ARTICLES

THE ITALIAN REGULATION ON CONFISCATED ASSETS REHABILITATION: ISSUES AND PERSPECTIVES IN PUBLIC LAW

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Abstract

Over the last few years, multiple legislative interventions have contributed to the definition, at state level, of a regulatory framework aimed at preventing and punishing the phenomenon of organised crime. Legislators, also borrowing from the investigative-judicial approach, have paid special attention to the economic side of illegally accumulated capital and focused on assets which, given certain conditions, must be seized and confiscated. Thus, a set of criminal and administrative procedures has been defined which, according to legal theory and practice, still presents a series of issues related to balancing constitutional rights and harmonising the various applicable legal measures. The purpose of this work is to analyse, through a theoretical approach, the administrative profiles of the allocation of confiscated real estate assets within the circular process of regulation which will be considered not only at national and European level (also observing the regulations and experience of other countries), but also from the judicial, administrative and practical point of view, considering the centrality of the choice of a legislative policy to achieve social aims, in particular through redevelopment and rehabilitation actions.

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1. Definition of the theme and purpose of this paper

The issue of the confiscation of real estate assets included in the possessions of persons belonging to mafia-type organised crime and their reuse has long been the subject of in-depth study from different perspectives. It is so from a scientific point of view and by scholars of different disciplines[1]. Looking at legal studies, numerous scientific

[1] In particular, in different macro-sectors and academic disciplines such as: agricultural sciences (e.g. agricultural economics and appraisal); architecture (e.g. architectural and urban design, urban and regional planning); legal studies; psychology (e.g. work and organisational psychology); geography (e.g. economic and political geography); history (e.g. contemporary history); economics (e.g. economic policy, public economics, business administration and management and organization studies); sociology (e.g. general sociology, economic sociology and sociology of work and organisations). This information was acquired by consulting a database on university research on the subject of mafias created by drawing on information collected by the Iris-Institutional Research Information System, a platform that collects and manages information on university research data in Italy. The database, which can be consulted at crui.it, makes it possible, through the use of key words (e.g., as in our case, "beni confiscati"), to trace the scholars, titles of contributions and the type of publication, for all the academic disciplines that have shown interest in the topic in question (as well as for any other topic). The work was carried out by the Conference of Italian University Rectors (Crui), the Parliamentary Committee of Inquiry into mafia-related organisations and the Interdisciplinary Research Laboratory on Mafias and Corruption (Lirmac) of the Department of Social Sciences of the University of Naples Federico II. For a description of the methodology see A. Scaglione, E. Breno, S. D'Alfonso, *Analysis of the review of research* in S. D'Alfonso & G. Manfredi (eds.), *Universities in the fight against mafias. Research,*

contributions have been published, in particular by researchers in criminal law, criminal procedure, administrative, civil, commercial, constitutional and tax law, philosophy and sociology of law[2].

A second perspective on the issue is the political-institutional one, from which state and regional legislators and the European Union[3] have contributed to the definition of the regulations. The contribution of different parliamentary anti-mafia committees, which have drawn up detailed reports[4] and promoted specific legislative initiatives[5], should also be mentioned.

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teaching and training (2022), 59-70 (open access publication http://www.fedoabooks.unina.it/index.php/fedoapress/catalog/book/377).

[2] For a specific reflection on legal studies on mafias, see S. D'Alfonso, *University research in the field of organised crime. Law studies*, in S. D'Alfonso & G. Manfredi (eds.), *Universities in the fight*, cit. at 1, 87-97.

[3] Continuous and various measures have been implemented by the European legislator over the last twenty years on the subject of asset seizure and confiscation and on the fight against organised crime. These include: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA, of 24 February 2005, on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Council Framework Decision 2006/783/JHA, of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders, strengthening European cooperation in confiscation; Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime; European Parliament resolution of 25 October 2011 on organised crime in the European Union 2010/2309 (INI); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime; and finally, Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

[4] Consider, for example, the recent *Report on the analysis of the procedures for the management of seized and confiscated assets*, doc. XXIII, no. 15, 2021, which will be referred to below, and which represents the result of the work of a specific Committee (IX). The Committee carried out an activity that lasted more than two years with the aim of verifying the application of the regulations in force concerning the fight against mafia assets, also in order to put forward proposals for changes to optimise the reuse of such assets.

[5] Reference is made to the organic reform of Legislative Decree no. 159 of 6 September 2011 (the so-called Anti-Mafia Code) implemented through Law no. 161 of 17 October 2017. The reference is to a bill presented by the Parliamentary Committee of

Furthermore, a significant role is played by government bodies such as the '*Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*' (henceforth ANBSC) which collaborates with the Agenzia del demanio (State Property Agency)[6] and a few ministries; also, there are the Prefetture (Central government institution at local level) which perform several functions in this field, for instance by supporting the ANBSC in the verification of the use of assets by private individuals or public bodies[7].

A significant role is entrusted to local institutions, especially municipalities, both through their regulatory power[8] and administrative functions[9], in particular on the subject of confiscated assets and, to a more limited extent, seized property. The role of these institutions is markedly valued and deemed significant at operational level by the ANBSC itself since these are the main assignees of assets[10].

On a different level, a fundamental role is played by the so-called social (or movementist or civil)[11] anti-mafia movement and by

Inquiry into the phenomenon of mafias and other criminal organisations, including foreign ones, established by Law no. 87 of 19 July 2013. The Committee first approved the 'Report on the provisions for an organic revision of the Anti-Mafia Code and prevention measures under Legislative Decree no. 159 of 6 September 2011', which was presented to the Houses in November 2014. The Committee's work is expressly referred to in the Final Report (Doc. XXIII, no. 38), forwarded to the Houses in February 2018, 8.

[6] With different competences than in the past, after the transfer of functions to the ANBSC. This body cooperates with the Agenzia del demanio on the basis of a specific agreement provided for by Article 113 (2) of the Anti-Mafia Code, concerning, in particular, the appraisal and maintenance of the assets in its custody as well as the use of the Agenzia del demanio staff. Such inter-agency cooperation is confirmed by a general reading of the entire Code, and specifically of Articles 48 (5 and 15-quarter); 111 (2), and 117 (3).

[7] *Ex* article 112 (4)(i) of the Anti-Mafia Code.

[8] Municipalities may approve specific regulations on confiscated property, as detailed below.

[9] For example, Article 48 (3)(c) of the Anti-Mafia Code.

[10] See ANBSC *Activity Report - Year 2020*, 14, website benisequestraticonfiscati.it. In the following pages, the Agency reports a series of tables and pie charts that provide a clear description of the 'distribution of assignees' by region and municipalities.

[11] One example is the association Libera, Associazioni, nomi e numeri contro le mafie (libera.it), which not only plays a decisive role in supporting information initiatives for the management of assets by the main beneficiaries - such as voluntary and

the assignees themselves[12], including communities, even youth communities, authorities, the most representative associations of local authorities, voluntary organisations, social cooperatives[13], therapeutic communities and centres for the recovery and treatment of drug addicts[14], environmental protection associations[15], other types of cooperatives provided they are prevalently mutual, national and regional park authorities and, in the terms described below, third sector authorities[16].

The reference to the stakeholders (and the related functions attributed to them)[17] provides us with an initial important piece of information on the multifaceted nature of the reference system, which, at a first glance, suggests a high degree of complexity of the regulatory framework, defined by multiple sources, as pointed out by the legal theory[18]. Another factor to be considered is the influence of the contributions, not without a significant ideological imprint, that can determine individual regulatory changes, at different times, and that, in some cases, end up upsetting the delicate balance between

cooperation associations - but has also promoted and supported fundamental legislative initiatives on the subject. Or, on a different front, Avviso pubblico (avvisopubblico.it), an association involving local authorities and regions.
On the anti-mafia system in its various articulations, see the contribution from a sociological perspective by V. Mete, *La lotta alle mafie tra movimenti e istituzioni*, in M. Salvati & L. Sciolla (eds.), *L'Italia e le sue regioni (L'età repubblicana)* (2015), 306.
For an analysis of the different facets of the anti-mafia system please refer to S. D'Alfonso, *Liberi professionisti e mafie. Per un modello sistematico di contrasto* in S. D'Alfonso, A. De Chiara, G. Manfredi (eds.), *Mafie e libere professioni. Come riconoscere e contrastare l'area grigia* (2018), 11 ff. and S. D'Alfonso, *Professions in Italy: a Grey Area,* 8 Ital. J. Public Law 201 ff. (2016).

[12] Pursuant to article 48 (3)(c), of the Anti-Mafia Code.

[13] Law no. 381 of 8 November 1991.

[14] As referred to in the "Testo unico delle leggi in materia di disciplina degli stupefacenti e sostanze psicotrope, prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza", pursuant to Presidential Decree no. 309 of 9 October 1990.

[15] Recognised pursuant to Article 13 of Law no. 349 of 8 July 1986.

[16] Pursuant to Legislative Decree no. 117 of 3 July 2017, the so-called Third Sector Code, and Articles 8 and 12 of Law no. 266 of 11 August 1991.

[17] On which we will dwell in part below, insofar as it is of interest to us in relation to the topic at hand.

[18] Hereinafter recalled.

principles and instruments which, respectively, inspire and characterise the different regulations that coexist in the field[19].

The focus of this contribution lies within the space recognised by the legislature for administrative law, especially for functions and activities entrenched in proceduralised models. The specific toolbox must be considered, in particular, for preventive measures, in relation to the broader one that is intertwined with criminal law (the repressive scope of which has been strengthened over time), given the numerous links on the twofold substantive and procedural level. As has been observed, this is directly and formally subsumed by the choice made by the legislator to include the regulation concerning the ''administration of confiscated property in the same anti-mafia legislation, which is essentially criminalistic in nature''[20]. In reference to such relationship, if on the one hand, as has been pointed out, for certain aspects, in particular for the "jurisdictional procedure of prevention", there seems to be a "paradigm [of] ancillarity of the administrative activity of care and allocation of confiscated goods and

[19] On this point, for example, see the contribution by G. Torelli, *I beni confiscati alla criminalità organizzata tra decisione amministrativa e destinazione giudiziale*, 1 Diritto amministrativo 205 ff. (2018). The author highlights (§ 6) the relationship between seizure and confiscation, relating the former instrument to the "sole function" it would have of "depriving the individual of material wealth, so as to make him less strong in the eyes of the territorial community". This choice, however, ends up impacting on principles such as the "presumption of innocence, or the right to property of the person".
A further aspect noted in the legal theory, which helps to argue what has been affirmed, is given by the relationship between the exercise of the administrative function, in particular in the hands of the ANBSC, and the "jurisdictional events that take place both in the phase before and after the final confiscation. As M. Mazzamuto observes, *L'incidenza delle vicende "giurisdizionali" sulla destinazione "amministrativa" dei beni confiscati*, in M. Immordino & N. Gullo (eds.), *Diritto amministrativo e misure di prevenzione della criminalità organizzata* (2021), 92, we are in the presence of a much more complex picture than that which would be perceived from the simple reference to a public authority of the competences in matters of confiscated goods and properties. The issue had already been addressed by the same author in *L'Agenzia nazionale per l'amministrazione dei beni sequestrati e confiscati alla criminalità organizzata*, Diritto penale contemporaneo 1-58 (2015).
[20] See N. Gullo, *Emergenza criminale e diritto amministrativo. L'amministrazione pubblica dei beni confiscati* (2017), 128.

property with respect" to criminal and criminal procedure activities[21], on the other hand, the legal framework is completed through the institution of specific bodies[22], or with the reference to the provisions of administrative law[23], such as seizure and confiscation, which fall within the group of measures of asset prevention. The specific 'weight' that administrative law assumes has also been understood by legal theory in support of an interpretation that goes so far as to define the

[21] *Ibidem*, in view of the origin of the management phase of seized and confiscated property.

[22] The National Anti-corruption authority (Anac) and, more interestingly for our purposes, the ANBSC.
On the role of ANAC, see G. Gallone, in G. Gallone, A. G. Orofino (eds.), *Tra misure preventive e strumenti di contrasto: la via italiana all'anticorruzione*, 29 federalismi.it 85-87 (2020); G. Fidone, *I nuovi scandali, la creazione dell'Autorità Anticorruzione (ANAC) e l'aggregazione della domanda pubblica*, in M. Clarich (ed.), *Commentario al codice dei contratti pubblici* (2019), 26-29; G.M. Racca, *Dall'Autorità sui contratti pubblici all'Autorità nazionale anticorruzione*, 2-3 Dir. amm. 345 ff. (2015). On the establishment of the ANBSC, see the *Relazione annuale del Commissario straordinario del Governo per la gestione e la destinazione dei beni confiscati ad organizzazioni criminali* (2008), 164-165. Extra contributions include L. D'Amore, *L'Agenzia Nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati*, in P. Florio, G. Bosco, L. D'Amore (eds.), *Amministratore giudiziario. Sequestro, confisca, gestione dei beni, coadiutore dell'ANBSC* (2014), 697-803; A. Cisterna (ed.), *L'Agenzia nazionale per i patrimoni di mafia. Amministrazione e destinazione dei beni confiscati dopo l'entrata in vigore dei regolamenti* (2012). See also the work carried out by the Law group of the Fondazione del Monte, M. Cammelli, L. Balestra, G. Piperata, P. Capriotti (eds.), *Beni sequestrati e confiscati alla criminalità organizzata: disciplina, criticità e prospettive* (2015), 12-22.

[23] On the legal measure of confiscation, see G. Fiandaca, chapter *Misure di prevenzione (profili sostanziali)*, Dig. disc. pen. (in Leggi d'Italia) 23 ff. (1994); E. Nicosia, *La confisca, le confische. Funzioni politico-criminali, natura giuridica e problemi ricostruttivo applicativi* (2012), 13; D. Piva, *La proteiforme natura della confisca antimafia dalla dimensione interna a quella sovranazionale*, 1 Diritto penale contemporaneo 201-217 (2013); R. Alfonso, *La confisca penale fra disposizioni codicistiche e leggi speciali: esigenze di coordinamento normativo e prospettive di riforma*, in A.M. Maugeri (ed.), *Le sanzioni patrimoniali come moderno strumento di lotta contro il crimine: reciproco riconoscimento e prospettive di armonizzazione* (2008), 254 ff. On the nature of confiscation measures, in case law: Court of Cassation in joint session, 17 Dec. 2003, no. 920, 1st civil section of the Court of Cassation, 12 Nov. 1999, no. 12535; Criminal section of the Court of Cassation, 21 Jan. 1992, no. 250.

existence of a 'new segment of the legal system', having specific relevance to the 'criminal emergency'[24].

