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The Last Imperative of Criminal Policy: Nullum Crimen Sine Confiscatione

Abstract

Led by the diktat “crime does not pay”, the recent criminal policy regarding measures to counter illegal assets is dangerously turning towards constitutionally abnormal models, often revealing “preventive criminal law” paradigms.

In this framework, confiscation plays a leading role: being teleologically ambiguous, it is easy to “manipulate” and misapply, thanks to “generous” judicial interpretations that breach the fundamental guarantees. The various types of confiscation, flourished in an authentic “penumbra of legality”, generate many controversial aspects: inter alia, the affirmed possibility to execute a “confiscation without conviction” seems to infringe the presumption of innocence; the “value confiscation” is more and more difficult to reconcile with legal certainty; the “extended confiscation” seems to be unreasonable, as “normalised” and generalised by the so-called “anti-mafia code”, also because of its neutral characterisation of facts supporting the prognosis of dangerousness.

This paper analyses the problematic aspects of this “criminal law of illegal assets” that dangerously tends towards illiberal models.

SUMMARY: 1. The diktat “crime does not pay” and its consequences – 2. The central role played by confiscation in the hyper-efficient program pursued by the European and national criminal policy – 3. The evolution towards a preventive criminal law: the “resistible rise” of crimes related to the flow of unlawful proceeds and the “generalization” of the confiscations *praeter probationem delicti* – 4. A confiscation system which is growing in a “penumbra of legality”: the efforts made by the case-law of the ECHR and the need for dogmatic harmonisation in order to ensure that confiscation respects fundamental guarantees – 5. An (only) partial inventory of the constitutionally sensitive questions – 6. The guarantees “behind the appearances”.

1. *The diktat “crime does not pay” and its consequences* – Nowadays, the diktat “crime does not pay” represents a categorical imperative of criminal policy. It embodies a (misinterpreted) declination of the principle of effectiveness on the ground of eco-

conomic coercion¹; and represents a common hint among the several European initiatives, tending to harmonize the reactions against “economic crimes”², being accompanied by domestic regulations (not only in the Italian jurisdiction) and, in particular, by a deep engagement of the Courts.

1.1. More specifically, “crime does not pay” is not a “principle” of criminal policy, nor a symbolic slogan. Rather, it is a *policy* - perhaps not codified yet - which has been considered for a long time a growing “key word”³. It embodies a precise *target* within the itineraries of contemporary “criminal law policy”⁴, which is expanding to the detriment of individual rights, and of von Liszt’s admonishment, that criminal law – and its guiding principles – must identify “the insurmountable barrier of criminal policy”.

The force this “key word” is gathering, in terms of the Italian legal order, has led it to be translated – *de lege lata* – in increasingly invasive and blunt manners against unlawful proceeds (insofar as the crime of “self-laundering” has been inserted in the Italian Criminal Code, Art 648-ter, by law no. 186 of 2014). On this point, the generous interpretations of the case-law exemplify a diffuse “anti-formalistic” approach inspired by – as it has effectively been said – a “well-intentioned authoritarianism”⁵.

1.2. The tool most frequently used by the legislator and the jurisprudence in order to enforce the *diktat* “crime does not pay” is the ambiguous institution of “confiscation”.

- 1 A declination which derives from a misunderstanding since the principle of effectiveness has been particularly exploited in order to critically control and limit (rather than foster) the criminal law, removing “ineffective sanctions”: see C. E. PALIERO, *Il principio di effettività del diritto penale*, in *Riv. It. dir. proc. pen.*, 1990, 430 ff. (paper recently inserted in the *Lezioni magistrali* at University Suor Orsola Benincasa, Editoriale scientifica, Naples, 2011).
- 2 See *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 in the European union*, inserted in an already relevant European *acquis* on the ground of *freezing and confiscation*; on this subject, see M. SIMONATO, *Directive 2014/42/EU and non-conviction based confiscation*, in *New Journal of European Criminal Law*, 2/2015; on the *iter* which led to the Directive’s approval and on the role played by the European Parliament see A.M. MAUGERI, *L’actio in rem assurgit a modello di “confisca europea” nel rispetto delle garanzie CEDU*, in *Dir. pen. cont. – Riv. trim.*, 3/2013, 252 ff.; in addition, C. GRANDI, *Il ruolo del Parlamento europeo nell’approvazione delle direttive di armonizzazione penale*, in *Riv. It. dir. proc. pen.*, 2015, 678 ff., 709 ff.
- 3 Among others, Court of Cassation, United Sections, October 25th 2005, no. 41936, Muci, expressly recalls the argument of “crime does not pay”.
- 4 It prefers this formula, comprehensive of policies concerning several (“responsible”) subjects, now, D. PULITANÒ, *L’evoluzione delle politiche penali negli anni Settanta e Ottanta*, typed and being published.
- 5 It is present within extensive interpretations and applications of the offences, in order to increase the protection of determined interests, and within some recreations and applications of the general institutions of criminal law, in accordance with the definition of D. PULITANÒ, *Crisi della legalità e confronto con la giurisprudenza*, in *Riv. It. dir. proc. pen.*, 2015, 29 ff., 42 ff. (and already Id., *Supplenza giudiziaria e poteri dello Stato*, in *Quad. cost.*, 1982, 93 ff.).

This institution, historically disposed to political scopes⁶, has acquired legitimacy as the “motivational counterforce” to economic crimes. Thus, it has been encouraged by a constant development, despite being highly *rights-sensitive*, in relation to the harmful consequences for the accused person, as well as the serious effects of overspill, as for the economic neutralization not limited to the acting person, but extended – as Beccaria said – to “put a price on the heads of the weak” and to “make the innocent suffer the sanction of the guilty one” (just considering the rights of the third party involved in – or overwhelmed by – the confiscation procedure).

1.3. The central role played by seizure and confiscation among the national and supranational legislation, together with the “manipulative” use of these tools within the “everyday criminal policy” (*Kriminalpolitik im kleinen*) of the Courts, permits a glimpse of radical transformation of criminal law, electing economic incapacity as *prima ratio* against (in particular) white-collar crimes.

This effective program is taking the shape of a criminal response, structured as a proper “fight”, as if – in the actual contest of economic crisis – the authors of “economic crimes” (*crimina atrocissima*) behave as political rivals, to whom one does not have to ensure any guarantees (*in atrocissimis licet iura transgredi*)⁷. Furthermore, it is a program whose deterrent component (*Abschreckung*) seems to be the most prominent: therefore, the more it is free from constitutional boundaries, “automatic” and, above all, unyielding, the more it is able to “frighten and discourage”.

In this perspective, confiscation – in *pendant* with preventive seizure – proves to be perfectly adequate to the scope, being *natura sua* resistant to fall within the meaning of “treatment”, and impenetrable by rehabilitation’s scopes. In fact, it is structurally disposed to consider the subject addressed not as a person having fundamental rights, but as a mere passive addressee of the measure.

