presumption of innocence, the principle of strict legality and non-retroactivity as well as that of *ne bis in idem*) are reflected by the corresponding rights of the European Charter of Fundamental Rights (CFR)¹⁵ and, since the latter has the same legal value as the EU Treaties¹⁶, they are already part of the European legal system. Moreover, as is well known, Art. 52(3) of CFR clearly states that the meaning and scope of rights that correspond to ECHR rights shall be same as their ECHR meaning (as resulting from the ECtHR case law)¹⁷.

31. Subsequently, the Italian Constitutional Court no. 93, 8 March 2010, acknowledged the violation of Art. 117 of the Constitution, as it refers to Art. 6 ECHR, since the proceeding for the application of the “preventive confiscation” did not allow a public hearing. On this point see M. Panzavolta, *Confiscation and the concept of punishment: can there be a confiscation without a conviction?*, in K. Ligeti, M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (2017), 25. On the applicability of Art. 6 ECHR to the Italian administrative proceeding and trial see M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo* (2012).

¹⁵ In particular, Art. 17 CFR, «Right to property», is based on art. 1, First Protocol, ECHR; Art. 47 CFR, «Rights to an effective remedy and to a fair trial», corresponds to Art. 6(1) ECHR; Art. 48 CFR, «Presumption of innocence and right of defence» is the same as Art. 6(2) and (3) ECHR; Art. 49 CFR, «Principles of legality and proportionality of criminal offences and penalties» corresponds to Art. 7(1) and (2) ECHR; Art. 50 CFR, «Right not to be tried or punished twice in criminal proceedings for the same criminal offence» has the same meaning and the same scope as the corresponding right in Art. 4, Protocol 7, ECHR, in case of the application of the principle within the same Member State.

¹⁶ See Art. 6(1) TFEU.

¹⁷ See Art. 52(3) CFR: «In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention».

3. The Strasbourg Case Law that classifies as criminal offences the interdictory and confiscation measures with both punitive and preventive aims

The question of which procedural guarantees are appropriate for the anti-Mafia “preventive confiscation” arises because Italian law does not label it as a penalty, but rather as a measure aimed at neutralising illegal profits and hindering contamination of the licit economy.

As is known, since the 1970s, abundant ECtHR case law has addressed the issue of distinguishing between substantially punitive measures and other measures (not criminal in nature). Indeed, the Strasbourg Court wanted to prevent the traditional instruments labelled as administrative or civil from being used to the detriment of the principles of *nulla poena sine iudicio* and *nulla poena sine lege* under Articles 6 and 7 of the European Convention on Human Rights (ECHR).

Starting from the renowned *Engel and Others v. the Netherlands* decision, which deals with military disciplinary sanctions (classified as non-criminal in the relevant body of law), the ECtHR has therefore enucleated a number of criteria that make it possible to identify the essentially criminal nature of a measure adopted by public authorities, regardless of its formal classification under the body of laws to which it belonged. This because, as the Court clearly observed, «if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will»¹⁸.

In particular, the ECtHR has identified two material criteria for classifying a measure by public authorities as “criminal”: its nature (in particular, its afflictive and deterrent character) and its severity¹⁹.

¹⁸ Decision ECtHR, no 5100/71, *Engel and Others v. The Netherlands*, 8 June 1976, §§ 81.

¹⁹ In *Engel*, § 82, the Court established three criteria for determining whether a measure is ‘criminal’ within the meaning of the Convention, namely (a) the domestic classification, (b) the nature of the offence, and (c) the severity of the potential penalty which the defendant risks incurring. However, the Court has specified that the first criterion provides no more than a starting point, while

In its orientation to protect human rights, the Court verifies whether such pre-requisites have actually been met by adopting an approach of maximum extension of the criminal scope. Therefore, on the one hand the severity is evaluated, as the case may be, having regard to the severity of the applicable penalty rather than the one actually inflicted²⁰; or else considering the subjective situation of the person involved²¹. On the other hand, the two criteria of the punitive character and severity are considered to be alternative and not cumulative. As a result, also a measure in which the punitive character does not prevail but which has severe consequences for the person involved can be of a “criminal” nature. This is the case of interdiction measures, which are commonly considered to be the expression of a generic power of care of the public interest but which, according to the Strasbourg judges, under certain conditions can be included in the criminal scope: just think of the measures to withdraw the driving license²², the measures to interdict from public offices²³ or the orders to close down shops²⁴.

Against this background, the ECtHR not surprisingly did not hesitate to classify as criminal the measures of confiscation of assets, as specifically qualified and governed in the relevant legal systems as administrative or in any case deemed to be excluded from the criminal guarantees because of the allegedly prevailing preventive purpose aimed in practice at caring for the public interest (rather than punitive). Indeed, from the point of view of the Court, the concept of criminal charge that is relevant for the

the very nature of the offence and the degree of severity of the penalty are factors of greater importance.