The main objective that state legislators place at the centre of the variegated, complex and transversal legal framework on confiscated property is the fight against mafia-type criminal organisations, pursued by acting on the assets of individuals; and in this, even with all the criticalities of constitutional harmonisation[25] and of the European Union system, the Italian regulations on the matter in question, when compared with those of other member states of the European Union itself, must be credited with having defined specific models of prevention and counteraction[26], acting on the individual

[24] See N. Gullo, *Emergenza criminale e diritto amministrativo,* cit. at 20, 47 (where this concept is first introduced and then analysed in detail).

[25] For example, in the relationship between personal criminal liability and associative offences. The presence of multiple constitutional criticalities is well known. We will dwell on some of them, especially the most determining ones in the reasoning pathways necessary for the framing of the issues of interest.
On the relationship between criminal law and the crime committed by an individual or by several persons as (differently) connected (e.g., *concorso esterno* - external aiding and abetting) with the criminal organisation, with reference to the "possible 'tensions' with constitutional principles" see *amplius* B. Romano, *L'associazione di tipo mafioso nel sistema di contrasto alla criminalità organizzata*, in B. Romano (ed.), *Le associazioni di tipo mafioso* (2015), 8 f. The reference is evidently to Article 27 (1) of the Constitution, hence to the relationship between personal criminal liability and the 'external profile', with the traditional limits of 'liability for the deeds of others'. The author unravels the specificities of the impact of Article 416-bis on the various criminal law fronts and dwells on external aiding and abetting, on which the contribution of case law is now well established. On this point, please refer to what has already been argued in S. D'Alfonso, *Liberi professionisti e mafie. Per un modello sistematico di contrasto* in S. D'Alfonso, A. De Chiara, G. Manfredi (eds.), *Mafie e libere professioni* (2017), 33-34. See also M. Ronco, *L'art. 416-bis nella sua origine e nella sua attuale portata applicativa*, in B. Romano & G. Tinebra (eds.), *Il diritto penale della criminalità organizzata* (2013), 86.

[26] For a detailed commentary on the regulations adopted by a significant number of European countries (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom), with particular reference to the procedures for seizure and confiscation, the bodies competent to intervene, timeframes and enforcement practices, see A. Di Nicola e B. Vettori, *Normative e prassi applicative in materia di amministrazione e destinazione dei beni confiscati negli Stati membri dell'UE: una mappatura* in S. Costantino, B. Vettori, A. Di Nicola. A. Ceresa, G. Tumminelli (eds.),

legal measures and in a systemic perspective[27]; this applies, for example, to: the double path chosen which sees the criminal confiscation flanked by the non-criminal one, like in Bulgaria, Greece, Ireland, the United Kingdom, Romania, Slovakia and Slovenia, and differently from the majority of the other countries; the sale by the ANBSC of the goods and properties being possible only in the case in which the allocation or the transfer for "purposes of public interest" has proved impossible (pursuant to Article 48 (5) of the Anti-Mafia Code), differs from what is provided for in most foreign legal systems[28] which, instead, mainly provide for the option of the sale[29]; the fact of having concentrated in the hands of a State body (precisely the ANBSC), the direct competencies for the adoption of measures for the allocation of assets while providing, at the same time, a functional application of the principle of subsidiarity which recognises among the direct or indirect recipients the territorial authorities, in particular the municipalities (ex Article 48 (3)(c) of the Anti-Mafia Code); the definition of specific terms within which the allocation must take place, indicated by a specific rule (provided for only by a few countries)[30], aimed at satisfying the need to consider and resolve the criticalities inherent in the relationship between the time required to make the intervention efficient and the risk of deterioration of the asset[31], with a

La destinazione dei beni confiscati alle mafie nell'Unione europea. Normative e prassi applicative a confronto (2018), 16-68; for a comparative analysis, in the same volume, see B. Vettori, *Normative e prassi applicative in materia di amministrazione e destinazione dei beni confiscati negli Stati membri dell'UE: un'analisi comparata*, 68.
In a more recent contribution, N. Gullo, *Il recupero dei beni confiscati tra restyling normativo e opportunità delle politiche di coesione e di attuazione del PNRR*, 1 Istituzioni del federalismo 72 (2022), defines as "sophisticated [the] management model of assets confiscated from mafias".

[27] With the exception of a few cases, which are recalled and expanded upon below.

[28] B. Vettori, *Normative e prassi applicative*, cit. at 26, 68. For a critical analysis of the different forms of confiscation and the critical issues resulting from 'rehabilitation' that we find in the 'national and international legal context', please refer to the recent in-depth study by A. M. Maugeri, *La riforma delle sanzioni patrimoniali (la confisca penale*), 10 Dir. Pen. Processo 1372 (2021).

[29] *Idem*, 69.

[30] *Idem*, 70.

[31] On this point, within a broader reasoning on the "difficult balance between protection and rehabilitation", on the negative effects in the allocation phase see N.

consequent impact also on the symbolic level[32] of the policies for preventing and combating mafia presence in the territory[33].

Each of these recalled profiles of our regulatory framework - on whose comparison with other legal systems insufficient attention has been paid so far by the legal theory[34] - is essential to understand the system built by legislators starting from the Law of 13 September 1982, no. 646 (so-called Rognoni-La Torre law). A critical analysis of the system must consider the interrelation between the individual legal measures and related application procedures, thereby satisfying the strongly felt need to interpret the individual measures also in the

Gullo, *La destinazione dei beni confiscati nel codice antimafia tra tutela e valorizzazione*, 27 Il diritto dell'economia 124-125 (2014).

[32] On which we will dwell below, *infra* § 2.

[33] Although, it should be noted, in Italy the overall time of proceedings is such that it negatively affects the preservation of assets. On this point, see the Government's Report to the Parliament *Relazione semestrale del Governo al Parlamento sui beni sequestrati o confiscati* (*Consistenza, destinazione ed utilizzo dei beni sequestrati o confiscati - Stato dei procedimenti di sequestro o confisca)*, June 2020, 3, available on the official website of the Ministry of Justice (website giustizia.it), and the *2020 Activity Report* of the ANBSC, cit. at 20. More recently, the Anbsc in its 2021 Report, pp. 36-38, commenting on a scientific university study, measured allocation times in relation to the resident population in an area. More specifically, times are longer in the case of assets in peripheral and rural areas than in central or industrial or commercial areas. In addition, looking at municipalities with a larger population, a lengthening of the timescale can be seen. On the other hand, it is interesting to note that the municipalities with the highest density of confiscated assets are those in which the timeframe for destination is shortened. This is explained by the experience gained in administrative procedures. For some reflections, see V. Martone (ed.), *Politiche integrate di sicurezza. Tutela delle vittime e gestione dei beni confiscati in Campania* (2020), 29 and 124-125; M. De Benedetto, *Rigenerazione e riuso dei beni confiscati: regole e simboli della legalità*, in F. Di Lascio, F. Giglioni (eds.), *La rigenerazione di beni e spazi urbani. Contributi al diritto delle città* (2017), 345 ff.
On the "structural and economic conditions of the assets" and the weight that these assume in the system of destination and management see N. Gullo, *Emergenza criminale*, cit. at 20, 558-559.

[34] On this point see, in a recent contribution, B. Vettori, *The Disposal of Confiscated Assets in the EU Member States: What Works, What Does Not Work and What Is Promising* in C. King, C. Walker, J. Gurulè (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (2018), 706. By the same author, see the earlier *Tough on Criminal Wealth. Exploring the Practice of Proceeds from Crime Confiscation in the EU* (Springer 2006). Consider also S. Costantino, B. Vettori, A. Di Nicola., A. Ceresa, G. Tumminelli, *La destinazione dei beni confiscati*, cit. at 26.

variety of interdisciplinary legal profiles. Thus, for example, the various instruments of an administrative nature, on which we will dwell here, must be correlated with those applicable following a conviction under criminal law for mafia organisation under Article 416-bis of the Criminal Code: among these is the obligatory 'confiscation' - in the case of "things that served or were destined to commit the crime and of the things that are its price, product, profit or that constitute the use" - or, more in general, as already ruled by the Constitutional Court recently, the "various juridical nature" that confiscation can assume, "in concrete terms", in application of single regulations of law and not as an abstract and generic figure[35].

The field of investigation is narrowed down here, in particular by looking at confiscation, while at the same time considering its close link with (prior) seizure and judicial administration[36].

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[35] This is the sense of the Constitutional Court sentence no. 29 of 9 June 1961, in which it stated that confiscation "may be ordered for various reasons and directed to various purposes, so as to assume, from time to time, the nature and function either of penalty, or of security measure, or also of civil and administrative legal measure". On this point see G. Napolitano, *La confisca diretta "per equivalente" del provento del reato* (2021), 52-54. The author, in observing how the words of the Court do not result "undermined by the elapsed time", defines "protean" the confiscation tool. See also G. Pistorio, *La disciplina della confisca nel dialogo tra Corti europee e giudici nazionali*, 8-9 Giur. it. 2068 (2009). On the definition of the legal nature of the institution of confiscation applied to persons suspected of belonging to mafia organisations, it has been affirmed that it could not be qualified as a penal sanction of a criminal nature, nor of prevention, while it would be ascribable to a tertium genus qualified by an administrative sanction. The relevant principles can be found in rulings of both the Constitutional Court and the Court of Cassation: Const. Court ruling of 8 October 1996, no. 335 (with a note by P.V. Molinari, *Una parola forse definitiva su confisca antimafia e morte della persona ritenuta pericolosa*, 2 Cass. pen. 1997, 334) and Court of Cassation in joint session no. 18 of 3 July 1996.

[36] Today governed by the Anti-mafia Code, which innovates on the previous regulations, assuming an applicative perspective of reference that tends to unify the regulations on the subject of personal and patrimonial measures of prevention, taking over as a single body of law following the abrogative provisions of Article 120 of the same Anti-mafia Code. On this point see M. Ronco (updated by M. Lombardo), Sub *art. 416-bis* in Dig. disc. pen. (in Leggi d'Italia).

For a concrete analysis of the articles of seizure and confiscation in reaction to the role played by judicial administrators and the current positioning in the Anti-Mafia Code with respect to these, see P. Florio, G. Bosco, L. D'Amore, *Amministratore giudiziario*, cit. at 22, 5-10.

The theoretical-general reconstruction of the subject must refer, as an initial regulatory premise, to the Anti-Mafia Code: to Article 45 and, above all, to the already mentioned Article 48, according to which, following final confiscation as a measure of prevention, the real estate is transferred to the State property, envisaging different allocations, resulting in specific procedures and assignment measures, which, inevitably, from a dogmatic point of view, cannot but be considered in relation to the traditional categories, especially those of public property.

From this point of view, it must be preliminarily pointed out that the administrative profiles on the subject in question, which at a first glance would seem to occupy the primary position, in consideration of the role and of the specific competences which the law attributes to a public authority such as the ANBSC, when better observed, must instead be collocated within a "much more complex framework (...)": it is sufficient, in primis, to think of the effects determined (in particular, in relation to the goods and properties) in the different jurisdictional phases, preceding and following the definitive confiscation[37].

This already shows how important it is for scholars to highlight and dwell on the link between the nature and effects of the different regulations on the management of assets, both in a broad sense and specifically on the relationship between certain legal measures pertaining to administrative law and, in part, to different frameworks.

2. National and European features of the emergency pre-condition and of the conversion of illegal economic networks into social purposes

The overall theoretical framework of the management and allocation of real estate assets needs a preliminary in-depth analysis of certain specific profiles that characterise the related legal measures, also in correlation with the main constitutional and EU reference principles.

[37] As also pointed out by M. Mazzamuto, *L'incidenza delle vicende "giurisdizionali"*, cit. at 19, 92.

There are two main macro-themes within which the reflection can be focused, namely the balancing of constitutionally relevant interests between legislative policy purposes and the practical application of the legal measures by entrusted institutions and proceduralisation, and the legal nature of seized or confiscated real-estate assets in the theory of public assets.

The first explanatory pathway that can be followed to clarify certain fundamental and general aspects requiring a more precise focus on the legal framework, regards the relationship between the objectives set out by legislative policy and the constitutional framework as a clear reference and condition of the regulatory thread. A necessary in-depth analysis concerns the legislative competence on the subject of confiscated assets and organised crime. The legislative competence lies exclusively in the hands of the State pursuant to art. 117 (2)(h), on the subject of 'public order and security'.

The Constitutional Court, with ruling No. 234[38] of 19 October 2012, makes explicit "reference to the allocation of assets and to the functions of supervision on the proper use of such assets by the assignees", in consideration of the assumption that confiscation is determined by the condition of incurring a cost for the "territorial communities" determined by the presence, or more correctly "emergency", of the mafia. The emergency character is also highlighted at an international level, in particular, by the UNODC (United Nations Office on Drugs and Crime), which recognizes the role

[38] As stated in the same year in Ruling No. 34 of 23 February 2012, discussed below. Other academic positions should also be considered. M. Mazzamuto, *Gestione e destinazione dei beni sequestrati e confiscati tra giurisdizione e amministrazione*, 2 Giur. it. (2013), § 2, which provides a different perspective, critically analysing the relationship between the criminal law system and the administrative regulation of the "management and (...) allocation of assets". In this case the connection with the jurisdictional activity is considered, to be included in the criminal system, regardless of the exact qualification of the confiscation. The same author observes how, on the contrary, constitutional case law is consolidated, having clearly stated the cardinal principles of the matter, referring, as previously indicated, to the matter of 'public order and security'. The reference is in particular to Constitutional Court ruling no. 246 of 24 July 2009, which confirms this principle by also recalling its previous case law. For a comment on the ruling see F. Di Dio, *Giustizia costituzionale e concorrenza di competenze legislative in materia di "tutela dell'ambiente e dell'ecosistema": dalla trasversalità alla "prevalenza" della competenza statale*, 6 Riv. giur. amb. 953 f. (2009).

of 'forerunner' (albeit, for us, dated) of the Italian legislation on the subject of "measures of patrimonial prevention"[39].

The State decides to avail itself of a regulatory framework rendering its actions legal in the face of illegally acquired economic resources by mafia-type groups, thus fighting their entrenchment – also social – through repression aimed at "re-establishing legality"[40].