1.4. Therefore, the Enlightenment’s dogma *nullum crimen sine poena* – threatened by the ineffectiveness of the traditional forms of punishment – seems well on its way to a reconversion to the dogma *nullum crimen sine confiscatione*, which considers confiscation as the only undeniable outpost, able to fulfil the State’s remunerative requirements, together with its deterrent implications.

6 Above all, in the original version of general measure for the assets’ acquisition (the *confiscatio bonorum*), deeply contrasted by the Enlightenment’s leaders [among which C. BECCARIA, *Dei delitti e delle pene*, Feltrinelli, 7, Milan, 1999, § XXV (*Bando e confische*)] together with members of the so-called “classical school”: see, for instance, F. CARRARA, *Programma del corso di diritto criminale*, ed. Il Mulino, Bologna, 1993, § 689, where it reminds that – even in the historical periods having several punishments – confiscation was a special instrument for certain offences, in particular the political ones, as a measure to strengthen a political party and undermine another.

On the residual types of confiscation see A. MAUGERI, heading *Confisca* (criminal law), *Enc. dir.*, Annali, Milan, 2015, 186 f.

7 M. DONINI, “*Diritto penale di lotta*” vs “*diritto penale del nemico*”, in R. Kostoris and R. Orlandi, *Contrasto al terrorismo interno e internazionale*, Turin, 2006, 19 ff.

As in the cultural *milieu* of the Enlightenment, the concept of a non-punishable crime seemed to contradict the ideal of certainty, of infallibility and of prompt response to the crime⁸, in the actual framework the concept of criminal profit, “torn” from the accused person, is considered the first and fundamental relaunch of public credibility.

Thus, confiscation must likewise be ready, certain, and unyielding beyond being de-claimed in the media.

In addition, the intense use of confiscation seems to increase the legitimacy of the judicial power, which is more and more aware of the fact that this legitimacy depends on the capacity to apply sanctions able to effectively influence the criminal activity and/or the unlawful proceeds⁹.

1.5. More generally, and widening the range of observations: an evident decrease of guarantees has accompanied the aim of economic neutralization, implying a sincere preference for efficacy rather than protection of individual rights. In this light, it is possible to distinguish – as far as white-collar crimes is concerned – a transition from the “rule of law” to a “preventive criminal law” (that is to say, a technocratic system which controls society and tends to punish acts not yet completed – or not fully assessed. It includes measures aiming to prohibit – *postor praeter probationem delicti* – misbehaviours attributable to specific categories of people symptomatically appreciated¹⁰.

In this framework, it is possible to glimpse even the outline of a proper “police state”, controlling properties (meant as a system to control the circulation of wealth through criminal tools, completely freed from the traditional guarantees which oversee the criminal law¹¹. After all, the evolution of citizens’ duties to inform and proactively cooperate with investigations –exceeding the mere prohibition of expressing solidarity with the accused person (*Solidarisierungsverbot*) – has been emerging for quite some time, namely in the field of money laundering.

8 See C. BECCARIA, *Dei delitti e delle pene* (1764), Feltrinelli, 7, Milan, 1999, § XIX.

9 See A. GARAPON, *La responsabilità delle persone giuridiche e le nuove regole del gioco mondiale. I casi paradigmatici BNP-Paribase Alstom*, in F. CENTONZE, *La responsabilità da reato degli enti nel contesto economico e giuridico italiano: limiti strutturali e proposte di riforma*, Bologna, 2016, being published, p. 6 of the typed version.

10 On this subject, see W. HASSEMER, *Sicherheit durch Strafrecht*, in HRSS, 2006, 130 ff.; on the epiphany of the subjective model within the criminal law, see also G. MARINUCCI, *Soggettivismo e oggettivismo nel diritto penale. Uno schizzo dogmatico e politico-criminale*, in *Riv. It. dir. proc. pen.*, 2011, 1 ff.

11 On the “criminal subsystem of the police”, see, *inter alia*, L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Rome-Bari, 1996, 795 ff.; on a recent use of the *Polizeistaat* category to understand some trends of the criminal policy in the European Union, B. SCHÜNEMANN, *Europäischer Sicherheitsstaat = europäischer Polizeistaat?*, in B. SCHÜNEMANN, *Die Europäisierung der Strafrechtspflege als Demontage des demokratischen Rechtsstaats*, Berlin, 2014, 189 ff.

2. *The central role played by confiscation in the hyper-efficient program pursued by the European and national criminal policy* – As previously stated, in this framework, the kaleidoscopic institution of confiscation¹² –which has been subject to a profound transformation, involving both *function* and *object* of the measure¹³, and which presents, nowadays, more and more special patterns¹⁴ –becomes the leading issue of contemporary criminal policy.

It has been strongly encouraged by an unceasing legislative impulse on the ground of supranational and European harmonization¹⁵, being evidently oriented toward effectiveness¹⁶ to the detriment of fundamental rights¹⁷.

Thus, the measure targeting valuable assets, which was merely a possibility and not always mandatory in the original frame of Italian criminal code (under the general provision of Art 240), becomes a nearly constant and unswerving consequence in the case of white-collar crimes, behaving as a proper ancillary sanction (*sub specie* of a value confiscation¹⁸, applicable –as is explained below – even without the assessment of a causal link between the asset and the crime justifying the measure.

Emerging from these patterns, several models have gradually developed, different in structure and functions. They follow the paradigm of “extended confiscation”, which does not consider the conviction for the original crime as a necessary requirement, and which aims to acquire a wider application (the extended confiscation, based on the presumption of an unlawful source of the assets, is exemplified by Art 12-*sexies* law decree no. 306 of 1992). In addition, this type of confiscation implies further variations, linked to the model of a proper *actio in rem*, which seems to be recalled even by the confiscation *praeter probationem delicti*, ruled by Art 16 and ff. of the decree no. 159 of 2011, the so called “anti-mafia Code”¹⁹.

12 It is more than an institution, a kaleidoscope of institutions, having different rules, strongly influenced by the specific nature of the *res* to be acquired, by the related offence and, last but not least, by the results of the process where confiscation is applied, in accordance with the recent judgment of the Court of Cassation, United Sections, June 26th 2015 - July 21st 2015, no. 31617.

13 Recently, A. MAUGERI, heading *Confisca* (criminal law), cit., 185 ff.; F. VERGINE, heading *Confisca*, *Digesto pen.*, Turin, 2013; L. FORNARI, heading *Confisca* (criminal law), in S. Cassese, *Dizionario di diritto pubblico*, vol. II, Milan, 2006, 1250 ff.

14 On this subject, in particular, D. FONDAROLI, *Le ipotesi speciali di confisca*, Bologna, 2005 *passim*; E. NICOSIA, *La confisca, le confische*, Turin, 2012.