²⁰ Decision ECtHR, no 11034/84, *Weber v. Switzerland*, 22 May 1990, § 34, that classified as criminal a fine of 500 Swiss francs which, however, could be converted into a term of imprisonment in certain circumstances.

²¹ Decision ECtHR, no 61821/00, *Ziliberg v. Moldova*, 1 February 2005, § 34, that classified as “criminal” a fine of few euros inflicted on a student for participating in an unauthorized demonstration assuming that such amount was in any case significant in relation to the income of the person involved.

²² Decision ECtHR, no 1051/06, *Mihai Toma v. Romania*, § 26.

²³ Decision ECtHR, no 38184/03, *Matyjec v. Poland*, § 58, relating to the imposition of measures providing for a 10-year interdiction from public offices and the exercise of specified professions provided for by Polish law with respect to those who had collaborate in the communist regime.

²⁴ Decision ECtHR, no 6903/75, *Dewer c. Belgique*, 27 February 1980, relating to the order to close down a butcher’s shop for violating domestic laws on prices.

purposes of ECHR pursues both afflictive and dissuasive purposes and respectively aims to care for public interest (in terms of remedying the damage suffered by public interest as well as for the purposes of prevention)²⁵.

The well-known 1955 *Welch* decision, on the confiscation of proceeds from drug trafficking is explicit on this point. Indeed, faced with a measure that was rather controversial in the English legal system, the ECtHR acknowledged that «*the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment*»²⁶.

Likewise, the ECtHR classifies as essentially criminal the confiscation for unlawful construction and site development in the Italian system under art. 44 of the Construction Code²⁷ even though, also in this case, the preventive aim, i.e. to protect the orderly development of the territory and protection of the environment, are pursued alongside punitive/afflictive aims. So much so that almost all domestic case law, since the 1990²⁸, considered the measure at issue as a real property measure of restorative nature that could be inflicted by merely assuming that specified works are contrary to urban-planning laws and hence, regardless of a criminal ascertainment of the subjective liability of

²⁵ On this point see F. Goisis, *La tutela del cittadino nei confronti delle sanzioni amministrative tra diritto nazionale ed europeo* (2014).

²⁶ Decision ECtHR, no 17440/90, *Welch v. The United Kingdom*, 9 February 1993, § 30, that also provides that: «*The preventive purpose of confiscating property that might be available for use in future drug-trafficking operations as well as the purpose of ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation. However, it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender*». In the case at issue, claimant argued that the confiscation (inflicted pursuant to the 1986 Drug Trafficking Offences Act) had been applied retroactively (for violations committed by it before 1986) and hence in contrast with Art. 7 ECHR.

²⁷ See Art. 44, Presidential decree 380/2001, repealing and substituting Art. 19 and Art. 20 of Law 47/1985, according to which: «*In a "final judgement" establishing that there has been unlawful site development, the criminal court shall order the confiscation of the unlawfully developed land and the illegally erected buildings. Following the confiscation, the land shall pass into the estate of the municipality on whose territory the site development has been carried out*».

²⁸ Starting from Corte di Cassazione, judgement no 16483, *Licastro*, 12 November, 1990. Subsequently, in its decision no 187/1998 also the Constitutional Court acknowledged the administrative nature of this confiscation.

the target (such that the confiscation was also commonly ordered against third parties that had acquired in good faith title to abusive real estate or when the criminal proceedings were time barred).

Under a line of thought that started with the 2007 *Sud Fondi v. Italy* decision (in respect of the confiscation of areas relating to the so-called “eco-monster” of Punta Perotti in the Puglia region)²⁹ and later re-confirmed a several times – lastly also by the Grand Chamber³⁰ – the Strasbourg Court has however inverted this approach, affirming the essentially criminal nature of the confiscation at issue by reason of its being in any case «*connected to a criminal offence*» (this being further endorsed, amongst other things, by the fact that, as a rule, it is inflicted by criminal courts) and that its aim is affliction rather than compensation/reparation³¹ and its severity³².

More in general, having regard to the first requirement mentioned, the Grand Chamber specified that, in order to determine whether a measure constitutes a punishment, a formal conviction is not required: «*while conviction by the domestic criminal courts may constitute one criterion, among others, for determining whether or not a measure constitutes a “penalty” (...), the absence of a conviction does not suffice to rule out the applicability of that provision*»³³.

In sum, a non-conviction based confiscation like the one provided for under Italian laws in relation to construction is a criminal measure in all regards and, as a result, benefits from all the guarantees under articles 6 and 7 of the ECHR.