[39] Unodc, *Digest of Organised Crime Cases, Annotated Collection of Cases and Lessons Learned*, New York, 2012 (website unodc.org). The Digest was produced in cooperation between the Italian and Colombian governments and Interpol. It deals with the issue of extended, *in rem* and non-conviction-based confiscation (97-102). Reference is made therein to the Albanian regulatory framework, which on these aspects similar to the Italian one.
As has been observed, A. Mangione, *Politica del diritto e 'retorica dell'antimafia': riflessioni si recenti progetti di riforma delle misure di prevenzione patrimoniali*, 4 Riv. it. dir. proc. pen. 1186 (2003), the Italian State, as well as European and international institutions, assume among the most demanding and difficult challenges "for the modern liberal democracies" the fight against organized crime. Starting from the increased awareness of an alteration of the 'civil, political and economic fabric', legislative policy choices are determined that move on multiple levels.

[40] The Constitutional Court, with ruling no. 234/2012, was called to rule on the constitutional legitimacy case raised by the Sicilian Region on Articles 45 (1), 47 and 48 (3) of the Anti-Mafia Code. With respect to the matters of constitutional relevance, the Court expressly reiterates what was stated in its previous rulings no. 34 and 35 of 23 February 2012. For a commentary see: A. Morelli, *Le conseguenze dell'invalidità: l'incererto ambito di applicazione dell'art. 27, secondo periodo, della l. n. 87 del 1953*, 1 Giur. cost. (2012), 439; see also G. Di Chiara, *Osservatorio Corte costituzionale - Gestione dei beni confiscati alle organizzazioni criminali e tutela dell'ordine pubblico: inesistente una potestà legislativa regionale*, 7 Dir. Pen. e Processo 807 (2012).
On a similar case, again with reference to Article 117(2)(h), consider the subsequent ruling no. 177 of 30 July 2020, concerning Apulia's Regional Law no. 14 of 28 March 2019 "Testo unico in materia di legalità, regolarità amministrativa e sicurezza".
For a more in-depth examination of the relationship between "public order and security", reference should be made to what has already been affirmed by the Constitutional Court, in rulings no. 6 of 13 January 2004 and no. 162 of 1 June 2004 (in particular, point 4.1 of the consideration in law), according to which these two elements must be considered at the same time.
On the specific point see L. Antonini, Sub art. 117, 2°, 3° and 4° co., in R. Bifulco, A. Celotto & M. Olivetti (eds.), *Commentario alla Costituzione* (2006), 2233. For a recent systematic treatment of the subject see L. Albino, *Ordine pubblico e sicurezza nello stato di democrazia pluralista* in A. Lasso & T H Sooon Hann (eds.), *Identity and Security* (2016), 45 f. and, in particular, 52-53, where, recalling the constant constitutional case

As already stated in 1996, with reference to Law 675, and then re-affirmed in 2012, the adoption of forfeiture measures in question and the consequences determined find their rationale in the definitive removal of an "asset from the 'economic circuit' of origin in order to insert it in another, free from the criminal conditioning that characterises the first"[41].

In view of the same concept of 'economic circuit', the joint criminal sections of the Court of Cassation, in ruling no. 4880 of 26 June 2014, also referring to sociological literature, highlight the distortion and contamination "of the ordinary competitive dynamics of the free market" caused by criminal organisations that direct their activities towards the accumulation of wealth of illicit origin[42]. To better clarify the point, it is useful to recall what the National Anti-Mafia and Anti-Terrorism Directorate observed in its 2019 Annual Report, according to which the relationship between illegal and legal activities must, in any case, take into account the persistence of 'conditions' of illegality[43].

law on the point, even dating back to previous rulings, he emphasises the non-conflictual distinction of the aforementioned elements.
For a broader reading of public security also in its relationship with public order see G. Pistorio, *Sicurezza (diritto costituzionale) (ad vocem)*, 7 Dig. disc. pubbl. § 3 (2021).
For further reconstructions, in which the constitutional case law of the time is reported, see also, G. Corso, *L'ordine pubblico* (1979) and by the same author *Ordine pubblico nel diritto amministrativo*, Dig. Disc. Public 438 f. (1995).

[41] Thus, the Constitutional Court in its ruling no. 335 of 8 October 1996. More recently, the Constitutional Court refers to this assumption in its ruling no. 21 of 9 February 2012 (in support of a different pathway of argumentation on the issue of confiscation against heirs). On this point, see the sidenote by F. Licata, *La costituzionalità della confisca antimafia nei confronti degli eredi: un altro passo verso la definizione della natura dell'actio in rem*, 1 Giur. cost. 240 f. (2012).

[42] The Court of Cassation in joint session affirms that the activities carried out by mafia groups are aimed at systematically accumulating wealth, through "intimidation, prevarication and the ability to infiltrate" administrations, institutions, as well as moving through the procurement system, "in defiance of the ordinary rules of competition". Therefore, the requirements set out in Article 416-bis (3) of the Penal Code are met.

[43] This is the broader formulation provided by the Dna (National Anti-Mafia Directorate) - albeit in a different argumentative context and with specific reference to the Camorra, but in any case, in our opinion, applicable in a broader sense - in the *Annual Report* 2019, 65, where reference is made to business networks that "heavily affect markets, where they transfer an extraordinary capacity to offer illegal or legal services, but on illegal terms".

The aim of these criminal groups is achieved within a system of relationships and through pervasive actions directed, in terms of the legal aspect hereby concerned[44], towards the external area of the organisations[45]. It is not only the origin that has to be considered but also the dynamic reflections of the 'social dangerousness of the subject' who has been found to belong to the mafia organisation and who would continue to hold the assets, which are precisely the object of the application of a forfeiture measure[46]. On this point, it is necessary to recall Article 18 (1) of the Anti-Mafia Code, pursuant to which the measures of asset prevention "can be requested and applied (...) independently of the social dangerousness of the subject being proposed for their application at the moment of the request for the

[44] A difference can be clearly noticed in the criminalistic approach, including the doctrinal and investigative-judicial one, pertaining to the so-called "internal side", where it is necessary to reflect on the configuration of the mafia association, but also for the mafia aggravating circumstance - ex Article 7 of Decree-Law no. 152 of 13 May 1991, converted into Law no. 203 of 12 July 1991, now provided for by Article 416-bis.1 of the Criminal Code (inserted by Article 5 (1)(d) of Legislative Decree no. 21 of 1 March 2018), external aiding and abetting (*concorso esterno*) and the special aggravating circumstances provided for certain offences - for example: Article 387 of the Criminal Code, which regulates aiding and abetting and provides, in paragraph 2, for a specific penalty "when the crime committed is that provided for in Article 416-bis. For a commentary, see B. Romano, updated by M. Schiavo, *Sub art. 378*, Dig. Disc. Pen. § 6 (2021).

[45] As is now established in legal theory through argumentative pathways that see the legal sciences intersect with those of a sociological and historical matrix. On the external projection of mafias, see C. Visconti, *Contiguità alla mafia e responsabilità penale* (2003). On the relationship between the criminal rule defining mafia organisations and related relationship with meta-legal concepts that are explored in the historical and sociological literature see G. Amarelli, *La contiguità politico-mafiosa* (2017), 14 ff.

[46] Again, according to the Court of Cassation in joint session cited above. Furthermore, on the point, in the sphere of the clarification argued by the abovementioned Court in comparing the generic dangerousness with the so-called qualified dangerousness, the Court focuses on the hypothesis of the evaluation of a dangerousness that is expressed by the relation between "asset components" of illicit origin of which the proposed person does not justify the possession and "the entire (criminal) pathway". For an in-depth study also with reference to the case law of the Edu Court, see M. Maugeri, *Una parola definitiva sulla natura della confisca di prevenzione? Dalle sezioni unite spinelli alla sentenza Gogitidze della Corte edu sul Civil Forfeiture*, 2 Rivista italiana di diritto e procedura penale § 7 (2015).

preventive measure"; therefore, in consideration of the temporal correlation between the social dangerousness and the acquisition of the assets to be confiscated. In this regard, reference should be made to the Court of Criminal Cassation, VI section, ruling no. 10153 of 18 October 2012, which frames the issue in constitutional terms. In particular, the Court states how the need to remove from the availability of the person "illicitly accumulated assets" whose "legitimate origin" is not demonstrated must be considered in relation to the provisions of Articles 42 and 41 of the Constitution, on the protected rights of property and economic initiative that "may be limited respectively in a social function" and "in the interest of the security needs of the general utility"[47]; this issue has been addressed in these terms, albeit with reference to different regulations, even by the Constitutional Court in previous rulings[48].

This can also be linked to the "effects of definitive confiscation as preventive measure" and to the regulation of asset allocation and of the functions related to the oversight activity on obligations sworn by assignees with regards to «correct use». As stated by the Constitutional Court[49], the competency to make laws in this realm lies with the State, as this issue is a public order one.

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[47] On this point see the critical considerations developed in the sidenote of the ruling by A.M. Maugeri, *Un'interpretazione restrittiva delle intestazioni fitttizie ai fini della confisca misura di prevenzione tra questioni ancora irrisolte* (*natura della confisca e correllazione temporale*), 1 Cass. Pen. 256 ff. (2014). The author, moreover, at 271, dwells on the role of legislators, on the discretion they are called upon to exercise, and to which the Court of Cassation refers; this function, as noted in this work, is always relevant in a difficult "regulatory context" subject to frequent tensions in the balancing of constitutionally protected interests. See also E. Mengon, *Confisca di prevenzione e morte del titolare: la pericolosità al momento dell'acquisto del bene*, 9 Cass. pen. 3203 ff. (2013), commenting on the same ruling.

[48] Reference is made to Order no. 721 of 22 June 1988, by which the Constitutional Court declared clearly inadmissible the question of constitutional legitimacy, raised with reference to Articles 41 and 42 of the Constitution, of Art. 2-ter, third, fourth and sixth paragraphs, of Law no. 575 of 31 May 1965, as amended and supplemented by Art. 14 of Law No. 646 of 13 September 1982, in the part in which it does not permit the confiscation of assets of illicit origin in the hypothesis of non-application of the personal preventive measure and of termination of the same for death of the offender.

[49] With aforementioned ruling no. 234 of 2012.

On this last aspect, the legal theory has underlined the presence, we could say, of a hendiadys that synthesizes "the policy of fighting against organized crime" in the "two inseparable dimensions" of the subtraction of goods and properties from mafia "influence" and of the subsequent "reconversion to forms of social use"[50] whose regulation also falls within the matter of 'public order'[51].

The legislation on the confiscation of real estate determines, therefore, effects on the territories and of different types. It should be noted, incidentally, echoing what was published in the ANBSC Report, how, aside from substantial effects, legislators have also considered those of a symbolic nature[52]. This must be taken into account, for example, by looking at the territory where the property is located, whether traditionally mafia-related[53] and where the person has operated; or, when the reference is to 'other' territories[54]. The symbolic side is indispensable in consideration of the relationship between

[50] See N. Gullo, *La destinazione dei beni confiscati nel codice antimafia tra tutela e valorizzazione*, cit. at 31, 60.

[51] *Idem*, on this point a previous reflection of the same author is hereby recalled, *Il procedimento di destinazione dei beni confiscati alla mafia: aspetti problematici della normativa vigente e prospettive di riforma*, Il Foro. it. 72 ff. (2003).

[52] On the role of the "so-called symbolic function", see in administrative theory M. Mazzamuto, *Gestione e destinazione*, cit. at 38, § 3. From the same author on this topic, consider the critical analyses developed in *L'agenzia nazionale per l'amministrazione e la gestione dei beni sequestrati e confiscati alla criminalità organizzata*, www.penaleceontemporaneo.it 38-39 (11 December 2015). In this work, reference is made to the relationship between the "so-called symbolic function", the favour of local authorities in view of the restitutive purpose to the community (corroborated by the aforementioned Constitutional Court ruling no. 34/2012) and the actual ability of the authorities themselves to be vulnerable to mafia infiltration and the consequent risks of negative effects on the symbolic level.

[53] On the control of territories, "especially in certain socio-cultural contexts", see N. Gullo, *Emergenza criminale*, cit. at 20, 35-36.

[54] Truth be told, to an increasingly lesser extent, considering the ascertained mafia presence in many regions deemed 'non-traditional' - where the investment of mafia capital is 'delocalized' with respect to the place of settlement. The Corte dei conti, Sezione centrale di controllo sulla gestione delle amministrazioni dello Stato, also intervenes on this point in its Report *L'amministrazione dei beni sequestrati e confiscati alla criminalità organizzata e l'attività dell'Agenzia nazionale (ANBSC)* of 2016 (p. 62), in which, while stating the "strong symbolic value" of the confiscation of assets, it underlines the erroneous representation of some territories as immune from mafia pervasiveness.

mafia criminal activities and the social context (also in contrast to the myth of 'invincibility' with which mafia groups pride themselves)[55], or insofar as it is directly connected to this, also economic and institutional. On the other hand, as can be deduced from criminal court cases – referred to expressly and constantly by the parliamentary anti-mafia committees of previous legislatures[56], as well as the ANBSC, in cooperation with other authorities[57] – the symbolic element is evoked several times, and to this the legal theory also draws attention by highlighting its characteristics and purposes: for example, grasping its "educational function oriented towards the transmission of the value of legality and its superiority"[58] or containing its teleological scope by qualifying it among the ends-means "subservient to the only end really pursued [...] public order"[59].

This is, moreover, taken into account when making regulations, so when the state legislature enhances the role of the private social sector in the direction of social goals, in order to give concreteness to

[55] As stated in N. Gullo, *Emergenza criminale*, cit. at 20, 569.

[56] Recently, in 2021, *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati* (Report on the analysis of the procedures for the management of seized and confiscated goods), 3.
See also the *Relazione sulle prospettive di riforma del sistema di gestione dei beni sequestrati e confiscati alla criminalità organizzata*, approved by the Anti-Mafia Parliamentary Committee of the 17th Legislature in its sitting of 9 April 2014, p. 14 and 32, in which reference is made to the social rehabilitation of confiscated property as a "symbol of legality and civil rebirth" and to the "symbolic value of confiscation".

[57] Reference is made to the Agency for Territorial Cohesion and to the Ministry of Economy and Finance, the State General Accounting Office and the General Inspectorate for Relations with the European Union and, in particular, to the document *National Strategies for the Rehabilitation of Confiscated Properties Through Cohesion Policies*, 2018. In the identification of the purposes to which reference should be made when defining the "forms and modalities of real estate use" there is an explicit focus (p. 23) on the 'symbolic profile', as precisely an 'end' to be considered in opposition to "customary practices" consolidated over time in territories subject to criminal control.

[58] In the sense of the educational function oriented to the transmission of the value of legality and its superiority see S. Pellegrini (ed.), *La vita dopo la confisca. Il riutilizzo dei beni sottratti alla mafia* (2017), 25.

[59] M. Mazzamuto, *Gestione e destinazione dei beni,* cit. at 38, § 2.

the management activity with a consequent contribution on the symbolic level[60].