15 In order to summarize the European legislative acts, see again A. MAUGERI, heading *Confisca* (criminal law), cit., 187 f., and M. SIMONATO, *Directive 2014/42/EU*, cit., 215 ff.

16 Emblematic, on this topic, the Recitals of the Directive 2014/42/EU.

17 A critical opinion about the current European legal framework, considering the Directive 42/2014/EU, by N. SELVAGGI, *On instruments adopted in the area of freezing and confiscation. A critical view of the current EU legal framework*, in *Dir. pen. cont.*, July 31st 2015, underlining the disproportion between *efficiency* and *fundamental rights*.

18 This type of confiscation can be applied to the majority of crimes (not only) in the economic field: on this topic, see F. VERGINE, *Il “contrasto” all’illegalità economica. Confisca e sequestro per equivalente*, Padua, 2012.

19 See A. MAUGERI, heading *Confisca* (criminal law), cit., 188.

Additionally, in this framework, traditional confiscation of the price and profit of a crime—constructed on the *Ideal typus* of the “security measures” and connected to the proof that the assets derive from the crime and thus are presumed dangerous – has been revitalised. In fact, the case-law has undergone considerable restyling: considering this kind of confiscation as a security measure and not as a punishment, it has decided to apply it even without a final conviction (that is to say, even if the proceedings have been time-barred), requiring only a previous conviction (in the first or second instance): a “Pyrrhic victory” with a derisive aftertaste for the principle *in dubio pro reo*²⁰.

Therefore, the traditional tools have been enlarged adding new types: value confiscation, together with several hypotheses of “extended confiscation” (starting from Art 12-*sexies* of the law decree no. 306 of 1992), has been added to the “traditional” confiscation/security measure under Art 240 of the Italian Criminal Code (21). Furthermore, many other special types have been introduced, bundling new and particular problems in various fields²².

3. *The evolution towards a preventive criminal law: the “resistible rise” of crimes related to the flow of unlawful proceeds and the “generalization” of the confiscations praeter probationem delicti*—The evolution towards an (excessively) preventive criminal law—bordering an actual “police state” controlling assets – is even more evident from a wide-angle perspective, and, therefore, from a systematic approach. In fact, beyond the several types of *crime proceed* prosecutions, the Italian legal order tends to develop crimes concerning the flow of unlawful proceeds (money laundering and recently, self-laundering), having, among their preventive roles, the evident function of supporting the confiscation of proceeds coming from criminal acts²³.

At the same time, the widening and progressive “normalisation” of confiscation *ante* (or *praeter*) *delictum*, has been observed, based on extremely generic evidence of imminent danger and on the mere disproportion between assets and lawful earnings (Art 16 ff. decree no. 159 of 2011).

20 In this light, Court of Cassation, United Sections, June 6th 2015 - July 21st 2015, no. 31617.

21 Measure originally linked to organized crimes and subsequently extended to several offences against public administration: see, R. ACQUAROLI, *l'estensione dell'art. 12-sexies l. n. 356/1992 ai reati contro la pubblica amministrazione*, in *Dir. pen.proc.*, 2008, 251 ff.

22 One considers the confiscation applicable to the legal entity under Art 19 of the legislative decree no. 231 of 2001, concerning criminal corporate liability; or the one – connected to the relative administrative sanction – used in the market abuse field under Art 187-*sexies* of the legislative decree no. 58 of 1998, whose disproportionate effects have already been brought before the Constitutional Court – without any success – (judgement no. 186 of 2011, and, more recently, no. 252 of 2012; on this topic, see, E. AMATI, *La confisca negli abusi di mercato al cospetto del principio di ragionevolezza/proporzione*, in *Dir. pen. cont.*, February 8th 2013).

23 See G. ARZT, *Geldwäsche und rechtsstaatlicher Verfall*, JZ, 1993, 913 ff., 914.

3.1. Considering the first aspect, the constellation of crimes related to the flow of unlawful proceeds (money laundering and its variations) is going through a “resistible rise”.

They were introduced with the strategic aim of isolating the convicted person in particularly serious cases. Under the rationale of the *délit obstacle*, they gained – as it is known – a first crucial development from the success of the “all-crimes approach” (see the COE, Strasburg Convention of 1990), which has generalized their application, releasing them from a restricted and predetermined number of crimes.

At the same time, the practical increase of the laundering crimes has been supported by broad interpretation of the case-law²⁴. One considers, for example, the (undisputed) punishable nature of the so-called *indirect money laundering*, which – on the basis of a broad concept of crime-related proceeds, adopted even at the supranational level²⁵ – ended agreeing with warnings, of several years ago, that criminalization of indirect and intermediate forms of money laundering had implicated the “gradual development” of the punishable conducts, together with the “quadrupling” of the “tainted proceeds” until neither of them was “clean”²⁶.

Furthermore, in the *mens rea* perspective, the “hunt” for intentional wrongdoing within conducts having a negligent nature has distorted the money laundering’s subjective element. The presence of concrete circumstances, which convey the suspect of tainted proceeds, is considered sufficient to infer (and prove) that the accused person was aware of the unlawful source of profit²⁷.

The Italian legislator has continued this trend, introducing – as mentioned above – the offence of self-laundering. It has completed the strategy of isolating unlawful proceeds, together with people acquiring them, even if these people have not committed (or contributed to) the predicate offence²⁸.

24 On this point, see V. MANES, *Il contrasto al riciclaggio tra repressione e prevenzione: alcuni nodi problematici*, in *Crit. dir.*, 2009, 261 ff.

25 See, at last, the above mentioned Directive 2014/42/EU, together with the broad definition included in Art 2, no. 1, which represents one of the core aspects of the system considering the ‘proceeds’ as it ‘means any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits’.

26 In this light, also, G. ARZT, *Geldwäsche und rechtsstaatlicher Verfall*, cit., 914.

27 It is well known: the international directives consider that the acknowledge of the unlawful origin of assets “may be inferred from objective, factual circumstances” [see, lett. a) of the FATF Recommendation no. 2; already Art 6, para 2, let. c), of the COE’s Strasbourg Convention of 1990 on laundering, search, seizure, confiscation of the proceeds from crime; and now Art 9, § 2, lett. c) of the COE’s Warsaw Convention on laundering, search, seizure, confiscation of the proceeds from crime and on the financing of terrorism].

28 On this topic, see the sharp critics of F. SUGBBI, *Il nuovo delitto di “autoriciclaggio”: una fonte inesauribile di “effetti perversi” dell’azione legislativa*, in *Dir. pen. cont.*, December 10th 2014; furthermore, A. M. DELL’OSSO, *Il reato di autoriciclaggio: la politica criminale cede il passo ad esigenze mediatiche e investigative*, in *Riv. it. dir. proc. pen.*, 2015, 796 ff.

3.2. As for the second aspect, the prevention from “profit driven crime” has been strengthened by confiscation *ante* or *praeter delictum*. This confiscation merely requires “conducts of danger”, traditionally consisting of personal *status*, symptomatic of potential future unlawful acts. They are shaped by ambiguous factual (or suspicious) elements approximately demonstrating a criminal personal history²⁹.