²⁹ See Decision ECtHR, no 75909/01 *Sud Fondi S.r.l. and Others v. Italy*, 30 August 2007.

³⁰ Decision ECtHR, Grand Chamber, no 1828/06, *G.I.E.M. S.r.l. and Others v. Italy*, 28 June 2018, §§ 215-233.

³¹ As demonstrated, according to the Court, by its mandatory character and by its being not subject to ascertainments of the actual prejudice caused by abusive works to the territory and the environment.

³² Which was inferred, amongst other things, from the fact that, within the boundaries of the site concerned, it could be applied not only to the land that was built upon, together with the land in respect of which the owner’s intention to build or a change of use had been demonstrated, but also to all the other plots of land making up the site.

³³ Decision ECtHR, Grand Chamber, *G.I.E.M. S.r.l. and Others v. Italy*, cit. at 25, § 217.

Therefore, according to the Court, any formal argument or declaration of particular interests aimed at prevention (as in the case of confiscation for unlawful construction and site development, the protection of the territory or of the environment) does not, per se, prevent a given measure from being classified as a criminal one, for the simple and intuitive reason that, otherwise, domestic lawmakers could always exclude from criminal matters any sanction by simply stating that it aims at public interest and prevention.

4. The Strasbourg Case Law on Anti-Mafia non conviction based confiscation: a “Preventive Measure”?

The extensive and substantial approach adopted by the Strasbourg Court on the possible coexistence in a given measure, of prevention/restoration and afflictive purposes, does not however seem to have been consistently developed by the ECtHR case law on the anti-Mafia “*preventive confiscation*”³⁴.

Indeed, until now the latter has been classified not as a criminal measure but rather as a mere preventive measure in that it aims to prevent assets suspected of having an unlawful origin from being put on the market and, in general, used «*to the detriment of the community*»³⁵: as stated several times «*according to the case-law of the Convention institutions, the preventive measures prescribed by the Italian Acts of 1956, 1965 and 1982, which do not involve a finding of guilt, but are designed to prevent the commission of offences, are not comparable to a criminal “sanction”*»³⁶.

All of this according to a rationale of macro-prevention, i.e. that considers not so much the profoundly afflictive effects on the

³⁴ On the inconsistency of the ECtHR case law on confiscation see also M. Simonato, *Confiscation and Fundamental Rights Across Criminal and Non-Criminal Domains*, ERA Forum Journal of the Academy of European law 365 (2017).

³⁵ See, among the first, ECtHR, no.12954/87, *Raimondo v. Italy*, 22 February 1994, § 30: «*Like the Government and the Commission, the Court observes that the confiscation (...) pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community*».

³⁶ See ECtHR, no. 52024/99, *Arcuri and Others v. Italy*, 5 July 2001, § 2 and the decisions referred to therein.

individual whose assets are confiscated but rather the “necessity” to combat what is perceived as a real social emergency.

Still, under a strict application of the *Engel* criteria it would be easy to classify the anti-Mafia confiscation within the criminal scope: there is a clear link between a formally criminal offence (to which confiscation reacts). In sum, a *malum* (immediate and essentially definitive one, because it is permanent) is inflicted that correlates to an alleged commission of offences, though on the basis of entirely attenuated and undefined evidence of liability. Likewise, one can hardly deny the severity of the consequences, in economic terms and on life as well as in terms of the damage to the good name and image of the target person/enterprise. The latter will likely suffer severe repercussions also on its private and relational life.

A sensitive issue of such measures is, amongst others, their aptitude to target not only the person directly suspected of belonging to the Mafia organization but also his/her family: indeed, the governing provisions make it very easy to confiscate the assets of the persons “close” to the person suspected of belonging to the Mafia association, as they require that the investigations on the assets «*be carried out also in respect of the spouse, the children and those who, in the last five years have lived*» with that person, as well as «*in respect of the individuals or entities, companies, consortia or associations, the assets of which the persons at issue can use in all or in part, directly or indirectly*»³⁷. In case of death of the person suspected, the heirs are certainly capable of being subject to confiscation³⁸.

This results in a process of “collective sanction” or, in any case, of “family sanction”, that is particularly eccentric compared to modern criminal law.

Ultimately, in this case one cannot even apply the distinction introduced by the ECtHR starting from the 2006 *Jussilla v. Finland* decision, between the sanctions belonging to the «*hard core of criminal law*» which are entirely subject to the guarantees under criminal laws and «*minor offences*» with respect to which «*the criminal-head guarantees do not necessarily apply with their full*

³⁷ Art. 19(3), Legislative decree 159/2011.

³⁸ Art. 18(2), Legislative decree 159/2011.

stringency»³⁹. Indeed, the objective severity in terms of the property and reputational consequences (i.e. stigma) of the measure at issue undoubtedly speaks to its belonging to the «*hard core of criminal law*».