Similarly, it has recently been decided to enhance this profile in the context of actions aimed at defining investments and the implementation of interventions under the National Recovery and Resilience Plan (NRRP)[61]. In fact, specific weight was given to the 'symbolic value' of confiscated assets when selecting projects to be assessed for specific and significant funding[62].

Even in the local context we find similar interventions that take the form of the exercise of regulatory power by municipalities, which (optionally) intervene on the subject of confiscated property[63].

The European side provides us with a number of significant references that are worth considering. More recently, a significant intervention was given by the ruling of the European Court of Human

[60] As noted in legal theory, N. Gullo, *Emergenza criminale*, cit. at 20, 538, the involvement of the "social private sector" that determines favourable effects for the community on the territory re-asserts the authority of the State, with the consequent erosion of the social consensus of criminal groups. The ANBSC also points out that the interest to be satisfied is symbolic. Thus, in its *Activity Report - Year 2020*, p. 13 (viewable at benisequestraticonfiscati.it).

[61] Reference is made to the "Public Notice for the submission of proposals for the selection of projects for the rehabilitation of confiscated properties to be financed under the NRRP, Mission 5 - Inclusion and Cohesion- Component 3 - Special interventions for territorial cohesion- Investment 2 - Valorisation of assets confiscated from mafias financed by the European Union- Next Generation EU".

[62] Alongside features such as size, sustainability and development prospects.

[63] The municipal regulations adopted provide, in fact, for the obligation of the person receiving the asset in concession to display, outside the same assets, a plaque indicating expressions such as 'property confiscated from the mafia, or from crime, acquired by the Municipality'.

It is worth noting that it is not compulsory in the legal system for municipalities to adopt regulations on the allocation and management of confiscated property. However, how such adoption is urged by several parties. It is worth noting, in particular, the observation of the Parliamentary Anti-Mafia Committee in the *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, in particular p. 388 and 400-401: therein the indispensability of the municipal regulations is affirmed, as a tool "necessary to implement the principles of equality, impartiality, publicity, sustainability and transparency". On this point see P. Pastorino, *Pubblicazione del modello di Regolamento sul trattamento dei beni confiscati alla criminalità*, 24 June 2020, in legalitaincomune.it.

Rights[64], 22 February 1994, no. 281. Although in the presence of a different regulatory framework, in analysing the two different measures of seizure and confiscation, the ECHR linked "the general interest", the "extremely dangerous economic power of an 'organisation' such as the mafia", "the difficulties encountered by the Italian State in the fight against the mafia", the relationship between "illicit activities, particularly "drug trafficking", the investment of accumulated capital and "international relations". In view of this general framework, the Court goes so far as to affirm that "confiscation constitutes an effective and necessary weapon" that legitimately accompanies seizure[65].

On this issue, European institutions have repeatedly and differently intervened over the last thirty years[66], starting from the adoption by the Council of Europe of the Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990[67]. After the Council Framework Decisions 2001/500/JHA and 2003/577/JHA on money laundering, seizing and confiscation of instrumentalities and the proceeds of crime, Framework Decision 2006/783/JHA is approved on the application of the principle of mutual recognition to confiscation orders. This is the first EU measure entirely dedicated to the disposal of confiscated property, including regulatory instructions (Article 16) on the transfer of such assets[68]. Looking at the regulations adopted by different EU

[64] The relevance of which is also proven by the special attention paid to it by the legal theory.

[65] Point 30 of the consideration in law.

[66] For a more in-depth analysis, see B. Vettori, T. Kolarov, A. Rusev (eds), The RECAST Report– *REuse of Confiscated Assets for social purposes: towards common EU Standards* (2014). The report includes the results of comparative research between EU states on the subject of confiscation and confiscated assets.

[67] The Strasbourg Convention (8 November 1990) states in the Preamble that for the attainment of a common criminal policy a well-functioning system of international co-operation must also be established. The adoption of legislative and other measures to confiscate instrumentalities and proceeds or property is one of the first objectives set out in article 2.

[68] In particular, pursuant to article 16 (2) of the aforementioned Framework Decision 2006/783/JHA, "Property other than money, which has been obtained from the execution of the confiscation order, shall be disposed of in one of the following ways,

States[69], it should be noted that, despite the introduction of various measures in the Framework Decision, according to the 2014 Recast Report, in EU Member States sale represents the primary choice[70], often within a procedure that guarantees the restitution to victims or their families.

More recently, the European legislator has acted with Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. The third 'whereas' of this regulation states that confiscation is among the most effective means of combatting crime and that the EU is committed to ensuring the re-use of criminal assets in accordance with The Stockholm programme – "*An open and secure Europe serving and protecting the citizens*" of 2010[71].

Within this regulatory framework, which as has been observed has failed to produce "common reference models"[72], Italy is the only EU Member State where the most frequently adopted measure is the re-use of confiscated assets, with symbolic value, through the allocation of the same assets[73].

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to be decided by the executing State: a) it may be sold, and proceeds of the sale shall be disposed of in accordance with paragraph 1; b) transferred to the issuing State. If the confiscation order covers an amount of money, the property may only be transferred to the issuing State when that State has given its consent; c) when it is not possible to apply (a) or (b), the property may be disposed of in another way in accordance with the law of the executing State".

[69] Contributions in legal theory include: B. Vettori e B. Misoski, *Social reuse of confiscated assets in the EU: current experiences and potential for its adoption by other EU and non-EU countries*, in *Liber amicorum. Studia in honorem academici Vlado Kambovski septuagesimo anno* (2019), 721-738; B. Vettori, *The disposal of confiscated assets in the EU Member States: what works, what does not work and what is promising*, in C. King, W.C. Walker, G.J. Gurulé (eds.), *The Palgrave handbook of criminal and terrorism financing law* (2018), 705-733.

[70] On this point, see the Recast Report, cit. at p. 20. For further details, see project-payback.eu on the creation of a European data management system for confiscated assets.

[71] Available online at eur-lex.europa.eu/legal-content.

[72] See N. Gullo, *Il recupero dei beni confiscati*, cit. at 26, 73-74.

[73] *Idem*. On this topic, the United Nations Office on Drugs and Crime (UNODC) performed, together with the Calabria Region, a study on the use of confiscated assets in Italy whose results were published in the Report "*The Italian experience in the*

It can be observed how the symbolic value (or impact on the general public) of property, especially with real estate, takes on a different meaning as in certain cases it manifests itself markedly whereas in other instances it does so only to a lesser extent or more marginally. As a consequence, this would require drawing a difference in terms of rehabilitation. This topic has been on the agenda of the Parliamentary Anti-Mafia Committee[74] and found operational space in the actions performed by the ANBSC[75].

3. Antimafia legislation, confiscated assets and general provisions of administrative law: critical aspects

The subject of confiscated real estate, particularly in terms of its allocation, interpreted in relation to the provisions of administrative law and to the constitutional system, is affected by a legislative policy approach which has strongly proposed to support anti-crime action, opposing mafia through prevention and repression, starting from criminal law and reaching a point relevant to administrative law[76], leading to dubious overlaps, and even potential conflicts between administrative and judicial power[77].

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management, use and disposal of frozen, seized and confiscated assets", Vienna, 2 September 2014. In p. 13-14 and 18 of this report clear reference is made to the centrality of the symbolic meaning of reusing confiscated assets in practical cases in Italy.

[74] In the abovementioned *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, 161, the Parliamentary Anti-Mafia Committee calls for the identification of those who are actually such and can therefore be valorised; this task should fall to the director of the ANBSC, and further action should be taken in the accreditation procedures.

[75] On "exemplary assets" to be rehabilitated, the ANBSC has implemented actions. The issue falls within the space of the "National Strategy for the Rehabilitation of Confiscated Assets Through Cohesion Policies". See *Activity Report – Year 2020*, p. 27 f.

[76] See M. Mazzamuto, *Gestione e destinazione*, cit. at 38, § 1.

[77] See the thorough argumentations of N. Gullo, *Emergenza criminale e diritto amministrativo,* cit. at 20, 566 f. who, referring in particular to temporary destination, highlights, expanding on the critical issues already noted by M. Mazzamuto, *L'Agenzia nazionale per l'amministrazione dei beni sequestrati e confiscati alla criminalità organizzata*, Diritto penale contemporaneo 15 (2015), reflects on the power exerted by

While on the one hand public-interest aims are undoubtedly pursued at theoretical level - also in the previously mentioned 'all-inclusive' sense of public order, social instances and re-use, as well as ethical and cultural purposes -, significant dysfunctions and certain inconsistencies emerge from the analysis of the regulatory framework in its different applications and these cannot be ignored when performing an in-depth theoretical study.

In order to substantiate this assertion, it is useful to focus on the effects of the choices made by legislators when defining certain legal measures. An example is the regulation of the phase between seizure and confiscation, when real estate tends to lose value, causing particular difficulties that impact on its subsequent reuse, an issue which can only be addressed through a burdensome financial and administrative commitment. This is one of the most critical issues highlighted in empirical observation, which is also reflected in the political-administrative will of potential recipient entities. As observed in several institutional fora, most recently by the Anti-Mafia Parliamentary Committee, "the dramatic shortage of funds at their disposal prevents (or at least significantly hampers) municipalities' ability to exploit or even to ask for the allocation of confiscated assets or their provisional assignment"[78]. On the other hand, as pointed out,

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the ANBSC with respect to the jurisdictional function - when this body is entrusted with the function of proposing to the judicial authority the adoption of measures deemed necessary to optimise the use of the asset "with a view to its destination or allocation" -, on the other hand, the judicial authority, in application of Article 11 (2)(b), expresses "an assessment [...] on the methods of allocation within the competence of the ANBSC". As observed by N. Gullo, *Emergenza criminale e diritto amministrativo*, cit. at 20, p. 568, this means 'entering into the context of evaluations that are a primary manifestation of administrative discretion concerning the pursuit of public interests, an unquestionable prerogative of the public administration'. This would constitute a generalisation provided for by the Anti-Mafia Code, which would be reprehensible from a constitutional point of view precisely because it would undermine the principle of separation of powers of the State. For a commentary on Article 110 of the Anti-Mafia Code see A. Cisterna, in G. Spangher & A. Marandola (eds.), *Commentario Breve al Codice Antimafia e alle altre procedure di prevenzione* (2019), 422-427.

[78] In 2021, in the Report on the Analysis of the Procedures for the Management of Seized and Confiscated Assets, cit. at 56, p. 302.

precisely on the subject of real estate, the Anti-Mafia Code itself, despite a detailed regulation on the subject, makes no provision for the rehabilitation of assets. More recently, these assessments have been confirmed in the 2021 Annual Report of the Anbsc[79]. For this specific aspect, as well as for other critical issues concerning the matter - e.g. insufficient technical-administrative capacity of public administrations, quality of confiscated assets or technical-urban peculiarities such as, for instance, illegal constructions and, finally, the impact of the mafia presence in the territory[80] — attention has also been paid from a de iure condendo perspective, analysing critical issues and proposing revisions to the relevant legislation. It would be up to the Parliament of the 19th legislature, which has just begun, to reconsider these needs[81].

A further critical aspect is given by the insufficient implementation of the rule of the Anti-Mafia Code[82] that imposes on local authorities the obligation[83] to form a list of the confiscated assets that have been transferred to them, to be updated monthly; this list must be published on the institutional website of the same recipient authorities, and must contain specific data concerning: "the consistency, destination and use of the assets as well as, in the case of

In the same report, there is a focus on public financial support and the criticality of relations with the banking system (p. 120-138).
An entire paragraph is also dedicated (p. 139-155) to ordinary, national and regional resources, to the financial instruments of Law No. 208 of 28 December 2015, (Article 1, paragraphs 195-198), to European funds and cohesion policies, and, finally, to the National Recovery and Resilience Plan (NRRP). This issue is also addressed in the Vademecum annexed to the Report (p. 320, 339), produced by Prof. Stefania Pellegrini of the Alma Mater University of Bologna.

[79] Submitted in August 2022 (available on the website benisequestraticonfiscati.it), cit. p. 35. Among the causes of criticality is the insufficiency of "financial resources for the repurposing of assets".

[80] *Ibidem*.

[81] The Anti-Mafia Committee itself, at several points in its detailed Report, cited above, proposes hypotheses for regulatory revision (e.g., p. 157). We can also find such activity in the work carried out by the ANBSC, which in its Report for the year 2021, cit. at 33, p. 45-47, also refers to those actions that have been reflected in the most recent regulatory interventions.

[82] Art. 48 (3).

[83] The provision expressly refers to Article 46 of Legislative Decree No. 33 of 14 March 2013. Failure to publish the list entails managerial responsibility.

assignment to third parties, the identification data of the concession holder and the details, object and duration of the contract of concession". As recently pointed out in detailed research on the relationship between confiscated goods and transparency, the data show a discouraging lack of attention on the part of territorial authorities[84], with obvious repercussions on access to information.

Generally, the question arises as to the extent to which the ideal, if not ideological, profile that inspires legislative activity affects the concreteness of administrative action and of the rules legitimising the exercise of administrative functions themselves; the relationship between the choices made and the constitutional principles of reference must therefore be considered.

First of all, two spheres of applications must here be considered and kept distinct within the regulation of confiscated assets: the allocation (in general and in particular for social purposes) and the (alternative measure of) sale.

With respect to the former, it is not a mere speculative exercise to respond to requests for clarification as to the possibility of classifying the confiscated asset as a non-available asset and, as provided for by the law, adopting the consequent measures, including for example the assignment of the asset "on the basis of a specific agreement" (as provided for by the Anti-Mafia Code)[85]. Of particular relevance for our purposes is the impact from the point of view of

[84] In summary, 63.5 % of municipalities do not publish the list, as noted in an important work of monitoring and critical interpretation of the data, in *Libera. Associazioni, nomi e numeri contro le mafie* (authors R.C. Falcone, T. Giannone, G. Illustrazione, L. Mennella), Fondazione Gruppo Abele (L. Ferrante), Department of culture, politics and society of the University of Turin (V. Martone), Rimandati. *Secondo Report Nazionale sullo stato della trasparenza dei Beni confiscati nelle amministrazioni locali* (2022), 14 (https://www.confiscatibene.it/rimandati_2022).
In numerical terms, out of 1073 municipalities monitored, 392 have published this list. But even these, to a large extent, have done so incompletely, failing to comply with the requirements of the Anti-Mafia Code. The same can be said of the other monitored entities (provinces, metropolitan cities and regions).
For an in-depth study of the subject, see U. Di Maggio, G. Notarstefano, G. Ragusa, *Re-cognising Confiscated Assets*, in R. Ingrassia (ed.), *Economy, criminal organisations and corruption* (2018), 157-174.
[85] Art. 48 (3)(c).

administrative law and the relationship with certain traditional classifications.