In this field, the Italian legislator has, in the recent reforms,³⁰ generalised an instrument originally tested (above all) in the field of organized crimes (being applied only to particular kinds of people characterized by qualified and specific danger), extending it to white collar criminality. Thus, it has broadened the so called “preventive confiscation” to other categories of subjects, characterised only by an (extremely) generic danger³¹, and shaping it as a sort of *actio in rem* which represents an incredible tool to counter the accumulation of unlawful proceeds, despite being problematic for the respect of the fundamental guarantees of criminal law³².

In the present framework, therefore, preventive confiscation concerns assets which are presumed to come from illegal acts whether they belong –even indirectly – to persons who are normally dangerous and/or accused of different offences (not all being connected to the organized crimes or to the “mafia offences”) and whose value is disproportionate in relation to the economic resources of their owners³³. It is not surpris-

29 In particular, after the judgement of the Constitutional Court no. 77 of 1980, and starting from the reform realized by law no. 327/1988 (modifying Art 1 of the law no. 1423/1956). However, the critical aspects remain unsolved, recently denounced – for instance - by T. PADOVANI, *Giustizia criminale. 2. Misure di sicurezza e misure di prevenzione*, Pisa, 2014, 8 ff., 195 ff.; for a broad sum-up see, V. MAIELLO, *La prevenzione ante delictum: lineamenti generali*, in V. MAIELLO *Coazione penale in materia di criminalità organizzata, misure di prevenzione ed armi*, Turin, 2015, 299 ff.; moreover, F. BASILE - V. MAIELLO - F. MENDITTO -A.M. MAUGERI - L. FILIPPI - M.F. CORTESI, *Le misure di prevenzione dopo il codice antimafia. Aspetti stanziali e aspetti procedurali*, in *Giur.it.*, 2015, 1520 ff.

30 Starting from the abrogation - realized by the legislative decree no. 92/2008 - of Art 14 of the law no. 55/1990, which limited the application of the preventive measures to specific categories of normally dangerous persons. Then, becoming part of the “anti-mafia Code” (Art 16 ff. decree no. 159 of 2011).

31 The rules governing confiscation as a “preventive measure on assets” are now included in Art 16 ff. of the legislative decree of September 6th 2011, no. 159, (the “anti-mafia and preventive measures Code”): it is provided that this hypothesis of confiscation shall be applied to those people suspected of being part of the mafia organizations or suspected to have committed some relevant crimes recalled by Art 4 of the legislative decree no.159 of 2011. However, it has also provided that this measure can be applied – and this is very important - to those who “must be considered, on the basis of factual elements, normally devoted to criminal trades” (Art 1, lett. a, legislative decree no. 159 of 2011), and to those who “have to be considered living normally, and even partially, thanks to the criminal proceeds, depending on their behaviour and standard of living” (Art 1, lett. b., legislative decree no. 159 of 2011), together with those who “have to be considered, on the basis of their behaviours, dedicated to committing crimes offending or threatening the moral or physical integrity of the underage’s, public health, security or serenity”.

32 A. MAUGERI, heading *Confisca* (criminal law), cit., 186.

33 In relation to the “subjects” of Art 16, Art 24 of the legislative decree no. 159 of 2011 provides that the Tribunal orders confiscation of the assets whose legitimate source the accused person is not able to justify, and which are not proportioned to the accused person’s income,

ing that this tool has recently become a “forerunner” measure to fight certain specific categories of suspects in which economic crimes are concerned (including, in accordance with the recent case-law, the so called “dangerous tax-related author” as well as the “serial briber”, etc.³⁴.

This evolution – supported by the Italian Supreme Court³⁵ – confirms, on one hand, that the traditional partition among the paradigms of organized crimes (“black”) and property crimes (“white-collar”) has been definitively overtaken³⁶. On the other, it demonstrates that the original project of ethical-social care, which used to involve the preventive measures against marginalized people and misfits, has turned into a tool

as it is declared for tax purposes, or for the economic activity, either of the assets which represent the proceeds from crime or its laundering.

Moreover, the following Art 25 provides the possibility of (seizure and) value confiscation: it rules that if the person, whose assets are subjected to the preventive measure, wastes, misappropriates, conceals and underestimates the assets in order to avoid the application of the measure, seizure and confiscation will address other assets having equivalent value. The same rule applies when the assets have been lawfully traded, before the seizure, with *bona fide* third persons.

34 On this topic, see F. MENDITTO, *Le confische nella prevenzione e nel contrasto alla criminalità ‘da profitto’ (mafie, corruzione, evasione fiscale)*, in *Dir. pen. cont.*, February 2nd 2015; and, A.M. MAUGERI, *La lotta all’evasione fiscale tra confisca di prevenzione e autoriciclaggio*, in *Dir. pen. cont.*, March 2nd 2015; among the case-law, see Lanciano Tribunal, October 3rd 2011, Judge Del Villano Aceto, in *Dir. pen. cont.*

35 In particular, in a recent judgement the Court of Cassation has affirmed, on one hand, that the measure *de qua* has a preventive nature (implying the application of the principle *tempus regit actum*, not of the principle of non-retroactivity), even if the evolution of laws and case-law is confirming the different scope of neutralize the unlawful proceeds, independently from the threat coming from the assets or the addressees [United Sections, June 26th 2014 (published in February 2nd 2015), no. 4880, judge Spinelli, affirming that the measure has to be considered preventive, despite any afflictive component, being a tool which tends to prevent the commission of other crimes and prohibiting standards of living which contrast with the rules of the society; see the critics of E. MAIELLO, *La confisca di prevenzione dinanzi alle Sezioni Unite: natura e garanzie*, in *DPP*, 2015, 722 ff.; and of F. MAZZACUVA, *Le Sezioni Unite sulla natura della confisca di prevenzione: un’altra occasione persa per un chiarimento sulle reali finalità della misura*, in *Dir. pen. cont.*, July 15th 2015; and, also, enlarging the perspective of analysis, A.M. MAUGERI, *Una parola definitiva sulla natura della confisca di prevenzione? Dalle Sezioni Unite Spinelli alla sentenza Gogitidzedella Corte EDU sul civilforfeiture*, in *Riv. it. dir. proc. pen.*, 2015, 942 ff.].

On the other hand, the judges have confirmed that the recent legislative innovations (that is to say the abrogation realized by the legislative decree no. 92/2008, by Art 14 of the law no. 55/1990, which limited the applicability of the preventive measures to specific categories of normally dangerous persons) brought about the enlargement of subjects affected by confiscation, not limiting them to the hypothesis of qualified threat, whereas making the measure generally applicable (see F. MAZZACUVA, *Le Sezioni Unite sulla natura della confisca di prevenzione*, cit., 2).