Moreover, in some decisions the ECtHR went so far as to affirm that, as the imposition of such measures «*does not depend on the prior conviction for a criminal offence (...), they cannot be compared to a penalty*»⁴⁰. In sum, the lack of a stringent ascertainment of the criminal liability is here enhanced, somehow paradoxically, to rule out application of the criminal guarantees despite the presence of a *malum* that, as said, is particularly afflictive and in any case absolutely significant.

This is in stark contrast with the most recent conclusions of the Grand Chamber with respect of the Italian confiscation for unlawful construction and site development: in the *G.I.E.M. s.r.l. and Others v. Italy* case, as seen, the Court upheld a broad and substantial notion of “criminal conviction” (deeming that a declaration of criminal liability made in a criminal-court judgement formally convicting the accused was not necessary) so as to be able to classify as criminal and subject to the guarantees under art. 7 ECHR also the confiscation for unlawful construction and site development ordered in respect of a person who had been prosecuted for illegal site development but had not been convicted because the offence had become statute-barred⁴¹.

Vice versa, in the ECtHR decisions on anti-Mafia measures there is a vicious circle, a de-escalation whereby the absence of the guarantees of a fair trial – including only in terms of fully ascertaining criminal liability according to the criterion *in dubio pro reo* – is not followed, contrary to what one could expect, by a strengthening of other guarantees to offset such absence (providing that this can be assumed). To the contrary, there even follows a loss of any further guarantee arising from classifying this measure as a criminal one.

³⁹ Decision ECtHR, Grand Chamber, no 73053/2001, *Jussilla v. Finland*, 23 November 2006, § 43.

⁴⁰ As expressly decided by the ECtHR under no. 24920/07, *Capitani and Campanella v. Italy*, 17 May 2011, § 35, only available in the French and Italian translation.

⁴¹ Decision ECtHR, Grand Chamber, *G.I.E.M. S.r.l. and Others v. Italy*, cit. at 22.

So much so that, even if the measure is formally ordered by the Court (at the request of the public prosecutor or of the police), it is inflicted after a procedure of the Chamber regulated by the anti-Mafia Code, in the absence of the most stringent guarantees of the right of controverting and defence that characterize the adversarial criminal trial, i.e. a fair trial that is undoubtedly in line with the provisions of art. 6 ECHR.

It is as if the Court did not realize that, in point of fact, the farther from the guarantees of the criminal trial (admitting, like in the case under examination, a merely evidentiary ascertainment based on allegations), the more the measure imposed becomes afflictive, dangerous and ultimately needs a strengthening of the procedural and trial rules.

Not only that, though. Also, as noted in the *G.I.E.M. and Others v. Italy* decision, as a result of the reasoning described earlier, the definition of “criminal matter” rests entirely with domestic lawmakers who would therefore simply need to connect their sanctioning to a generic prevention aim, regardless of a full ascertainment of liability, in order to rule out in criminal law guarantees in their entirety: *«In the Court’s view, if the criminal nature of a measure were to be established, for the purpose of the convention, purely on the basis that the individual concerned had committed an act characterized as an offence in domestic law and had been found guilty of that offence by a criminal court, this would be inconsistent with the autonomous meaning of “penalty”. Without an autonomous concept of penalty, States would be free to impose penalties without classifying them as such, and the individuals concerned would then be deprived of the safeguards under Article 7 §1. That provision would thus be devoid of any practical effect»*⁴².

5. Anti-Mafia non-conviction based confiscation and property right: towards a harder-edged principle of legality?

Aside from the inconsistencies identified earlier, in fact the Strasbourg Court has fully included the preventive confiscation in what art. 6 ECHR defines as the *«determination of civil rights and obligations»* as opposed to the *«determination of criminal charge»*.

⁴² Decision ECtHR, Grand Chamber, *G.I.E.M. S.r.l. and Others v. Italy*, cit. at 22, § 216.

That is to say that it has deemed that the confiscation measure is not a penalty to be imposed subject to the criminal law guarantees under articles 6, §§ 2 and following and 7 ECHR, but rather a measure that impacts the property right. Just as if it were eminent domain rather than the consequence of an offence, though ascertained only as a suspicion.

The *preventive confiscation* ultimately comes close, to some extent, to the *actiones in rem* that are typical of Anglo-Saxon countries, where the confiscation of the proceeds from the offence is not considered as a sanction but as a limitation of the property right warranted by the consideration that “the offence does not pay” and that, therefore, no lawful purchase of property can derive from it⁴³.

However, with respect to the institution under examination, also the guarantees in respect of the property right and, in particular, the principle of proportionality between the sacrifice imposed on the latter and the need to protect the public interest, are applied by the ECtHR in a very flexible manner.