The question, which recurs frequently in the scholarly debate, is whether and in what way the asserted specialty of the anti-mafia legal framework (deriving from the axiom of emergency)[86] justifies some 'twistings' and the consequences these entail in the relationship between different institutions. This is also because one must not shy away from evaluating, on a theoretical level, the extensibility of regulations without a prior clarification of the reference criteria. One must ponder whether the aforementioned argument of the mafia criminal emergency is sufficient to justify some dogmatic impositions and, in any case, whether a greater attention by legislators is not desirable, in order to better respond to the needs of balancing the constitutionally protected interests and so as to avoid uneven clustering of measures, which also have an impact on rights and on the distribution of powers within the State[87].

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[86] With respect to this particular 'emergency' aspect, to further argue what has been elaborated above in § 2, it is worth emphasising certain reflections proposed by administrative and criminal law doctrine. Here, we shall report only two significant points of view. The first reference is to N. Gullo, *Emergenza criminale e diritto amministrativo*, cit. at 20, p. 550-553, who after broad arguments of general scope and their more specific repercussions on "antimafia law" summarises in the expression "administrative law concerning the criminal emergency and the administration of confiscated goods" a process of maturation and "transformation of administrative law in parallel with the expansion of economic criminal law" (p. 547-548). From a criminal law perspective see V. Militello, *La "lotta" alla criminalità organizzata*, 2 Rivista Italiana di Diritto e Procedura Penale 779 (1 June 2020). The author - in a wide-ranging work that also describes the anti-mafia legal framework 'undergoing the DNA test represented by the criminal law of the enemy' (791 ff.) - dwells critically on the feature of the emergency, which is in reality stabilised, reconstructing its regulatory references with an approach that is also historically based. It is interesting to observe how the frequent use of emergency decrees (p. 780, nt. 12) is a first eloquent indicator (p. 784).

[87] The considerations developed in the critical conclusions of the wide-ranging and articulate work by N. Gullo, *Emergenza criminale e diritto amministrativo*, cit. at 20, 571, are relevant in this sense. The author points out how the experimentation of 'legal models' is sometimes marred by 'normative approximation, technical legislative superficiality' with repercussions on 'administrative action'. Regarding the contribution of scholars, in particular administrative law scholars, the author calls for a necessary in-depth study of these issues, also in support of the *de iure condendo*

One of the issues that has long been the subject of in-depth discussion concerns the rights that the legal system recognises to the person in charge of seizure and confiscation. Legal theory dwells on such rights, establishing a relationship between criminal law and procedure, and administrative law[88].

Prior to analysing the allocation of confiscated real estate for social purposes, we must mention a different, alternative option, the alienation of assets, in order to clarify its prerequisites. These must also be considered because of their relevance in terms of administrative law (which intersects with civil law), and of the consequences for the legal nature of confiscated assets. Again, we find ourselves, *mutatis mutandis*, within the same loop - criminal emergency, economic circuit and illicitly acquired assets, restoration of legality and restitution, ultimately, directly to the public.

The body in charge, the ANBSC, is vested with a discretionary power differently delimited in time, with not only formal but also substantial effects that are not to be underestimated. The legal system provides for the exercise of the power of alienation of property only by the State and in respect of specific conditions, among which the most significant one is avoiding that the property may, in the future, be directly or indirectly attributed to the person in charge of the procedure, but also to recipients of legal measures that link them to

perspective. The need to develop such specific support on a scientific level equally takes into account the contributions of criminal law and private law scholars.

[88] On this point, please refer to: M. Mazzamuto, *Gestione e destinazione*, cit. at 38, § 5.1 on seizure and non-definitive confiscation § 5.3; M. Mazzamuto, *L'Agenzia nazionale*, cit. at 77, 53. For a critique on the complexity of the confiscation system see A. Macchia, *Le diverse forme di confisca: personaggi (ancora) in cerca d'autore*, 7-8 Italian Supreme Court – Criminal Section 2719 (2016). See also G. Torelli, *I beni confiscati alla criminalità organizzata,* cit. at 19, §1, which critically investigates the legal arrangements of seizure and confiscation under the Anti-Mafia Code in their relationship with the sentences of criminal trials, considering the jurisprudential evolution on the matter.

On this point, from a *de iure condendo* perspective, see the Parliamentary Anti-Mafia Committee, *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, 260, intervening on the issue of different classifications of danger - citing the recent Constitutional Court judgment of 24 January 2019, no. 24, with case note by C. Forte, *La Consulta espunge dal sistema le misure di prevenzione nei confronti dei soggetti "abitualmente dediti a traffici delittuosi"*, ilpenalista.it (March 28th 2019).

mafia crimes; it must be said, though, that the instruments currently foreseen do not appear suitable to effectively avoid this occurrence[89].

A further limitation is the inalienability of the asset in the following five years[90].

As a last resort, an ex-post intervention is envisaged, as the Anti-Mafia Code provides for a dispensation from the assignment and destination order in the event that the asset should be returned "to the availability or under the control of the person subject to the confiscation order" through a third party (where legislators have recently provided for the specific competence of the Agenzia del demanio, the State Property Agency redefining an important new distribution of the management function)[91].

[89] On this subject, see the critical remarks of the Parliamentary Anti-Mafia Committee in its *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati,* cit. at 56, 41, according to which "the anti-mafia certification does not appear sufficient, as it would have been preferable to provide for more thorough asset investigations on potential purchasers, also to verify the lawfulness of the funds used for the purchase".

[90] Pursuant to Article 48 (5) of the Anti-Mafia Code.

[91] Article 48 (15) of the Anti-Mafia Code. More recently, legislators, through Article 60-bis (1)© of Law Decree No. 77 of 31 May 2021, converted with amendments by Law No. 108 of 29 July 2021, established that in the event of revocation of the destination, the ANSBC will take possession of the asset, evaluating the possibility of its subsequent destination. In the event of a negative outcome, the asset will be kept as State property. The relevant management responsibilities will fall to the *Agenzia del demanio* (Italian Public Property Agency). The relevant paragraphs of the mentioned Article 48 are 15-*quater* and 15-*quinquies* - introduced, respectively, by Articles 36 (1)(g) of Law Decree no. 113/2018 and 60-*bis* (1) of the abovementioned Law Decree no. 77/2021. For a recent reflection on the 'historical transitions' induced over time by the 'political will' to reshape the relationship between ANSBC and *Agenzia del demanio* (Italian Public Property Agency) in terms of ordinary management of confiscated property, see N. Gullo, *Il recupero dei beni confiscati*, cit. at 26, 80-81. The author dwells on the role that would be assumed by the Agenzia del demanio, which, in light of the current regulations, would be responsible for functions such as the adoption of measures to recover and rehabilitate the confiscated assets themselves - including also "their urban regularisation" (as known, a high impact critical point) -, and then, according to the current regulations, the allocation to local authorities and to the various social actors who are potential recipients under the Anti-Mafia Code.

These conditions fulfil a very specific requirement, which also, *a contrario*, includes the symbolic aspect, since every possible care must be taken to prevent goods from re-entering the illegal economic circuit.

The field of observation must, however, be expanded, since the sale of confiscated real estate to private parties would be applicable at the administrative level once various other avenues have been unsuccessfully pursued, such as: the retention of the asset by the State or local and territorial authorities, the transfer from the ANBSC, the concession to a series of subjects for different purposes, essentially social, but also for profit[92] whose proceeds would be allocated to social purposes or to the maintenance of assets whose management has the same purposes. The balance of interests chosen by legislators also entails the sale, for example, in the event that this leads to 'a greater utility for the public interest or if [...] it is aimed at compensating the victims of mafia-related crimes'[93].

4. Legal nature of confiscated assets allocated to social purposes and theoretical principles of public assets: general framework and critical reflections

The phrase 'property confiscated from organised crime'[94] refers to those assets that have already 'passed' the seizure procedure - inspired by the logic of safekeeping, preservation and, where possible, increased profitability[95] - and now enter the confiscation phase, heading towards the reintegration of the asset into the legal circuit. Both periods, seizure and confiscation, fall within the broader judicial

[92] If they could not be assigned through procedures open to public scrutiny.

[93] The above is provided for in Article 48 of the Anti-Mafia Code. On this point, see the ANBSC *Activity Reports for the year 2020* (*Relazioni dell'ANBSC sull'attività svolta dell'Anno 2020)*, cit. at 20, 10 (which mentions the impact on the matter of Law Decree no. 113/2018 on the Anti-Mafia Code with particular reference to the sale) and for the year 2017.

[94] First used in Law no. 646 of 13 September 1982 (the so-called Rognoni-La Torre Law).

[95] The period of seizure, pursuant to Art. 24 (2) of the Anti-mafia Code, lasts one year and six months from the date of the court-appointed administrator's entry into possession, barring extensions of six months for no more than two times. Concerning the logic that inspires the regulation of preventive seizure, see, among others, P. Florio, G. Bosco, L. D'Amore, *Amministratore giudiziario*, cit. at 22, 55-73.

phase, and after the definitive confiscation sentence, flow into the so-called administrative phase[96], where the task of administering and managing the assets is entrusted to the ANBSC, which also becomes the subject holding the power of allocation.

One of the main points of attention is the legal nature[97] of the assets confiscated from organised crime, which, under Article 48 of the Anti-Mafia Code, may be movable, immovable or corporate[98]. For our

[96] A combined reading of Art. 110 (2)(d) and Art. 44 (1) of the Anti-Mafia Code reveals that this task and this role are entrusted to the ANBSC as of the moment the confiscation decree is issued by the court of appeal. For the sake of completeness, we must say that within the judicial phase one can distinguish three sub-phases: the first, from the seizure to the (possible) first-degree confiscation; the second, from the first-degree confiscation to the (possible) second-degree confiscation; the third, from the second-degree confiscation to the (possible) definitive confiscation which is issued with a sentence by the Court of Cassation. For some contributions on seizure and confiscation proceedings, see supra §1. The competent subjects are different depending on the specific stage of the procedure. In the judicial phase, starting at the time of issuance of the decree of seizure by the Court of preventive measures, it is up to the court-appointed administrator to dynamically preserve the seized assets and, where possible, to increase their profitability: in other words, while the National Agency performs a role of assistance up to the second degree confiscation, the court-appointed administrator is responsible for the administration of the assets and their management "on behalf of those responsible"; this management performs a function of conservation and restitution in favour of those who will emerge as the legitimate holders of the disputed right at the conclusion of the proceedings. In particular, pursuant to Article 110(2)(f) of the Anti-Mafia Code, the ANBSC may adopt initiatives and measures necessary for the timely allocation and destination of the confiscated assets. Concerning the administrative phase, see - although the work predates the establishment of the ANSBC and the entry into force of the 2011 Anti-Mafia Code - N. Gullo, *Il procedimento amministrativo di destinazione dei beni confiscati alla mafia: aspetti problematici della normativa vigente e prospettive di riforma*, 126 Foro it. 72-83 (2003).

[97] Concerning the current debate on the legal nature of confiscated property see F. Manganaro, *Le procedure per il recupero sociale dei beni confiscati alla criminalità organizzata*, in N. Gullo & M. Immordino (eds.), *Diritto amministrativo e misure di prevenzione della criminalità organizzata*, cit. at 19, 85. On the same topic see also N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 111, who highlights the failure of legislators to intervene on the specific issue in the 2011 Anti-Mafia Code, despite the debate generated in legal theory in the previous years.

[98] To get an idea of the number and types of assets referred to, see the recent semi-annual Government Report to Parliament on seized or confiscated assets (Consistence, destination and use of seized or confiscated assets - Status of seizure or

purposes, we are interested in observing, in particular, whether and where the public law nature of the assets emerges, especially as regards immovable property; subsequently, we will focus on whether they are part of the non-available assets of the local authority.

In the Italian legal system, as is well known, public assets[99] are 'traditionally' divided into three categories (state property, non-available property and available property) and, depending on the category, the legal status differs more or less significantly from that of private property, not only in terms of use, but also in terms of protection and circulation. In relation to use, moreover, public assets are traditionally divided into: assets for collective use, assets intended for use by one or more administrations, assets owned privately by administrations[100].

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confiscation proceedings), December 2021, 22 and ff., available on the official website of the Ministry of Justice.

[99] Traditional public law theory defines public goods as a "descriptive category covering multifarious and articulated normative cases whose common feature is that they are subject to a different regime compared to common law". So reads M. Arsì, *I beni pubblici*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo speciale. Tomo II* (2003), 1513 ff. Let us briefly recall some references to the US literature on the subject - in particular with reference to the definition of public goods as goods "*...which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtraction from any other individual's consumption of that good, so that simultaneously for each and every with individual and each collective consumptive good*", P.A. Samuelson, *The Pure Theory of Public Expenditure,* 36 M.I.T. Review of Economics and Statistics (1954), 387-389. See also: L. Johansen, *The theory of public goods: misplaced emphasis?*, 7 Journal of Public Economics 147–152 (1977); A. Sandmo, *Public goods*, in J. Eatwell, M. Milgate, P. Newman, (eds.) *Allocation, Information and Markets* (1989), 254 ff.

[100] On the subject see G. della Cananea, *I beni*, in S. Cassese (ed.), *Istituzioni di diritto amministrativo* (2012), 233 ff.; A. Vesto, *I beni. Dall'appartenenza egoistica alla fruizione solidale* (2014), 126-12.

It seems useful to recall what has been affirmed by the civil section of the Court of Cassation in joint session, 16 February 2011, no. 3813, whereby "there are 'goods that, regardless of a prior identification by the legislator, due to their intrinsic nature or purpose prove to be functional to the pursuit and fulfilment of the interests of a community, on the basis of a full interpretation of the entire regulatory system". In legal theory, it has been observed that the legal status of public assets must be distinguished according to whether they are 'reserved' assets or assets for public use: reserved assets are those identified by law for their natural characteristics and as such

The analogies and differences between state property and patrimonial property[101] are useful here, and may be helpful in understanding the most specific subject of this work. State assets[102] are inalienable, indefeasible, and cannot be expropriated, regardless of whether they are part of the so-called necessary[103] (Article 822 (1) of the Civil Code) or accidental[104] (Article 822 (2) of the Civil Code) state property. Therefore, such assets cannot be the subject of rights in favour of third parties and therefore of legal transactions under private

reserved for public ownership; assets for public use are those of the public administration intended for a public function or service (see V. Cerulli Irelli, *I beni pubblici nel codice civile: una classificazione in via di superamento*, 20 Economia Pubbl. (1990), 523-527). Authoritative doctrine holds that 'reserved' assets are those which cannot be appropriated by subjects other than public bodies, see S. Cassese, *I beni pubblici: circolazione e tutela* (1969), 123. For a reflection on the evaluation of goods, see A. Ferrari Zumbini, *Valutazione e valorizzazione dei beni pubblici in una prospettiva comparata*, in A. Police, *I beni pubblici: tutela, valorizzazione e gestione* (2008), 635-638.