36 Another example of progressive interconnection among opposite models: C. E. PALIERO, *Criminalità economica e criminalità organizzata: due paradigmi a confronto*, in M. Barillaro, *Criminalità organizzata e sfruttamento delle risorse territoriali*, Milan, 2004, 141 ff., 144 ff.

protecting the economy, and having the specific purpose of promoting *economic order* (such as *fair competition*)³⁷.

Evidently, the aforementioned extension is troublesome to the fundamental principles of criminal law.

In fact, its conformity to the Constitution has yet to be proved, being even more uncertain once the preventive measures have evolved from a subsidiary role to become (dangerous) co-protagonists in relation with the classic provisions of criminal law and with the principle of personal liability (see *infra*, § 5.4).

4. *A confiscation system which is growing in a “penumbra of legality”: the efforts made by the case-law of the ECHR and the need for dogmatic harmonisation in order to ensure that confiscation respects fundamental guarantees* – As it is evident, the expansion of the confiscation system has been developed and is still developing in an authentic “penumbra of legality”, instigated by a synergic cooperation between an effective legislator and a “fighting” jurisprudence.

The uncertainties, related to the frame of the different forms of confiscation, allow the legislator (both European and national) and the domestic jurisprudence to act freely, expanding several hypotheses of property confiscation in a dimension which is often in contrast with the fundamental guarantees –together with the “negative certainties”- of criminal law (gradually affecting the rule of law, the presumption of innocence, the principle of proportionality, etc.).

The ECHR case-law has contained this evolution, focusing “behind the appearances [on] the realities of the situation” and observing, firstly, that some types of confiscation can be considered “substantially criminal”, falling within the meaning of the *matière pénale* and, thus, respecting the guarantees provided by Artt 6 e 7 ECHR³⁸.

As is well-known, the “substantial approach” adopted by the Strasbourg Court in order to apply the criminal guarantees, overtaking the formal labels conferred to a certain measure by the relevant national legal order, leads to a structural and teleological analysis, dealing with the partition between the *reparative*, *afflictive* and *preventive* functions. Moreover, it is necessary to distinguish – and this is of major interest– among preventive scopes which deal with danger (i.e. treatment, neutralization) and scopes which are *lato sensu* preventive but, in any case, attributable to the concept of punishment (as deterrence and intimidation), implying the respect of the guarantees that govern each measure part of the “*matière pénale*”³⁹.

37 Emblematic, on this point, Court of Cassation, United Sections, June 26th 2014 (published on 2nd February, 2015), no. 4880, judge Spinelli, in particular § 7.1.

38 In this light, for instance, the judgement *Welch c. Regno Unito* on the afflictive nature of the extended confiscation under the Convention; as for the confiscation of unlawful land and buildings (Art 44, § 2, D.P.R. no. 380 of 2001), see the judgements *Sud Fondi v. Italy* and *Varvara v. Italy*.

39 On this point, see the judgement of the ECHR, February 9th 1995, § 30; see, also, F. MAZZACUVA, *La materia penale e il “doppio binario” della Corte europea: le garanzie al di là delle apparenze*, in *Riv. it.dir.proc.pen.*, 2013, 1899 ff.

Furthermore, this remarkable attempt to obviate the problem of “mislabelling” (*Etikettenschwindel*) has sometimes been echoed by the Italian Constitutional Court⁴⁰. The ECHR influence is also evident in other decisions which have recognised that the *value confiscation* has a *criminal nature*⁴¹.

However, the ECHR effort gets more difficult because of the models’ crossbreeding and, in particular, the absence of a common principle, erected on common categories, which often let the alternative prevention/affliction seem excessively simple. This represents a further confirmation – if needed – of the fact that a dogmatic harmonisation is indispensable to provide an effective harmonisation of guarantees at the supranational level⁴².

5. *An (only) partial inventory of the constitutionally sensitive questions*—Recalling the criminal policy models, consolidated at the EU level⁴³, it is possible to underline some critical questions, which evidently contrast with constitutional guarantees.

5.1. The direct confiscation of criminal proceeds, which necessarily demands a final conviction even in the “generous” European model (apart from particular and exceptional cases), is on the contrary often applied by a recent case-law of the Italian Supreme Court even *without a final judgement* (especially due to a discontinuing clause as the prescription period), on the ground of security measure of Art 240 of the Criminal Code⁴⁴. Nevertheless, it has been recognized for a long time that this confiscation does not involve any preventive function, even if it regards the *profit, price* and *product* of the offence⁴⁵. Rather, it satisfies a compensative function, that is to say the civil concept of unjust enrichment shifted in the criminal sphere⁴⁶.

40 For instance, judgement no. 196 of 2010 (concerning the afflictive nature of the confiscation of vehicles driven under the influence of alcohol), has promptly adopted the supranational approach: this judgement has been truly relevant since it concerns a special hypothesis of confiscation whose afflictive nature has been recognized: V. MANES, *La confisca punitivatra Corte costituzionale e CEDU: sipario sulla “truffa delle etichette”*, in *Cass. pen.*, 2011, 76 ff.

41 For instance, decision no. 97 of 2009.

42 On the role played by dogmatic harmonization in Europe see J. VOGEL, *Strafrecht und strafrechtswissenschaft im internationalen und europäischen Rechtsraum*, in *JZ*, 2012, 25 ff.

43 The different types of confiscation can be identified in four macro-categories (evident from the Recitals of the Directive 2014/42/EU): a) confiscation of instrumentalities and proceeds of crime following a final decision (Recital no. 14; Art 4, § 1); b) value confiscation (Recital no. 15; Art 4, § 2); c) extended confiscation (Recitals no. 19 and no. 20; Art 5); d) the confiscation which concerns property transferred to third parties (Recital no. 24; Art 6; in the Italian jurisdiction, Art 12-*quinquies* of the legislative decree no. 306 of 1992).

44 In this light – after many previous case-law anticipations - the recent decision of the Court of Cassation, United Sections, June 26th 2015 - July 21st 2015, no. 31617, cit.

45 *Inter alia*, A. ALESSANDRI, heading *Confiscancel diritto penale*, in *Digesto/pen.*, III, Turin, 1989, 44 ff.; on the problem of “mislabelling”, realized by the legislator that unified under the same model several types of confiscation having different functions in order to apply less guarantees, A. MAUGERI, heading *Confisca (criminal law)*, cit., 192.

46 See, G. WOLTERS, *Die Neufassung der strafrechtlichen Verfallsvorschrift*, Baden-Baden, 1995, 68 ff.

In this way, a security measure related to property is structured as a new - “general” - hypothesis of “quasi offence” (any economic crime being “quasi proved”), committing – in any case – a violation of the presumption of innocence, where the principle *in dubio pro reo* is replaced by that *in dubio pro republica*.