Indeed, the Court acknowledges that, obviously, the preventive confiscation is an “interference” with property rights that is subject to Article 1, Protocol 1 of the Convention, but nonetheless deems that it is entirely proportioned to the severity of the Mafia crimes in Italy and to the difficulties of the Italian State in combating it⁴⁴. Significantly, some decisions refer to the *preventive confiscation* as being «*an effective and necessary weapon in the combat against this cancer*»⁴⁵.

⁴³ See N. Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y. Sch. L. Rev. 95 (1994). More recently, J. Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (2017), 67, 75; I. Smith-T. Owen-A. Bodnar (eds.), *Asset Recovery: Criminal Confiscation and Civil Recovery* (2015); J.P. Rui, (ed.) *Non-conviction-based confiscation in Europe* (2015); C. King and C. Walker (eds.), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets* (2014).

⁴⁴ Decision ECtHR, no. 52024/99, *Arcuri and others v. Italy*, 5 July 2001: «*The enormous profits made by these organisations from their unlawful activities give them a level of power which places in jeopardy the rule of law within the State. The means adopted to combat this economic power, particularly the confiscation measure complained of, may appear essential for the successful prosecution of the battle against the organisations in question*».

⁴⁵ Decision ECtHR, no. 12954/87, *Raimondo v. Italy*, 22 February 1994, § 30.

Clearly, this approach can only be explained in light of the emergency represented by Mafia crimes.

In fact, the very historical origins of the *preventive confiscation* explain its extraordinary nature. This institution, established for the first time by Act 646/1982 (so-called Act Rognoni-La Torre)⁴⁶ was conceived as a measure intended to target the Mafia with an innovative approach hinging on the “incapacitation” of individuals and legal entities, however connected, “to own property”, in a period that is, objectively, an emergency for Italy, triggered by the Mafia attacks of the early 1980s. With the introduction of this non-conviction based confiscation the lawmakers wanted to change the strategy used to combat this particular form of organized crime in consideration of its endemic nature, of its increasing infiltration in the economy of the country and, ultimately, acknowledging the need to put in place reaction instruments other than the ones that are typical of the traditional criminal repression.

Indeed, save for the fascist period⁴⁷, this measure is unprecedentedly pervasive, capable of combining the sufficiency of doubt, of suspicion and the conversion in *custodia legis*, on the basis of an inversion of the burden of proof, potentially also of the entire estate of the target.

Moreover, also in terms of respect of the principle of legality, as a guarantee of the actual possibility for the individual to foresee the consequences arising from its action or omission, the case law of the ECtHR on preventive confiscation seems to be pervaded by a rationale of emergency and derogatory.

If, indeed, in general, the Strasbourg Court believes that in the presence of measures that impact the property right, the principle of legality operates in a manner that is not substantially different compared to criminal measures (save that in relation to the non-retroactivity of the Act, which is only guaranteed in

⁴⁶ See Act 646/1982, that modified the anti-Mafia Act 575/1965 by introducing, alongside personal preventive measures, also property-related ones, i.e. seizure and confiscation of estates.

⁴⁷ The royal decree 773/1931 introduced a specific form of confiscation of assets of associations, organizations and institutions conducting activities contrary to the fascist ideology.

relation to the criminal offences)⁴⁸, this, again, does not seem to apply to the anti-Mafia non-conviction based confiscation.

So, the assumption of the necessity to prevent severe criminal phenomena seems to distract from one fundamental problem, i.e. that the objective requirement of the measure, that is to say the suspicion of belonging to a Mafia association, appears to be entirely evanescent here.

Indeed, the referrals to (persons) «*suspected of belonging to the associations under art. 416-bis of the criminal code*»⁴⁹ are silent on the practical behaviours that warrant application of the measure. Nothing more is said on the minimum level of evidence of the commission of criminal activities required in order to be considered to be «*suspected*»⁵⁰.

In reality, the criterion was probably left undefined because the purpose of the lawmakers, when introducing the preventive confiscation, was that of having available a most agile and straightforward instrument that is capable of adapting to every specific need to prevent the Mafia crimes. Clearly, this can be understood in terms of an emergency but raises considerable doubts in relation to guarantees⁵¹.

In this regard, it is significant that recently the Strasbourg Court criticized the Italian provisions that govern the preventive measures against individuals, in terms of infringement of the principle of legality.

In particular, in the *De Tommaso v. Italy* decision, the ECtHR Grand Chamber deemed that the preventive measure of special

⁴⁸But see Decision ECtHR, no 14902/04, *AO Neftyanaya kompaniya Yukos v. Russia*, 8 March 2012, § 567 ss. which stated, in relation to an administrative sanction that: «The Court reiterates the principle, contained primarily in Article 7 of the Convention but also implicitly in the notion of the rule of law and the requirement of lawfulness of Article 1 of Protocol No. 1, that only law can define a crime and prescribe a penalty. While it prohibits, in particular, extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy».