[101] Similarities and differences to be found as far back as the 1865 Civil Code. The reference is in particular to Article 426, located in Chapter III concerning property in relation to the persons to whom it belongs, Title I concerning the distinction of assets, Book II of assets, ownership and its modifications, of the Royal Decree of 25 June 1865.

[102] In any case, the essence of state property lies precisely in the functional link between the instrumental asset, which must be public property, and the best pursuit of a public purpose. See F. Baldi, *Il demanio culturale e le alienazioni del patrimonio immobiliare pubblico*, 3 Il Mulino – Economia della cultura (2004), 386.

[103] We refer to so-called 'necessary state property' because, by its very nature, such property could not but be: 'the seashore, the beach, the roadsteads and harbours; rivers, streams, lakes and other waters defined as public by the relevant laws; structures intended for national defence' (art. 822 (1) of the Civil Code). To put it more precisely, the necessary state property comes into existence *ex re*, i.e. it comes into existence by reason of the natural state of the assets comprising it.

[104] Accidental state property is the immovable property and the universality of movable property that becomes state-owned only when it comes into the possession of the territorial public bodies: in addition to the nature of the subject holding the property, an administrative act is required. These are: "roads, motorways and railways; airfields; aqueducts; buildings recognised as being of historical, archaeological and artistic interest in accordance with the relevant laws; collections of museums, picture galleries, archives and libraries" (art. 822 (2) of the Civil Code). For a commentary see G. Minunno (updated by D. Parola), *Sub art. 822 of the Civil Code*, in *Commentario al codice civile* (in Leggi d'Italia).

law[105], nor can they be subject to usucaption; they can, however, be the subject of administrative concessions[106].

Non-available patrimonial assets[107], on the other hand, are in principle marketable, as long as they are not removed from public use. The relevant legislation, however, establishes their non-marketability: in this respect, the status of non-available assets is similar to that of state property[108].

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[105] Except in the manner and within the limits established by special laws. The administrative authority therefore has the task of protecting such assets, including by the authoritative legal means of coercion under public law. State ownership, in short, presupposes that the asset is among those expressly provided for by law, that it belongs to the State or public bodies (including territorial ones), that it is intended for a public purpose. Among the works on this subject, see: M. Olivi, *Beni demaniali ad uso collettivo: conferimento di funzioni e privatizzazione* (2005); M. Renna, *I beni pubblici*, in F. Fracchia (ed.), *Manuale di diritto pubblico* (2014), 188-197.

[106] In the relevant laws concerning state assets, "where the possibility for the administration to create rights in favour of third parties over the assets is provided for, it is generally established that this takes place through the instrument of the administrative provision of concession (e.g. concessions of beaches and lidos, water concessions, port concessions, or airport concessions)", M. Renna, *I beni pubblici*, cit. at 105, 191. Concessions on state assets may determine, depending on the case, the attribution of real rights or rights similar to personal rights of use. See G.F. Nicodemo, *Concessione a favore di terzi: illegittimo l'affidamento di beni pubblici senza gara*. Note to Council of State, 5 Giur. it. 2 (2017).

[107] On the topic, see M. Clarich, *Manuale di diritto amministrativo* (2019), 420-422. For a contribution on non-available assets and the impossibility of identifying 'a common element from which to infer the homogeneity of the category', see M. Dugato, *Il regime dei beni pubblici: dall'appartenenza al fine* 29-30 (2008).

[108] Furthermore, the transition to the regime of patrimonial assets occurs when, due to natural phenomena or technical developments, or, in any case, due to historical events, state assets lose the characteristics that made them intrinsically such, without this depending on the will of the public administration. As a matter of fact, it is not undisputed either in legal theory or in jurisprudence whether the so-called tacit removal from state ownership could arise: as regards removal from state ownership pursuant to Article 829 of the Italian Civil Code, the transfer of property from public domain to state property must certainly result from a declaration act by the administrative authority. To this effect: D. Sorace, *Cartolarizzazione e regime dei beni pubblici*, Aedon § 5 (2003). Both legal doctrine and jurisprudence have identified mandatory criteria for the "tacit removal from state ownership" of assets, namely: "unequivocal and conclusive acts, incompatible with the will of the public authority of preserving the destination of the asset for public use"; N. Centofanti, *I beni pubblici. Tutela amministrativa e giurisdizionale* (2007), 182. It should also be borne in mind that,

Gradually delving into the merits, it may be noted that case law has sometimes affirmed that confiscated property belongs to the public domain[109]. This statement, albeit concise and therefore not inclusive of any further analysis leading to different classifications[110], seems useful,

unlike state property, non-available patrimony assets may belong not only to territorial entities but to any public body and may be movable and immovable assets. For a collection of legal directives on the subject of 'state property and public assets' refer to *Demanio e patrimonio pubblico. Principi generali*, in *Rassegna di giurisprudenza 2009-2019* (2020).

[109] In administrative case law, see, most recently, Council of State, sect. III, 10 April 2019, no. 2364; 28 September 2018, no. 5569.

[110] Even the traditional classification of assets for accounting purposes, derived from Royal Decree no. 827 of 23 May 1924, is based on the civil law distinction between public property and patrimonial property. It has been remarked by A. Crismani, *La contabilità dei beni pubblici*, in A. Police, *I beni pubblici: tutela, valorizzazione e gestione*, cit. at 100, 611-612, that public accounting terminology was aligning itself (or has by now aligned itself) with that of business accounting: the classification of assets as produced and non-produced non-financial assets (ex annex 1, decree of the Ministry of Economy and Finance of 18 April 2002) expresses an economic logic for the representation of assets, which differs from the logic arising from legal-administrative requirements on which the categories hitherto reported in the general account were based. In fact, Article 15 of the same Royal Decree stipulates that public assets (i.e. owned by the State as if privately) are to be shown in special accounting records, representing the changes in their amount and value. In turn, these assets are divided into available and unavailable assets and, again, into movable and immovable assets. The latter can be found in various ways in both the financial and property records that are kept by each public administration. And it is precisely in the property records that their amounts and value 'should' be identified. In this regard, pursuant to Article 36 (3) of the public accounting and finance law, Law No. 196 of 31 December 2009, the General Asset Account is the accounting document, prepared by the Statal Department of the General Accounting Office, that annually discloses the State's asset situation and the demonstration of the various points of concordance between the balance sheet and asset accounts. To be able to enter an asset in the balance sheet, it is necessary that it be classified as a 'public asset' beforehand. This is where the notion of public assets and their division into the three traditional categories comes into play. With regard to state property, for example - although not relevant to the more specific subject we intend to discuss here - Legislative Decree no. 279 of 7 August 1997 (setting forth the identification of the basic provisional units of the State budget) provides that state property, without prejudice to its legal nature and the constraints to which it is subject under the laws in force, is evaluated on the basis of economic criteria and entered in the General State Property Account. Article 14 of Legislative Decree no. 279 of 1997 introduces a

since it provides a straightforward description that enables one to approach the complex subject of confiscated property and its legal nature. On the other hand, available patrimonial assets are distinguished from both state-owned and non-available assets: from the former, in that public ownership is not required; from the latter, because public use is not required. They are also characterised by a regime that is (almost) entirely governed by civil law, except in the case of asset disposal, which must take place under public law, i.e., by public auction or public sale[111].

Specifically, in the procedure for the allocation of confiscated assets, within 90 days of receipt of the notification of the final confiscation order[112], and after carrying out an estimate of the value of the assets – the ANSBC is tasked with arranging for the adoption of the measure of allocation, by resolution of the Board of Directors, (Article 47 of the Anti-Mafia Code). In doing so, the ANSBC enjoys broad discretionary powers with regard to the destination to be conferred on the property[113]: in Article 48 (3) of the Anti-Mafia Code[114], legislators expressly provide - after an evaluation in view of a 'virtuous use'[115] of

new classification with the aim of identifying assets susceptible to economic exploitation. However, this is not a new classification replacing the previous one, but additional to the traditional distinction into 'categories' of public assets. On this point, see A. Crismani, *La contabilità dei beni pubblici*, cit. here, 586 ff.

[111] On this subject, see M. Renna, *I beni pubblici*, cit. at 105, 188-189.

[112] Extendable by a further ninety days in the case of particularly complex operations.

[113] On this point N. Gullo, *Il procedimento amministrativo*, cit. at 89, 76, observes that the State property agent could deviate from the proposal of the competent territorial office by accepting the possible indications of the mayor or the prefect, or decide to transfer the property to the municipality even in departure from the opinion expressed by the mayor. The reference is to the legislation in force before the entry into force of the Anti-Mafia Code, under Law no. 575/1965. More recently, see again N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 74.

[114] Already Article 45(1) of the Anti-Mafia Code provides that "as a result of the final preventive confiscation, the goods and properties are acquired by the State free of charges and burdens [...]".

[115] Constitutional Court, 15 February 2012, no. 34. On the effective and efficient use of confiscated good, see also *Strategia Nazionale per la valorizzazione dei beni confiscati attraverso le politiche di coesione* (February 2018), 20 ff., available at this webpage: benisequestraticonfiscati.it, created by ANBSC in cooperation with the Territorial Cohesion Agency and the Ministry of Economy and Finance - State General

the confiscated assets - the possibility of maintaining such property as State property for purposes of justice and public order, or to transfer it for institutional or social purposes 'to the non-available patrimony' of the municipality (or province, metropolitan city[116], region) where the property is located.

On closer inspection, even before the adoption of the allocation measure, Article 47 (2) of the Anti-Mafia Code, concerning the protection of confiscated assets refers to the second paragraph of Article 823 of the Civil Code, which entrusts the administrative authority with the protection of property belonging to the public domain and, according to a now consolidated legal direction[117], to non-available assets. According to one hermeneutic position[118], this regulatory provision would not suffice to entitle the administration to exercise the so-called executive self-protection, since it is a mere reference to the codified provisions, lacking the necessary requisites of the principle of legality[119].

As observed by legal theory[120], the inclusion of real estate confiscated from mafias in the non-available or available assets of the local authority does not always originate from a discretionary assessment of the public administration. In fact, the considerations of the judge must be taken into account when pronouncing the confiscation order. These are capable of affecting the very legal nature of such assets and the ANBSC's acts of allocation. In particular, the reference is to the application of the preventive measures of seizure and confiscation - governed respectively by Articles 20 and 24 of the

Accounting Department, with favourable opinion of the State-Regions Conference of 19 April 2018.

116 N. Gullo, *Il recupero dei beni confiscati*, cit. at 26, 87, is favourable to including metropolitan cities, also in view of the 'more relevant operational dimension' that they have come to assume over time.

117 More recently, see ruling no. 596 of the Council of State, 5th section, 24 January 2019.

118 M. Ragusa, *Dubbi sulla pretesa natura pubblica dei beni oggetto di confisca di prevenzione*, in M. Immordino & N. Gullo, (eds.), *Diritto amministrativo e misure di prevenzione della criminalità organizzata*, cit. at 19, 71-73.

119 Among the many works on this subject, see F. Merusi, *La legalità amministrativa. Altri sentieri interrotti*, Bologna, 2012; F. Sorrentino, *Le fonti del diritto amministrativo*, in G. Santaniello (dir.), *Trattato di diritto amministrativo* (2004), 262-263.

120 See G. Torelli, *I beni confiscati alla criminalità organizzata*, cit. at 19, 205-247.

Anti-Mafia Code.[121] As held by the case law of the Italian Court of Cassation even prior to the entry into force of the Anti-Mafia Code[122], seizure is aimed at temporarily removing the assets from the control of the addressee of the court order (or those who hold them on his behalf), while confiscation, which is subsequent to seizure, "targets entire patrimonial estates that can be traced, on the basis of evidence, to a presumed illicit origin"[123].

As noted above in greater detail[124], the same Article 48(3)(a) establishes, in the presence of victims of mafia-type crimes and for compensation purposes, the possibility of selling the confiscated property[125], in priority over other possible uses. This provision is

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[121] For an overview of the preventive seizure and management of seized assets, see *Relazione semestrale al Parlamento sui beni sequestrati o confiscati*, December 2019, 6-12, a report issued by the Ministry of Justice – Department of Justice Affairs. Although both are independent of the final ascertainment of the offender's guilt (in this sense, see Constitutional Court, 8 October 1996, no. 335), seizure and confiscation are two different but closely related instruments. While seizure is a measure of a provisional and precautionary nature issued by the Court without prior hearing of the other party, and aimed at temporarily removing the assets from the addressee of the measure (or those who hold them on his behalf), the anti-mafia confiscation is a measure of prevention subsequent to the seizure and "targets entire patrimonial estates that can be traced, on the basis of evidence, to a presumed illicit origin". On the measures of prevention, fundamental are the studies of G. Fiandaca, *Misure di prevenzione* (substantial profiles), 8 Dig. pen. 108 ff. (1994). Among the most recent works, see F. Menditto, *Le misure di prevenzione personali e patrimoniali* (2019), 490 ff.; A.M. Maugeri, D. Falcinelli, A. Cupi, *Sequestro e confisca* (2017), 24 ff.
For a contribution on the evolution of seizure and confiscation, accompanied by statistical data on their application, covering the period before 2003, see B. Vettori, *Sequestro e confisca dei proventi della criminalità organizzata*, in M. Barbagli (ed.), *Rapporto sulla criminalità in Italia* (2003), 373-398.

[122] Among many examples, see Court of Cassation – Civil Section, 16 January 2007, no. 845.

[123] E. Nicosia, *La confisca, le confische. Funzioni politico-criminali, natura giuridica e problemi ricostruttivo applicativi* (2012), 13. For a reflection on confiscation, see D. Piva, *La proteiforme natura della confisca antimafia dalla dimensione interna a quella sovranazionale*, 1 Diritto penale contemporaneo 201-217 (2013).

[124] *Supra* § 3.