5.2. The “value confiscation”, introduced in order to simplify the burden of proof, excluding the need to demonstrate the connection of origin between offence and proceeds, operates still in a context of *serious uncertainty of the legal framework* – starting from the “totally uncertain” legal notion of *profit* to be confiscated⁴⁷ – and unlikely to comply with the rule of law and the “void of vagueness” under Art 25, § 2, of the Italian Constitution.

Furthermore, in a recent judgement⁴⁸, the Court of Cassation stated that, this form of confiscation does not find application whether the criminal proceeds consist of an amount of *money*. The requirement of a formal final conviction is – even in this case – circumvented, while *vice versa* it should be imposed since the value confiscation has (and it is no longer discussed) a criminal nature.

This approach implies a clear application of the regime of direct confiscation *sine periculositate*, to the detriment of the fundamental requirement which the structural model (of art. 240 Italian criminal code) refers to.

5.3. In essence, the Italian legal order is getting used to confiscations applicable *without final convictions* (non-conviction based confiscations). This idea firstly emerged in relation to the special hypothesis of confiscation of unlawful lands and buildings, according to the Constitutional Court (judgement no. 49 of 2015), and is now going to be “generalized” by the aforementioned decision of the Court of Cassation. In fact, in several cases the Court has affirmed that the lack of a final conviction – together with the presumption of innocence – has to be assumed as a *quantité négligeable*⁴⁹.

On the contrary, this approach has been rejected – after a long discussion⁵⁰ – by the recent European provisions (Directive 2014/42/EU) and it appears questionable even before the ECHR, which has stated “*l’interdiction d’infliger une peine sans constat de*

47 Recently, V. MONGILLO, *Confisca (per equivalente) e risparmi di spesa: dall’incerto statuto alla violazione dei principi*, in *Riv. it. dir. proc. pen.*, 2015, 716 ff., 731 ff., 741 ff., considering the institution as “the most unconstitutional in the Italian criminal law on the ground of the rule of law”, in a paper particularly focused on denying that the situations of unlawful incomes belong to the concept of “profit”, since there is no unlawful wealth, coming from external situations, that can be factually proved.

48 As mentioned, Court of Cassation, United Sections, June 26th 2015 - July 21st 2015.

49 However, this rule is likely to be extended considering the ambiguous nature of the relevant special hypothesis of confiscation: see Court of Cassation, sez. III, October 22nd 2015, no. 42458, affirming that the mandatory confiscation, under Art 174 of the legislative decree no. 42 of 2004 (which punishes those who transfer artistic and historical goods abroad without having the proper authorization), is an administrative (not criminal) sanction, applicable even without any finding of liability.

50 See C. GRANDI, *Il ruolo del Parlamento europeo nell’approvazione delle direttive di armonizzazione penale*, cit., 712 ff.

responsabilité”⁵¹ under Art 6, § 2, and 7 of the Convention. Furthermore, the authority of the Grand Chamber will soon deal with this issue in the case *Hotel Promotion Bureau s.r.l. and Rita Sarda s.r.l. et al. v. Italy* (application no. 34163/07).

5.4. Even more serious concerns regard those types of confiscation which involve the *genus of extended confiscation*.

As for the so called “disproportioned confiscation”, ruled by the above-mentioned Art 12-*sexies*, its constitutional compliance, already very weak⁵², is even more controversial considering the Italian case-law. In fact, no pertinent connection is required between the confiscated assets and the offence, nor any connection of chronological coherence.

In this light, the main concerns involve the presumption of unlawfulness of the assets’ origin, relieving the judges from any duty to motivate their decisions in relation to frameworks of danger, which are so varied that they seem totally vague.

In fact, the fragile balance, which made the Italian Constitutional Court save the norm, risks not resisting the extension of the measure even to less relevant criminal phenotypes. It currently refers to “basically legal contexts”, in relation to which the presumption of unlawful proceeds appears to lack solid empirical grounding, with the consequent and unreasonable sacrifice of the right to property⁵³.

Preventive confiscation (Art 16 ff. decree no. 159 of 2011), fails to perfectly fit the pattern proposed at the European level (*extended confiscation*)⁵⁴. In the Italian version, it seems unlikely to correspond to a model of pure prevention. Rather, the prevalence of an afflictive function emerges from the fact that no danger has to be proved in rela-

51 ECHR, October 29th 2013, *Varvara v. Italy*, § 67; on the Constitutional Court judgement no. 49 of 2015, see the comment by V. MANES, *La “confisca senza condanna” al crocevia tra Roma e Strasburgo: il nodo della presunzione di innocenza*, in *Cass. pen.*, 2015, 2204 ff.

52 On the permanent doubts on constitutional legitimacy see R. CANTONE, *La confisca per proporzione*, in V. MAIELLO, *La legislazione penale in materia di criminalità organizzata, misure di prevenzione ed armi*, cit., 119 ff., 121 ff.

53 It is sufficient to recall – *mutatis mutandis* – the Constitutional Court case-law on the presumption of adequacy of the pre-trial detention, starting from the judgement no. 265 of 2010.

54 As already mentioned, even in the Directive 2014/42/EU the extended confiscation is provided (Art 5), but this is linked to a “criminal offence which is liable to give rise, directly or indirectly, to economic benefit”; it is also provided a confiscation of the unlawful proceeds without a final decision but only in exceptional cases (illness or absconding of the suspected or accused person), not approving the proposal to include a measure under the broad model of the *actio in rem* which was present in the proposal by the European Parliament’s Commission for Civil liberties, justice and home affairs.

As it has been highlighted, that model provided the identification of the afflictive nature of confiscation and the respect of the ECHR guarantees under Artt 6 and 7, starting from a serious burden of proof of the unlawful origin of the assets [A. MAUGERI, heading *Confisca (criminal law)*, cit., 188; but also, *amplius*, EAD., *L’actio in rem assurge a modello di “confisca europea” nel rispetto delle garanzie CEDU?*, cit., 252 ff.].

tion to people affected by the measure⁵⁵: this allows to neutralize *tout court* the (presumptively) illegal proceeds and to impose the prohibition of retroactive effects, in spite of the Court of Cassation's assumption⁵⁶.

Beyond the chronological regime, the structural requirements of the measure – totally depending on the judge's discretion – justify serious doubts on its constitutionality. The extension to persons *generally* dangerous, and the unrestricted delegation of powers to judicial authorities, renew – and intensify – the traditional concerns related to the preventive system's compliance with the rule of law.

Those concerns have already led the Constitutional Court to ban the legitimacy of the preventive system within the well-known judgment no. 177 of 1980. The Court has retained “decisive [...] even for the preventive measures” that “the legal description, the legal type of the offence, lets identify the conduct or conducts whose assessment, in a concrete case, could lead to a reasonable prognostic judgement, pointed at the future”. It has also made clear that “the conducts required to apply the preventive measures, since the scope is preventing crimes, have to involve a reference, implicit or explicit, to the crimes or the categories of crimes whose prevention is implied. In this way, the description of the relevant conduct or conducts acquires more certainty, allowing to deduce from their actual taking place the reasonable prevision that those specific crimes could be committed by those persons”⁵⁷.