⁴⁹ See Legislative Decree 159/2011, Art. 4(1), lett. a). Art. 416-*bis* of the Criminal Code is the rule that punishes the Mafia association.

⁵⁰ See Legislative Decree 159/2011, Art. 4(1), lett. a).

⁵¹ See P. Edwards, *Counter-terrorism and counter-law: an archetypal critique*, 2 Legal Studies 279 (2018), arguing that counter-terrorist legislation systematically undermines the rule of law.

supervision with compulsory residency order in relation to the categories of persons under art. 1 of Law 1423/1956 (the current art.1, let. *a e b* of Legislative decree 159/2011) was not sufficiently precise and, thus, did not satisfy the foreseeability requirements established in the Court's case law.⁵² Indeed, the referral, in Art. 1 mentioned above, to the «*individuals who, on the basis of factual evidence, may be regarded as habitual offenders*» and to the «*individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence may have been regarded as habitually living, even in part, on the proceeds of crime*», did not allow to foresee *ex ante* what types of behaviour could lead to the application of the aforementioned personal preventive measure. In particular, the Grand Chamber noted that «*the imposition of such measures remains linked to a prospective analysis by the domestic courts, seeing that neither the Act nor the Constitutional Court have clearly identified the "factual evidence" or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures*»⁵³.

The *De Tommaso* case concerned personal preventive measures which impacted the freedom of circulation under Art. 2 of Protocol no 4 of the Convention, which is quite different from the property right. However, ultimately the Italian Constitutional Court has applied the same reasoning followed by the ECtHR in *De Tommaso* to "*preventive confiscation*": indeed, in the judgement no. 24 of 2019, the Court has acknowledged that the referral, in Art. 1, lett. a) of Legislative decree 159/2011, to the «*individuals who, on the basis of factual evidence, may be regarded as habitual offenders*» is a too vague and open-textured formula also to justify measures that impact property rights.⁵⁴

Moreover, it is interesting to notice that, both in *De Tommaso* and in the Italian Constitutional Court decision no. 24 of

⁵² See Decision ECtHR, Grand Chamber, no 43395/09, *De Tommaso v. Italy*, 23 February 2017, § 117.

⁵³ See *De Tommaso v. Italy*, cit., § 117.

⁵⁴ See Italian Constitutional Court (*Corte costituzionale*), judgement no. 24, 24 January 2019, which ruled that the claim of unconstitutionality of Art. 1, lett. a) of Legislative Decree n. 159/2011 was founded on the grounds of Art. 117, par. 1, It. Constit. (which provides for the obligation of the Italian legislation to respect international treaties such as the ECHR) and of Art. 1, First Protocol ECHR.

2019, the criticism relating to the lack of foreseeability and certainty was in respect of regulatory provisions that were not, one can believe, more obscure than the generic referral, set out in Legislative Decree 159/2011, to those «suspected» of committing specified offences (which is the objective requirement for the adoption of the “*preventive confiscation*”), be they Mafia offences or of another nature.

6. Anti-Mafia non-conviction based confiscation and crimes against public administration: the emergency that does not exist

It has been said that the broadly deferent attitude maintained by the ECtHR *vis-à-vis* the choices of Italian lawmakers in relation to anti-Mafia confiscation seems to be hardly consistent both with its orientation on other measures that are, broadly speaking, preventive (including for confiscation) and, more in general, with the approach that has always characterized it that tends to extend individual guarantees.

The decisions on the anti-Mafia preventive confiscation seems to express a political rather than judicial position, along lines that, *per se*, are rather debatable.

Still, the perplexities about whether such instrument is compliant with conventional guarantees are stronger now that Italian lawmakers extended it to a fairly broad series of offences against public administration including corruption offences.

Indeed, in relation to such offences, at least two elements are missing which could possibly, if not fully justify, at least explain, the flexible approach of ECtHR to anti-Mafia confiscations.

First and foremost, that we are faced with an emergency: indeed, it has in no way been proven that in Italy there is today, compared to the remaining issues on the criminal front, a specific emergency in relation to “crimes against public administration” that justifies the use of wholly exceptional instruments.

However, it does not seem that, inversely, reference can be made to the well-known decision of the Strasbourg Court in the *Gogitidze and Others v. Georgia* case relating to a non-conviction based confiscation ordered in respect of a former minister of the government of Georgia charged with several offences against

public administration. In this case, several assets available to the politician and to some of his close relatives had been confiscated as they had been considered overtly disproportioned to the income declared.