[125] In fact, recourse to sale as an alternative solution to destination was introduced by Law no. 515 of 22 December 1999 concerning the revolving fund for solidarity with the victims of mafia crimes. In the literature, see N. Gullo, *Il procedimento amministrativo*, cit. at 89, 76, and more recently G. Torelli, *I beni confiscati alla criminalità organizzata*, cit. at 19, 216-217.

certainly not helpful in the legal classification of confiscated assets: at a first reading, one might think that legislators, by allowing the circulation of confiscated assets, favour their return within the available assets. However, this does not seem to be the case for at least two reasons. On the one hand, in fact, the transferability of the asset cannot be considered a necessary criterion, since the sale of certain assets of the available patrimony of a local authority can take place only under certain conditions[126]; on the other hand, one cannot help but consider that the primary purpose of the transferability of a confiscated immovable asset is to compensate the victims and their families for the damage caused[127]. It has also been observed that the rationale behind the provision may lie in the intention to guarantee a

[126] This refers to state assets transferred to territorial entities upon request, pursuant to Article 2 (5) of Legislative Decree No. 85 of 28 May 2010 (introducing the so-called *federalismo demaniale*, i.e. state property federalism). These assets - with the exception of property related to airports and cultural property indicated in the context of specific development agreements - become part of the available assets of the region or local authority and can be sold after the involvement of a special services committee aimed at acquiring the necessary authorisations, permissions and approvals for the change in the urban destination of the assets. See the following works: A. M. Colavitti and A. Usai, *Federalismo demaniale e autonomie locali: gli strumenti per regolare i rapporti interistituzionali nel trasferimento dei beni costieri appartenenti al Ministero della difesa*, 2 Aedon (2014); A. Police, *Il federalismo demaniale: valorizzazione nei territori o dismissioni locali?*, 12 Giorn. dir. amm. 1233 ff. (2010). See also the comment to Article 822 of the Civil Code by A. Police and A.L. Tarasco, in A. Jannarelli, F. Macario (eds.), *Della proprietà (Commentario del codice civile)* (2012), 122-124.

[127] Even in Law Decree No. 373, containing the 'Code of anti-mafia laws and preventive measures as well as new provisions on anti-mafia documentation', transmitted by the Government to the Presidency of the Chamber of Deputies on 16 June 2011 (documenti.camera.it/attigoverno/Schedalavori), Article 58 (3)(a), it was stipulated that 'assets are kept in the State's property for purposes of justice, public order and civil protection [...], unless they have to be sold to compensate the victims of mafia crimes'.

'welfare function'[128] for the victims of mafia crimes. And precisely this function would give it the 'character' of public purpose[129].

In view of this regulatory framework, administrative case law[130] has consolidated an orientation according to which the asset acquired as a result of confiscation has now taken on a strictly public nature that does not allow it to be diverted, even temporarily, from its intended use and public purposes. This would determine that the legal regime

[128] The exact phrase 'welfare function' is used by G. Torelli, *I beni confiscati alla criminalità organizzata*, cit. at 19, 217. Likewise, N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 75.

[129] In literature, on the public function character of confiscated property, see N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 112-113 and 116. More recently, G. Torelli held the same opinion in *I beni confiscati*, cit. at 19, 229. M. Ragusa's view differs in *Dubbi sulla pretesa natura pubblica*, cit. at 118, 71 ff.

[130] On this subject, see: Council of State, 3rd section, 10 December 2020, no. 7866; Council of State, 3rd section, 22 October 2020, no. 6387; Council of State, 3rd section, 5 February 2020, no. 926; Council of State, 3rd section, 4 March 2019, no. 1499; Council of State, 3rd section, 19 February 2019, no. 1159; Council of State, 3rd section, 16 June 2016, no. 2682; Council of State, 3rd section, 25 July 2016, no. 3324; Council of State, 3rd section, 5 July 2016, no. 2993; Council of State, 3rd section, 23 June 2014, no. 3169. See also the Control section of the Corte dei conti (Court of Auditors) of the Apulia region, resolution of 26 March 2020, no. 28; Civil cassation, labour section, 11 June 2018, no. 15085.
All the aforementioned rulings are linked by a single common thread: the assimilability of the confiscated property to the regime of non-available assets. The 1st section of the Criminal Court of Cassation, through ruling no. 12317 of 31 March 2015, seems to have paved the way for the orientation then consolidated in administrative case law, stating that "it must be recognised that the legal status of property confiscated under Law no. 575 of 1965 can be assimilated to that of state property or to that of property included in non-available assets". On this subject, see N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 116; G. Torelli, *I beni confiscati*, cit. at 19, 218, according to whom "only confiscation gives a public service imprint to the asset to be sold on a priority basis, with the consequent reclassification in the category of non-available property"; L. D'Amore, *Sub art.* 48, in G. Spangher, A. Marandola (eds.), *Commentario breve al Codice antimafia*, cit. at 77, 280, in which it is stated that "with reference to the legal regime applicable to confiscated assets, given the current regulatory and jurisprudential context, it is possible to affirm that such assets are part of the so-called non-available public property". In the same direction, see also the ANSBC's guidelines *Linee guida per l'amministrazione finalizzata alla destinazione degli immobili sequestrati e confiscati*, 2019, 9.

of the confiscated item is similar to that of assets forming part of the State's non-available property[131].

Therefore, actual facts and constant case law, supported by the legal theory[132], attribute confiscated assets to the non-available assets belonging to the local authority; furthermore, there seems to be no room for their inclusion in the available assets, resulting in a series of consequences that we should specify. While non-available assets (and state property) are subject to a special public law regime, available assets are subject to one of a circulatory and dispositive private law nature[133].

In the case of available assets, on the other hand, the municipality assigns them, acting by private law, by means of a loan for use agreement, or of a lease (or rental) contract.[134]. Public assets are classifiable as available assets, according to case law[135], when it is impossible to exploit administrative concession in order to assign the use of such assets in favour of private individuals. In this case, the public administration can only recur to a loan for use (or lease) agreement.[136] Rather, one might think that - in view of the economic advantage that the third party would enjoy from the 'transfer' of an

[131] It must also be ruled out that a judgment balancing public and private interests is required, since the same has already been carried out by legislators, who have regarded as priority the need to combat organised crime by eliminating from the market an asset of illicit origin, by means of a final forfeiture order, allocating said asset to public interest initiatives. On this, see Council of State, 3rd section, no. 926/2020.

[132] Recalled earlier.

[133] On the regulation of available assets, see: A. Torrente, P. Schlesinger, *Manuale di diritto privato* (2019), 180-183; R. Caterina, *I beni*, in S. Mazzamuto (ed.), *Manuale di diritto privato* (2017), 449; P. Zatti, V. Colussi, *Lineamenti di diritto privato* (2013), 229-230.

[134] On this subject, see for example A. Torrente, P. Schlesinger, *Manuale di diritto privato*, cit. at 133, 180 ff.; F. Gazzoni, *Manuale di diritto privato* (2021), 199 ff.

[135] As stated by the Court of Cassation in Joint Session, 25 March 2016, no. 6019; Court of Cassation 3rd civil section, 10 November 2016, no. 22917; Administrative Tribunal of Lazio-Rome, section II-*bis*, 2 October 2019, no. 11489.

[136] On available assets and their falling under private law, see, among others, S. Vaccari, *Sulla concessione in comodato di beni pubblici a enti del terzo settore*, 2 Dir. amm. 435 (2020).

available asset through a loan for use agreement[137] – it is necessary to comply with the principles of public evidence even in the case of confiscated assets returned to the local authority's available assets. That is, the local administration should choose the bailee (as well as the concession holder) in the light of the general principles of publicity, transparency, impartiality and equal treatment[138]. Only then would the difference between available and non-available assets be mitigated, treating equally the confiscated assets belonging to either category.

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[137] According to S. Vaccari, *Sulla concessione in comodato*, cit. at 136, 444-445, the economic advantage for the beneficiary would consist in the "use 'at no cost' of the asset, with evident and economically appreciable savings - not having to pay the average fee for the acquisition of an analogous asset by turning to the market". And as a result of this definition, the case would fall within the scope of application of Law no. 241/1990, Article 12, from which would derive "the duty of the body granting the concession to carry out a comparative procedure for the selection of the bailee" (p. 444). In this vein, the Corte dei conti, Molise regional control section, opinion n. 1/2015.
Administrative case law (*ex pluribus*, Council of State, A.P., 28 September 1995, no. 95) has brought the concession of public property within the framework provided for by the aforementioned Law no. 241/1990 Article 12. The rationale of the provision is to ensure the transparency of the administrative action, which is to be pursued not only by adequately disclosing to the public the start of the procedure, but also by meeting objective criteria that precede the individual measure. On this point, see G.F. Nicodemo, *Concessione a favore di terzi*, cit. at 106, 7. For an analysis of Article 12, see the comments by F. Giglioni, *Commento all'art. 12*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa* (2017), 672; D. Vaiano, *Commento all'art. 12*, in A. Bartolini, S. Fantini, G. Ferrari (eds.), *Codice dell'azione amministrativa e delle responsabilità* (2009), 324-326.
For an experience concerning a municipality, see for example the *Guidelines* of the Municipality of Naples, cit., noting that what is provided for therein could well have found a place in a normative source, specifically in a municipal regulation. Article 11 of said *Guidelines* (Executive provision for the assignment of assets - *Disposizione dirigenziale di assegnazione del bene*) establishes, in paragraph 1, that the department responsible for confiscated assets allocates by executive provision the confiscated asset to the person(s) identified by the Selection Committee referred to in Article 9 above, at the end of the public disclosure procedure.
[138] For the general principles of allocation see, among others, M. Clarich, *Manuale di diritto amministrativo* (2019), 431 ff.; M. Cafagno e A. Farì, *I principi e il complesso ruolo dell'amministrazione nella disciplina dei contratti per il perseguimento degli interessi pubblici (artt. 29, 30, 34, 50, 51)*, in M. Clarich (ed.), *Commentario al codice dei contratti pubblici*, cit. at 22, 201 ff.

Even assets confiscated from the mafia, whose public nature is thus evident in the light of the underlying public interest, transcend the traditional allocation of public assets in a strict sense[139], to achieve a social function[140].

This classification would coincide with the innovative framing perspective provided by the Court of Cassation[141], and then consolidated over time, according to which the classic tripartition of public goods must be reinterpreted through constitutional principles. There would be assets that, in light of their innermost nature, are functional to the pursuit and satisfaction of the interests of a community, regardless of prior identification by legislators. Reasoning in terms of possible ownership by the State, the interpretation to be offered does not regard the State as an apparatus, as a public legal person, but rather refers to the State as collective, in view of its exponential status that predisposes it towards the realisation of broader interests encompassing the entire citizenry.

The jurisprudence itself must exhort us to go beyond the three-dimensional type of distinction, and instead push our gaze 'beyond, with regard to function and related interests'. Therefore, one can perceive the need to change the perspective through which we look at

[139] About which we have previously dwelled.

[140] Consider the arguments of N. Gullo, *Emergenza criminale e diritto amministrativo,* cit. at 20, 557. In his conclusions, he observes how if one wants to continue to refer to the 'trichotomy of the civil code', one must observe how confiscated assets, to be ascribed to the category of patrimonial assets, are characterised "by a form of reinforced protection, against both illicit behaviour and the legal claims of third parties". The reference in this case is to assets at the pre-destination stage. Otherwise, in the subsequent phase, when the ANBSC has proceeded with the choice of destination, the "legal framework" would change, having to return to the "categories of the Civil Code, albeit with the persistence of some exempting profile".

[141] Court of Cassation in joint session, 14 February 2011, no. 3665; Court of Cassation in joint session, 16 February 2011, no. 3811 e 3812; Court of Cassation in joint session, 18 February 2011, no. 3937, 3938 and 3939. On this subject, see G. Fidone, *Proprietà pubblica e beni comuni* (2017), 1-2. For reflections on the topic, see also C.M. Cascione, *Le Sezioni Unite oltre il codice civile. Per un ripensamento della categoria dei beni pubblici*, Giur. It. 12 ff. (2011); E. Pellecchia, *Valori costituzionali e nuova tassonomia dei beni: dal bene pubblico al bene comune*, 1 Foro it. 573 ff. (2012); A. Di Porto, *Res in usu publico e beni comuni. Il nodo della tutela* (2013).

public assets, regarding them no longer purely as patrimonial-proprietary, but as personal and collectivistic[142].

On the other hand, if we accept the traditional approach to public assets, in case confiscated assets are eventually placed within the local authority's available assets, they are "used in a manner that more or less complies with the rules of the Civil Code, without the restrictions that apply" to state property and non-available assets, "in particular with regard to the required identification of the purpose for which the asset is functional"[143]. In the light of these in-depth studies, which also take into account legal theory and case law, we believe that the level of complexity of the matter is even more evident, as the institutions responsible for applying the rules have also expressed - for example, during the hearings at the Parliamentary Anti-Mafia Committee. In view of the framework of principles (on which we have dwelt) and of the overall rationale *taken as reference by the scholars and the judges in their role as interpreters of the law*, it can be assumed that the social function underlies the same legal qualification. Hence the prevalence - not only de facto (which, as we have seen, emerges from the data interpreted by the ANBSC) but also theoretically - of the allocation precisely for social

[142] This is because "there are assets that, regardless of prior identification by legislators, by their intrinsic nature or purpose are functional to the pursuit and satisfaction of the interests of a community, on the basis of a full interpretation of the entire regulatory system" Court of Cassation in joint session – civil section, 16 February 2011, no. 3813. See G. Spoto, *Usi civici e domini collettivi: "un altro modo" di gestire il territorio*, Riv. giur. edil. 9 (2020).

[143] G. Torelli, *I beni confiscati*, cit. at 19, 207. It follows that the provisions of articles 822 and following of the Italian Civil Code are "still relevant to the extent that the administrative bodies have greater or lesser decision-making capacity in the choice of how to use the property (sale, free transfer, lease, rent, rehabilitation)".
As observed by N. Gullo, *La destinazione dei beni confiscati*, cit., 111, "through a survey of the normative data on the matter in question, one must note the absolute impossibility of attributing confiscated assets not only to the categories envisaged by the civil code (state property, non-available property and available property), but also to the more recent dogmatic categories fashioned by public law doctrine in order to overcome the contradictions and inconsistencies of the codified tripartition".
On the categorisation of public assets, see G. della Cananea, *I beni*, cit. at 100, 230-231. According to the author, 'at the centre of the legal framework is not so much the ownership of assets as their use. The pre-eminence of use over belonging is evident in the legal system of the European Union". With reference to the classification of assets, see also M. Dugato, *Il regime dei beni pubblici*, cit. at 100, 17-20.

purposes. The sale of the confiscated assets, on the other hand, has limited application potential, especially with regards to our main area of interest, namely real estate. *De iure condito*, this is what can ultimately be inferred.