However, before the ECHR, this *generalization* could appear problematic: in fact, if the Strasbourg Court was indulgent with preventive confiscation in relation to those subjects belonging to mafia organizations⁵⁸; it reached opposite conclusions regarding a “confiscation without conviction”, based on the mere suspect that different types of

55 See Court of Cassation, November 13th 2012, Occhipinti, in *Dir. pen.cont.*, commented by A. M. MAUGERI, *La confisca misura di prevenzione ha natura “oggettivamente sanzionatoria” e si applica il principio di irretroattività: una sentenza storica?* (July 26th 2013); in this light, also V. MAIELLO, *La prevenzione ante delictum*, cit., 313 ff., 316; similarly, ID., *La confisca di prevenzione dinanzi alle Sezioni Unite*, cit., 723, 725 f., stating that the confiscation, when the connection among the presumed illegal assets and the dangerous person is interrupted, stops involving preventive scopes while it has afflictive functions.

56 On the above mentioned judgement of the Court of Cassation, United Sections (June 26th 2014, published in February 2nd 2015, no. 4880), see F. MAZZACUVA, *Le Sezioni Unite sulla natura della confisca di prevenzione*, cit., in particular 3 ff.

57 Constitutional Court no.177 of 1980, declaring Art 1, n. 3, of the law no. 1423 of 1956 (which concerns the preventive measure for the so called “prone to crime”), constitutionally unlawful.

58 Among the well-known judgements, ECHR, September 4th 2001, *Rielav. Italy*, concerning an hypothesis of confiscation applied on the ground of a suspected (depending on the proves collected in the process) membership of a mafia-type organisation, based in Sicily, where the Court has excluded the confiscation to have afflictive nature since it aims to prevent other crimes and it does not require a final conviction. Therefore, that sanction could not be defined criminal. Generally, in this case, as in others, the ECHR has considered that the preventive measures have to respect the principle of fair trial under Art 6, § 1, ECHR, and not also under Art 6, § 2 and 3, concerning the presumption of innocence and the rights of the accused person (see ECHR, March 16th 2006, *Bocellari and Rizza v. Italy*; February 2nd 2010, *Leone v. Italy*; August 17th 2011 *Capitani and Campanella v. Italy*; June 17th 2014, *Cacucci and Sabatelliv v. Italy*).

offences had been committed (in particular, robberies within trucks, even if in an organized form)⁵⁹.

5.5. As already mentioned, these considerations are not exhaustive: many other concerns could be analysed.

5.5.1. Several important conflicts, for instance, have involved the principle of proportionality, even if it is considered at the European level a prerequisite for the legitimacy of each seizure and confiscation⁶⁰. This emerges from the long-lasting duration of the Italian seizure orders throughout the entire proceedings, without any judicial assessment on the current risk of losing the assets (to the detriment of the EU provisions)⁶¹. Also, it is evident observing the unreasonable extension reached by the confiscation's object in some specific cases: sometimes it depends on barely reasonable legislative choices (as in the hypothesis of confiscation of the assets used to commit market abuse's crimes), and, at other times, it depends on excessively broad judicial interpretations (for instance, the value confiscation of savings which derive from unlawful conducts⁶²).

5.5.2. Moreover, there is a question related to the rights of third persons affected by – or dragged into – the confiscation orders. In this field, the legitimacy shortcomings of confiscation increase in arithmetic progression, undermining the principle of personal liability in criminal law (*nullum crimen sine culpa*).

Clearly beyond the subject of the “heirs”, it suffices to consider – as mentioned above – the relations among confiscation and insolvency procedures (bankruptcy and compromise with creditors), an area often enmeshed by the predominance of public revenue on the rights of third parties (and “on the merely private interest of the *par condicio creditorum*”, essential in those procedures)⁶³.

59 ECHR, March 1st2007, *Geering v. Netherlands*, under Art 6 § 2 of the Convention.

60 See, for instance, as for the value confiscation, Recital 17 of the above mentioned Directive; but also Art 1, Protocol 1, to the ECHR, which identifies proportionality as a pre-requirement for the lawfulness of confiscation, as it has been highlighted in the judgment of the ECHR, May 12th 2015, *Gogitidze v. Georgia* (see A.M. MAUGERI, *Una parola definitiva sulla natura della confisca di prevenzione?*, cit., 960 ff.).

61 In particular, one considers Recital no. 31 of the Directive no. 2014/42/EU: “given the limitation of the right to property by freezing orders, such provisional measures should not be maintained longer than necessary to preserve the availability of the property with a view to possible subsequent confiscation. This may require a review by the court in order to ensure that the purpose of preventing the dissipation of property remains valid”.

62 On this topic, see the critical observations of V. MONGILLO, *Confisca (per equivalente) e risparmi di spesa*, cit., in *Riv.it.dir.proc.pen.*, 2015, 716, together with the relative case-law.

63 See, *inter alia*, Court of Cassation, Sez. I, March 22nd 2011, no. 16797: the Court constantly affirms that the preventive procedure has to prevail on the bankruptcy procedure when the bankrupt has been declared before the seizure and, also, when it has been declared after the acquisition (see Court of Cassation, Sez. I, 26.5.2006, no. 18955). This privilege is justified by the preeminence of the public interest pursued by the anti-mafia law on the private interest of the “*par condicio creditorum*” pursued by the bankruptcy law. The superior interest also

This principle is barely embraceable and “constitutionally sustainable”: it has been challenged only by a commendable case-law, conferring to the judge – in specific cases – a cautious assessment able to guarantee a more reasonable balance between the relevant demands⁶⁴.

regards the need to avoid the assets to return into the market and, in particular, to the mafia organization, since it is true that the assets’ property remains to the insolvent (and he can acquire the assets’ disposal) once there is a positive income at the end of the insolvency procedure, even if he lost the administration of the assets due to the bankrupt.

64 The argument elaborated by this case-law starts from the necessary distinction between the (mandatory) confiscation of dangerous assets and the faculty to confiscate the assets which are dangerous since they are owned by a particular person or, in other words, from the need to assess in this second case that the insolvency procedure is able to ensure the loss of the ownership as the preventive measure does, conferring the power to balance opposing interests to the judge.

On this topic, the *leading case* is the judgement of the Cassation Court, United Sections, May 24th 2004, no. 29951, *Focarelli*, in a case concerning the preventive seizure ordered for the confiscation under Art 240 of the Italian Criminal Code of the assets subjected to a bankruptcy procedure: the judges, denying the preeminence of the public needs, have affirmed that it is not possible to exclude that the loss of ownership due to a bankruptcy procedure absorbs the function of the criminal seizure (that is to say, avoids that the accused person keep controlling the assets used to commit the crime or its proceed or price), allowing a balance with the needs of the creditors of the insolvent entrepreneur (as fundamental public interest).