Now then, in the case at issue, while rejecting the criticism raised by claimant that complained about the disproportionate interference with its property right, the Court decided that the confiscation at issue (expressly classified under the relevant laws as an *actio in rem* and, in many regards, not dissimilar to the anti-Mafia “preventive confiscation”) had been ordered in compliance with a special piece of legislation passed in Georgia at the request of several international experts concerned for the alarming levels of corruption in that country. Indeed, the decision specifies that «the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the Group of States Against Corruption (GRECO) and the OECD’s Anti-Corruption Network for Transition Economies, noticing the alarming levels of corruption in the country at all levels, repeatedly advised the Georgina authorities that they undertake legislative measures to ensure that the confiscation of proceeds, including value confiscation, applied mandatorily to all corruption and corruption-related offences and that confiscation from third parties should also be possible»⁵⁵.

The decision seems to confirm that emergency is the leading criterion followed by the Strasbourg justices to justify the use of particularly extended non-conviction based confiscations of assets based on presumption and ascertained circumstances.

So much so that, when it had to decide on hypotheses of non-conviction based confiscations adopted in the absence of a particularly alarming social situation, the ECtHR did not hesitate to find that the conventional criminal guarantees had been violated.

⁵⁵ See Decision ECtHR, no 368862/05, *Gogitidze and Others v. Georgia*, 12 May 2015, § 106, which also specifies that, following the adoption of the measures, commended the Georgian authorities for having largely complied with the instruction and in particular, «they noted that, thanks to the introduction of civil proceedings in rem in addition to the possibility of confiscation through criminal proceedings, the Georgian legislation had been brought into line with the appropriate requirements of the international legislation and in particular with the relevant Council of Europe Conventions, although they still warned the Georgian authorities against possible misuse of that procedure, calling for the utmost transparency in that regard».

For example, in the *Geering v. the Netherlands* case, the Court found that «if it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2»⁵⁶. Significantly, in this case, the measure at issue, based on domestic legislation, was «not designed or intended to determine a criminal charge or a criminal penalty, but to detect illegally obtained proceeds, to determine their pecuniary value and, by way of a judicial confiscation order, to deprive the beneficiary of these proceeds». Instead, according to the ECtHR, the purpose of this measure was on the one hand «to remedy an unlawful situation» and, on the other, «to bring about a general crime-prevention effect by rendering crime unattractive on account of an increased risk that proceeds of crime will be confiscated»⁵⁷.

Moreover, also in the European Union the non-conviction based confiscation is not particularly welcome: indeed, Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, provides for non-conviction based confiscation only as an exception, when reaching the conviction is impossible due of illness or absconding of the suspected or accused person (Art. 4, § 2)⁵⁸.

Besides, while the very recent EU Regulation on the mutual recognition of freezing and confiscation orders has imposed the mutual recognition of confiscation orders (including without conviction), providing that they are adopted as part of criminal proceedings, to all Member States, including those that have not

⁵⁶ Decision ECtHR, no 30810/03, *Geerings v. the Netherlands*, 1 March 2007, § 47.

⁵⁷ See *Geerings* cit., § 24.

⁵⁸ «Art. 4 – Confiscation: (1) Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia. (2) Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial». See also Recital 15 of the Directive 2014/42/EU.

adopted that model⁵⁹, through this course, the “minimalist” avenue of mutual recognition has been taken, and the impossibility has been pointed out, though implicitly, of harmonizing the various European systems by building a common European model of non-conviction based confiscation (as had been requested by the European Parliament and Council)⁶⁰.

Secondly, in the new hypotheses of non-conviction based confiscation introduced by Italian lawmakers there is no stability over time (i.e., permanence) and the serial accumulation of profits that enable the Mafia association to control the territory through widespread investments in the productive activities and, ultimately, to take on a role that, not accidentally, is often compared to the one that ought to be carried out by the State.

Indeed, the lawmakers are content with the existence of an association, even entirely occasional and not stable. Still, in ordinary criminal associations, the coordination of three or more persons in the commission of an offence is, in general, aimed to the commission of a single crime.

In these cases, on the sociological and criminological fronts, what is entirely missing is a possible justification in terms of “incapacitation” of an organization “to own property”, given that such objective can only be assumed in relation to a permanent association.

In addition to the above, in order to combat the offences against public administration, it probably makes more sense to rely on the inhibition and expulsion measures already in place (such as prohibition to participate in tenders, temporary ban or

⁵⁹ Regulation (EU) of the European Parliament and of the Council of 14 November 2018, on the mutual recognition of freezing orders and confiscation orders.