5. On the (administrative function of) confiscated assets rehabilitation

The main line of thought hitherto pursued has led us to frame our subject from the point of view of principles, to delve into the legal nature of assets confiscated from organised crime and to identify some underlying critical issues, in particular in the relationship between the regulatory framework in question, with its specific features, and the provisions of administrative law. Reviewing the topics discussed, a concept recurs several times in acts of a political and programmatic nature, in regulatory sources, administrative acts and judicial measures. The concept is the rehabilitation of assets confiscated from organised crime. The use of the term 'rehabilitation' well represents, also symbolically, the role to be played by political institutions, public administrations and private social bodies within the broader system of governance[144].

The term mainly recurs within acts aimed at defining programmes and policies. An example is cohesion policy through European funds. In implementing the 2017 Stability Law[145] explicit reference is made to the term in the "National Strategy for confiscated assets rehabilitation through Cohesion Policy", which, in a context of cooperation between institutions, envisages that the fight against organised crime is realised through the link between confiscation and rehabilitation[146], in consideration of the provisions of the 2015 Economic and Financial Document, approved by the Council of Ministers, which refers to the rehabilitation of the aforementioned assets[147]. This type of act identifies - along with the instruments of

[144] Envisaged in particular by the codes of law.
[145] According to the provisions of Article 1 (611) of Law no. 232 of 11 December 2016.
[146] Reference is to Resolution no. 52 of 25 October 2018, adopted by the Inter-Ministerial Committee for Economic Planning, available at agenziaceosionegov.it.
[147] Approved by the Council of Ministers on 10 April 2015. Reference is in particular to Section III.

aggression against illicit assets - rehabilitation of confiscated assets as an objective, to be pursued through coordinated procedures between the single relevant administrations and the ANBSC. These procedures are aimed at the planning of interventions, monitoring and analysis of the results achieved, thus involving the exercise of specific administrative functions.

Similarly, Article 1 (194) of the 2016 Stability Law[148] states that the rehabilitation of assets is to be achieved through 'specific actions aimed at strengthening and developing skills, including internal skills, necessary for the effective performance of institutional functions'.

The concept of rehabilitation can be found in the Reports prepared by some competent authorities on the subject: thus, the ANBSC dwells on its 'action of administration and allocation of confiscated assets under management', which aims at rehabilitating the 'real estate assets taken away from mafia groups' by devolving them to the community, thus pursuing 'the improvement of social and economic welfare'[149].

The Anti-Mafia Code also mentions rehabilitation, and on specific issues: in Article 41-bis on financial instruments for the management and rehabilitation of seized and confiscated companies; in Article 112 (4)(g), on the subject of changing the intended use of the confiscated asset[150]; more recently[151], with Article 48 (15-quinquies), legislators have established that, in the event of revocation of the intended use of the confiscated asset, and under certain conditions, the State Property Agency (Agenzia del demanio) will take over the management and will have the task of regularising the asset and making it functional again[152].

[148] Law no. 208 of 28 December 2015.

[149] In particular, reference is to the ANBSC's report *Activity Report – Year 2020*, cit., p. 13.

[150] On the fragmentary nature of the 'segment' on recovery and rehabilitation of confiscated assets, as well as on the lack of direction in defining the basic guidelines for public action in this field, see the *Strategia Nazionale*, cit. at 108, 3.

[151] Through Law decree no. 77 of 31 May 2021, converted with amendments by Law no. 108 of 29 July 2021.

[152] And also the subsequent allocation, free of charge, to the persons referred to in paragraph 3 (c) of the same Article.

In addition to State legislation, we also find explicit references to rehabilitation at a regional level. For example, the Apulia Region Law no. 14 of 28 March 2019 '*Testo unico in materia di legalità, regolarità amministrativa e sicurezza*' (subjected to a review by the Constitutional Court), provides for a series of interventions to be carried out to rehabilitate real estate and companies confiscated from organised crime[153]. In such cases, attention must be paid to the limits on the exercise of the legislative function of regions in matters that fall within the competence of the State[154], verifying, in any case, that any legislation supporting the rehabilitation of such assets does not conflict with the constitutional provisions, and that it does not interfere with state regulation or its implementation.

The foregoing attests to the fact that despite the evolution of the concept of 'rehabilitation' over time, which is articulated in numerous and diversified activities, also liable to adaptation in the face of arising needs linked to the relevant territories[155], legislators have not deemed

[153] The law in question is the Apulia Regional Law no. 14/2019.
The Constitutional Court pronounced its ruling in Judgement no. 177 of 30 July 2020. It declared as unfounded the question of the constitutional legitimacy of paragraph 2 of said article, concerning the possibility for the Region to grant itself the power to reward projects that contemplate activities of social reuse of real estate (for the part that is relevant for our purposes), and to do so through "understandings and cooperation agreements with State bodies" and public (as well as private) entities. The Court affirms (consideration in law, point 12.3) that the regional law does not innovate or provide "differently from the State regulations on the further use of real estate and businesses confiscated from the mafia", seeking, on the contrary, to promote the very same values recognised in the State legislation; therefore, no negative impact would be caused "on the regulation or implementation of the rules on the further use of confiscated assets". Rather, what is provided therein constitutes "stimulus and impulse to activities considered - by the State itself - of significant importance".

[154] We have dwelled on such aspects above, see § 2.

[155] These needs emerge on multiple levels of government. These include the aforementioned *Strategia Nazionale*, cit. at 108, 40 ff., and at a regional level, the Campania region's *Piano strategico per i beni confiscati*, Regional Council Resolution no. 110 of 26 March 2019, which intends to strengthen governance in the field of confiscated assets, intervening across several areas, from improving urban quality and safety conditions in cities to helping innocent victims. On the subject, see E. Tedesco, *Conclusioni. Riflessioni su una stagione di policy e prospettive future*, in V. Martone (ed.), *Politiche integrate di sicurezza*, cit. at 33, 176-179.

it necessary to provide a definition. The result is a broad and undefined notion, to which doctrine has also paid attention, albeit in few works[156].

It may be useful to cast a broader gaze on the subject, albeit briefly. In doing so, we can notice a closer attention by legal theory in another fundamental, broad and organic regulatory framework, namely that governing cultural assets. In this context, it seems interesting to recall that legal thought which dwelt on rehabilitation, reflecting on its meaning in terms of the actual exercise of an administrative function of rehabilitation. The issue to which we refer for further study[157], however, seems quite different from that of confiscated goods and, more specifically, of rehabilitation, both in consideration of the 'robust' constitutional references and of the

[156] In legal theory concerning the rehabilitation of confiscated assets, the preeminent work is by N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 103 and 123-130, and R. Di Maria, in R. Di Maria, F. Romeo, (eds.) *I beni confiscati*, cit. at 595, thus in the part where the author, with regard to assets subject to court-imposed administration, finds in the Anti-Mafia Code "some references to (possible) rehabilitation from the economic/management point of view".

[157] The reference is to the regulation of cultural heritage in Legislative Decree No. 42 of 22 January 2004 (the so-called Code of Cultural Heritage and Landscape). Although there are several elements that differentiate it from confiscated goods, a comparison with the regulation on the rehabilitation of cultural heritage may be useful. In particular, their rehabilitation is defined and regulated in Articles 6 and 111 ff. of the Cultural Heritage and Landscape Code. According to Art. 6 (Rehabilitation of cultural heritage), it 'consists of the exercise of functions and the regulation of activities aimed at promoting knowledge of the cultural heritage and ensuring the best conditions of public use and enjoyment of the heritage itself, including by the disabled, in order to promote the development of culture'. The literature on the subject is extensive. See, among others, M. Dugato, *Fruizione e valorizzazione dei beni culturali come servizio pubblico e servizio privato di utilità pubblica*, 2 Aedon (2007); D. Vaiano, *La valorizzazione dei beni culturali* (2011); among L. Casini's works see: *La valorizzazione dei beni culturali*, 3 Riv. trim. dir. pubbl. § 1 (2001) and 10, the most relevant to the subject of our analysis; The rehabilitation of landscapes in 3 Riv. trim. dir. pubbl. 385 ff. (2014); *Valorizzazione del patrimonio culturale pubblico: il prestito e l'esportazione di beni culturali*, 1-2 *Aedon* (2012); *Ereditare il futuro. Dilemmi sul patrimonio culturale* (2016), 108; *Valorizzazione e gestione,* in C. Barbati, M. Cammelli, L. Casini, G. Piperata, G. Sciullo (eds.), *Diritto del patrimonio culturale* (2017), 203; M.C. Cavallaro, *I beni culturali: tra tutela e valorizzazione economica*, 3 Aedon (2018); F.G. Albisinni, *L'affidamento in concessione dei servizi culturali*, 4 Riv. trim. dir. pubbl. 1107-1126 (2020). For a contribution prior to the entry into force of the Anti-Mafia Code but after the Law Decree of 31 March 1998, no. 112, see S. Cassese, *I beni culturali: dalla tutela alla valorizzazione*, 7 Giorn. dir. amm. 673-675 (1998).

decidedly greater attention that the legislator has reserved to the rehabilitation of cultural assets.

This line of argumentation has specific features that could possibly lead to a deeper exploration in this direction in our case as well. However, there is a systematic reason why it cannot be dealt with here. As a matter of fact, in the same way as what has been widely argued, in an innovative sense, on the subject of "regeneration and reuse of public property spaces" - in relation to the hypothesis of characterising the theme in terms of administrative function - it would be necessary to proceed to a reconstruction "starting from the state, regional" - within the limits previously mentioned - "and municipal regulations adopted in recent years, as well as from administrative practice"[158]. Referring, even in our case, to this methodology of analysis would necessarily require a prior theoretical framework through specific references to the dogmatic concept of the administrative function[159]. This pathway of argumentation could not find correspondence in the present contribution, as the necessary strands of study would not be satisfied in an approach, however partial, characterised by the delimitation we have assumed in defining the scope of a work circumscribed to the management and destination of assets confiscated from organised crime. The range of activities, and corresponding regulatory sources and practices, which can be summarised in the concept of rehabilitation, should in fact be traced within a much broader regulatory body than the one we have identified, in particular, from a limited part of the Anti-Mafia Code.

Considering again the rehabilitation of confiscated assets[160], it can be useful to dwell on a few specific aspects that enrich the reference framework in terms of the objectives set out in this work. Therefore, looking at the re-use of such assets with the aim of promoting the values and culture of legality[161], it can be observed how administrative law needs to take into account a regulatory system not limited to the

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158 See E. Chiti, *La rigenerazione di spazi e beni pubblici: una nuova funzione amministrativa?*, in F. Di Lascio & F. Giglioni (eds.), *La rigenerazione di beni e spazi urbani* (2017), 15-16.

159 As we observe in the two contributions referred to: *ibidem* and L. Casini, *La valorizzazione dei beni culturali*, cit. at 157.

160 And this, evidently, also applies to confiscated companies.

161 On this subject, see S. Pellegrini (ed.), *La vita dopo la confisca*, cit. at 58, 25.

forfeiture of assets from criminal property but, as highlighted in legal theory[162] through a series of "indicators applied to the regulation", including the rehabilitation of assets while pursuing institutional or social purposes[163]. Rehabilitation is in fact achieved through a series of administrative actions[164]. However, even in this case, the system reflects a series of critical issues in the exercise of the administrative functions that are associated with it. In the local context, for example, one cannot help but observe how the use of concession related to the management of such goods and properties, in application of the positive element of the Anti-Mafia Code, has determined significant implications on the institutional level, producing actual phenomena of transfer of the exercise of the administrative function to private subjects. In fact, in the administrative procedure for the destination of the confiscated property, the local authority to which the National Agency has allocated the confiscated property, following the expression of interest at the services conference, acquires it as part of its own unavailable assets and thus becomes the manager. This point needs clarification, in the sense that - pursuant to Article 48 (3)(c) of the Anti-Mafia Code[165] - it is possible to distinguish between direct and indirect management: the former is carried out by internal organisational structures of the public administration (i.e. a municipal administration office within a confiscated property); the latter is

[162] N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 124. The reference is to a series of provisions of the Anti-Mafia Code, in particular: the possibility of the use of confiscated property by the National Agency for economic purposes (Art. 48 (3)(b)); the alienability of real estate, both to acquire, as a priority, resources to be allocated to compensate the victims of mafia-type crimes, and to favour the circulation of assets in the market in case of non-allocation (Art. 48 (3)(a) and (5)); the sale of business assets (Art. 48 (8)(b) and (c)); the possibility of assigning real estate to social cooperatives(Art. 48 (3)(c)); the overall regulation of confiscated companies, aimed at preserving the continuation of entrepreneurial activity (Articles 35 and 41).

[163] See the *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, 317, by the Parliamentary Anti-Mafia Committee.

[164] See N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 124; G. Torelli, *I beni confiscati*, cit. at 19, 205 ff.

[165] According to which, territorial authorities may administer the property directly or, on the basis of a special agreement, assign it in concession, free of charge. The Parliamentary Anti-Mafia Committee in its recent Report, cit. at 56, 337-338, also expresses itself in terms of direct and indirect management.

implemented by means of a concession in use to third parties by the administration to whose unavailable assets the property belongs. In other words, it is from this rule that it follows that the relationship between the local administration and the private social sector[166] (public-private relationship) can be considered intrinsic and inherent to the activity of rehabilitation of the confiscated property. And it is precisely in such a context that the dichotomous view of the relationship between public and private law frameworks seems to be abandoned in order to embrace a new perspective that considers not only distinct public interests but also private interests, understood as the interests of the general community and of individuals to be able to use such property.

The choice between direct or indirect management is left, on a case-by-case basis, to the local administration to which the asset belongs, and is a discretionary assessment based on the concrete needs of the administration itself and of the territory of reference. It has been observed that, although the administration can choose between two different possibilities, it generally tends to opt for forms of indirect management through third parties, especially from the private social sector, through 'concessions'[167], subject to public procedures, i.e. following comparative evaluation procedures of the projects presented in the public notice. The reference model in the field of indirect management is the measure of concession.

What has been discussed here allows us to return to the critical considerations on which we initially focused when approaching the matter in legal-administrative terms, highlighting the numerous framing and interpretative difficulties that the regulatory framework concerning confiscated property continues to present. The hope, already envisaged, remains that of sensitising legislators to place greater attention on the relationship between administrative functions and traditional legal measures of administrative law, considering, with

[166] On the definition of 'private social sector' see P. Donati, *Pubblico e privato: fine di una alternativa?* (1978). The same author also provided a subsequent contribution in *Privato sociale. Le nuove forme di solidarietà associativa nel welfare societario*, in *Welfare state. Il modello europeo dei diritti sociali* (2005), 101-123.
[167] Pursuant to article 48 (3)(c) of the Anti-Mafia Code.

greater attention, the results that the case law and scholars continue to produce on the subject.