This principle has been applied even by the subsequent case-law in the cases concerning the extended confiscation (on one hand, under Art 12-*sexies*, law no. 356/1992, on the other, under Art 198, law no. 228/2012) to be applied to those properties subjected to a bankruptcy procedure, affirming in both cases that the stage of liquidation represents an adequate tool to ensure the loss of ownership for the addressee of the preventive measure [see, respectively, Court of Cassation, Sez. III, February 2nd 2007, no. 20443, Sorrentino, and Court of Cassation, Sez. VI, October 17th 2013, no. 49821, *Lu.fra.trasportis.r.l.*, concerning an hypothesis of preventive confiscation applied before the entering into force of the “anti-mafia Code”, where the Court has affirmed that the stage of liquidation, made in order to satisfy the creditors’ needs, demonstrates the absence of danger (even for the procedures not ruled by the anti-mafia Code) of the assets affected by confiscation; the act of selling the assets is not compatible with the bond and unchangeable State’s ownership which characterizes confiscation.

This approach has been followed even by other case-law (for instance, Trib. La Spezia, March 22nd 2014; Trib. Naples, Sez. X, June 20th 2011), where it has been affirmed that – although the effects on the entrepreneur’s property are different – it is not possible to exclude that, even before an insolvency procedure, the opposite interests of the two procedures have to be balanced. They are both focused on public needs, considering the concrete characteristics of the insolvency procedure in the stage of liquidation and the attitude of this procedure to ensure that the property – even through unreal creditors- does not to return to the person subject to confiscation.

In conclusion, the above mentioned case-law - which affirms that the confiscation (and therefore even the preventive measure) is “receptive” in relation to both the bankrupt and the insolvency procedure, since the stage of liquidation realizes the same scopes of confiscation (that is to say – as highlighted by the Constitutional Court - removing the asset from the original economic network to insert it in a lawful circuit, judgement no. 21 of 2012, § 6) - seems preferable, even if the legislator has not expressly ruled the case, since it is able to ensure a balance which respects the constitutional guarantees protecting the rights of the

5.5.3. Finally, observing the problematic overlapping between the criminal and accounting processes (and, consequently, between confiscation, compensation for damages and liability to tax authorities), which often emerges in relation to some offences (such as offences against public administration), several concerns with the principle of *ne bis in idem* emerge. This principle prohibits duplicating proceedings which tend to apply, for an *idem factum*, sanctions “having a criminal nature” (65). Analogous problems involve the area of tax offences, in which payment (even if late) of tax obligations should prevent any subsequent confiscation, which would imply a “double sanction”66.

6. *The guarantees “behind the appearances”*—Plural and deeply ambiguous, the instrument of confiscation – somewhat like the face of Medusa –has become the place where the traditional categories appear subverted, with serious consequences for legal guarantees.

The “resistible rise” of tools contrasting the economic crimes seems to be constitutionally abnormal: it provides a *trend* of dangerous transition towards a “system of prevention”, detached from the ordinary categories of criminal law, *actus reus* and *mens rea*, and from the judicial assessment “beyond any reasonable doubt”.

This transition cannot be justified by the “good intentions” which inspire the legislator and the Courts, contrasting corruption and white-collar crimes. It is not even mitigated by the idea of a “double standard of guarantees” for prison sentences (or other limitations on personal freedom) and property sanctions67. In fact, although the property measures imply a weaker undermining of the fundamental rights, they do not intend – and have never intended – to promote a sort of *locus minoris resistentiae* for the guarantees, unlimited by the principles which govern the punishing powers.

third parties and conferring to the judge the power to balance the relevant interests under the principle of rationality.

This is confirmed by the recent judgement of the Court of Cassation – already mentioned – on the nature of the preventive confiscation (Cassation Court, United Sections, June 26th 2014 - February 2nd 2015, no. 4880, cit., § 9), where it has been affirmed that this special hypothesis of confiscation – even after the modifications of the legislative decree no. 159/2011, not requiring to assess that the accused person is actually dangerous in order to apply the measure - finds its origin in the (even not present) dangerousness of the person and not yet in the dangerousness of the assets which can easily be inserted in the economic network once the link with the accused person has been interrupted.

65 ECHR, Second Section, March 4th 2014, *Grande Stevens v. Italy*, applications no. 18640, 18647, 18663, 18668 and 18698/2010, which has been commented upon, *inter alia*, by A. F. TRIPODI, *Uno più uno (a Strasburgo) fa due. L'Italia condannata per violazione del ne bis in idem in tema di manipolazione del mercato*, in *Dir. pen.cont.*

66 See MONGILLO, *Confisca (per equivalente) e risparmi di spesa*, cit., 748, 754.

67 This peculiar aspect has been recently recalled, considering the several guarantees applicable, by O. DI GIOVINE, *Antiformalismo interpretativo: il pollo di Russell e la stabilizzazione del precedente giurisprudenziale*, in *Dir. pen.cont.*, June 12th 2015, 17.

Overall, in general, none of those arguments are able to justify the “penumbra of legality” which is characterizing the constellation of confiscations in economic (and not only economic) criminal law.

To this extent, the effort tracing the constitutional attitude of the property measures cannot be limited to contemplating the criminal policy models, proposed at the European level and spread at the national one, where nowadays confiscation is in disarray. Rather, the challenge is developing a “functional anatomy” of the singular structural models, which depicts the relevant framework of guarantees and realises the legitimacy assessment. This assessment may not be satisfied by the mere juxtaposition between preventive measures and those which are afflictive (actual “property sanctions”). On the contrary, it has to investigate the substantial aspects which are truly prevalent in the single case⁶⁸.

It is necessary to pledge a common denominator of guarantees able to embrace both these sides in order to return them to a “constitutionally sustainable” climate⁶⁹ and to search for a balance, among the effectiveness demands and the individual rights, adequate to a model of criminal law, considered as a “science of the boundaries of punishment” (*Strafbegrenzungswissenschaft*)⁷⁰.

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68 On this topic, see A. MAUGERI, heading *Confisca (criminal law)*, cit., 193 ff.; F. MAZZACUVA, *La materia penale e il “doppio binario” della Corte europea*, cit., 1928 ff.

69 The principle of non-retroactivity should, for instance, include all the sanctions (punishments, security measures and *ante delictum* measures), when they have afflictive nature and independently on the prevalent preventive dimension (until Art 25, § 2, of the Constitution is conventionally interpreted, enforcing the protection of guarantees as the Constitutional Court requires); the same approach should concern the principle of foreseeability and accessibility of the different measures and also, perhaps, the principle of retroactivity of the *lex mitior* (identified long time ago under Art 7 ECHR), oriented towards the primary requirements of equality and proportionality and so towards the “*prééminence du droit*”.

70 The “negative science” well described by W. NAUCKE, *Negatives Strafrecht*, cit.