⁶⁰ When adopting Directive 2014/42/EU, the European Parliament and the Council, in a joint statement, called on the Commission «to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity (...)» and «to analyse, at the earliest possible opportunity and taking into account the differences between the legal traditions and the systems of the Member States, the feasibility and possible benefits of introducing further common rules on the confiscation of property deriving from activities of a criminal nature, also in the absence of a conviction of a specific person or persons for these activities». See A.M. Maugeri, *Le tipologie sanzionatorie: la prevenzione patrimoniale e la legittimità della confisca di prevenzione come modello di “processo” al patrimonio tra tendenze espansive e sollecitazioni sovranazionali*, 2 Riv. It. Dir. e Proc. Pen. 559 (2017).

dismissal of officials) rather than on forms of incapacitation of the persons involved to own property.

7. Conclusion: the risks of the “Emergency Rationale”

The foregoing analysis shows that balancing guarantees and efficiency is the main criticality in the relationship between domestic crime-prevention measures and conventional European guarantees.

Clearly, measures such as the “*preventive confiscation*” can turn out to be very effective in combating certain permanent, organized criminal activities because they undermine the ability of the offender to infiltrate and control society⁶¹.

Still, it is equally true that prevention cannot become the new formal “label” which, as was the case in the past with the “administrative sanction”, allows to avoid conventional guarantees.

For this reason, the approach of the Strasbourg Court to the anti-Mafia confiscation is not convincing: the Court that has imposed that we rethink the borders between administrative and criminal matters (reclassifying as criminal many sanctions that, in the various national States, were undisputedly considered to be administrative), curiously pulls up when faced with a measure that is evidently much more dangerous and to be feared than an administrative sanction for speed driving or of a fine of few hundreds of Euros (both undisputedly criminal according to the ECHR)⁶².

It has been said that such case law can only be explained in light of emergency and exceptional situations. Therefore, it does not seem that it can legitimate the new provisions introduced by Italian lawmakers in 2017 given that in the case of crimes against

⁶¹ Even though it should be said that many have pointed out that the impact of preventive measures on individuals and property is, based upon factual evidence, often overestimated including because of the impact (which is in point of fact very strong) on the consensus in the public opinion: see M. Ceresa-Gastaldo, *Misure di prevenzione e pericolosità sociale: l'incolmabile deficit di legalità della giurisdizione senza fatto*, *Diritto Penale Contemporaneo* 1 (2015).

⁶² For example, respectively, Decision ECtHR, no 35260/97, *Varuzza v. Italy*, 9 November 1999, and Decision ECtHR, Grand Chamber, no 73053/2001, *Jussilla v. Finland*, cit. at 33.

public administration, it should at least be demonstrated that there is an emergency.

In any case, it is useless to deny that also such explanation (i.e., the exceptional nature) is not entirely satisfactory.

First and foremost because the rationale of emergency is different from that of guarantee. And emergencies, as is well known, can always change and, sometimes, also depend on more or less well-grounded collective perceptions⁶³. The extension of the *preventive confiscation* to crimes against public administration is a clear example of this.

Secondly, because guarantees, especially supra-national ones, should by definition disregard emergencies, just as they disregard the political choices of the signatories of the Convention. Indeed, oftentimes, behind assumed emergencies are hidden political options which it is not clear why they should prevail over conventional obligations.

In fact, in terms of defence of human rights, as one would expect from the ECHR, the severity of the consequences of a specified offence can justify the severity of the consequences for those who have been found liable, but not the removal of the guarantees altogether. Quite to the contrary, particularly (and understandably) afflictive measures should, out of consistency, be accompanied by a particular strength of the latter.

In other words, the severity of certain offences and the social alarm that they create require reasonably dissuasive punishments rather than instruments that are capable of avoiding the guarantees that must always accompany a punitive response.

If the ECHR, which was initially conceived as an instrument to effectively and substantially guarantee human rights, loses its connotation in terms of defence of human rights and focus on the reality of things, it is not only ultimately inconsistent with its broad principle on the boundaries of criminal matters but, more radically, risks forgetting its own reason of being.

The Strasbourg Court will have to take this into account in the future when, as is likely to be the case, it will be called upon to decide on whether the "*preventive confiscation*" regime as extended

⁶³ S. Cassese, *Misurare la corruzione serve per studiare interventi mirati*, *Corriere della Sera* (2017), 12 December.

to offences against public administration is compatible with the ECHR guarantees. Moreover, this is an increasingly topical issue, considering also the very recent decree law 113/2018, so-called security decree, enacted into law as 132/2018, which, though slightly changing the 2011 Anti-Mafia Code, fully re-confirmed the rules that govern “*preventive confiscation*” and its extension to offences against governmental agencies⁶⁴.

⁶⁴ See Law 132/2018 dated 3 December (that amends and enacts into law Decree Law 113 dated 4 October 2018) which sets forth urgent measures relating to international protection, immigration and public security.