

General Overview and Critical Analysis of Italian Preventive Measures and Ecthr Case Law

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Abstract

To fight the growing penetration of illegal economies in legal economy, Italian legislator allowed the law enforcement authorities not only to impose measure of repression, but also to use the so-called “preventive measures” (wiretapping, protective custody, confiscation of assets), now collected in and regulated by the “Antimafia and prevention measures Code”. This is the most significant peculiarity of Italian experience, where the aim of prevention measures is not to punish the person, but rather to acquire, in favor of the State, assets which, illegally entered in the availability of dangerous people, have to be subtracted to them, in order to prevent further manifestation of their dangerousness. The application of “confiscation without conviction”, has caught, in recent decades, the attention of doctrine and jurisprudence, not only in Italy but also in other “supranational” systems, and posed the question of compatibility of prevention measures with European Convention on Human Rights. This paper wants to propose a general overview and a critical analysis of Italian preventive measure, also with respect to the ECtHR’s case law.

1. Preamble

In recent years, the recession and the economic crisis have fueled the increasingly heated debate about crime and economic development, costs and effects of the first on the second and the impact of criminal organization on business structure and territorial, social, and cultural context. Respect for the law is above all an ethical and moral value, an essential pillar of all civil society, but also a fundamental economic value, a necessary condition to protect the freedom of traders, the regular course of business dynamics, market transparency, free and fair competition.

The proper functioning of the market and its continued growth, unfortunately, are sometimes hindered by forms of “economic crime” (or “profit crime”) that alter the game’s rules, undermine the principles and values of the democratic state, distorting the market, debasing the work and, ultimately, hindering the freedom of enterprises, credit and investment. Profit crime includes a number of diverse phenomena, whose common characteristic can be identified in wrongful behaviors constituting offenses, direct to illicit enrichment.

Among different forms of profit crime, a leading role is represented by three sectors, indicated by many as a major cause of lawlessness and lack of growth in the country: mafias, corruption and tax evasion. The penetration of these illegal economies in legal economy entails effects that impact not only on the value of what is produced through criminal activity, but also on the value of what was not produced because of distortion caused by the spread of crime².

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² I. VISCO, *Contrasto all'economia criminale*, Nov 7th 2014, www.bancaditalia.it

To combat these forms of profit crime, which obviously have a high cultural, social and economic cost, Italian legislator allowed the law enforcement authorities not only to impose measures of repression, but also to use a number of prevention measures, like wiretapping, protective custody, confiscation of assets, operations with under covered officers, use of special intelligence information.

In particular, the preventive measures on assets were born as police control instruments for people considered dangerous for political and legal system and became a fully "jurisdictional" instrument which permit, among the others, seizure of illicitly accumulated capitals belonging to mafia suspects or to people living of the income of every crime of any nature (also white-collar crimes).

2. An Italian Unique: The Antimafia and Prevention Measures Code.

The prevention measures constitute a peculiar institute of Italian legal system.

In their modern idea, they were born with the Zanardelli code and with the law of public security of 1889. Over the years, they became, during the Fascism, an agile and effective tool in the hands of executive power to marginalize socially undesirable people and neutralize politically dissenting subjects.

In fact, crime prevention represents a fundamental and essential task of every organized society. However, said task should be carried out without disfiguring the face of a democratic state, trying to maintain a balance between warranty requirements and requirements of efficiency. So, over the time, the distortions of this authoritarianism exercise tool have been corrected, first by Italian Constitutional Court³, then by the so called "cleanup" law, no. 1423/1956. Afterwards, said law has been modified, by Law no. 575/1965, Law no. 152/1975, and Law "Rognoni/La Torre" of 1982, which in the fight against organized crime, introduced prevention measures on assets (confiscation, first of all), then being extended to other manifestations of crime.

In order to unravel the legal tangle thus arisen with regard to preventive measure, Italian legislator, in 2010, with Law no. 136, delegated the Government to adopt a legislative decree. Therefore, it was issued the Legislative Decree no. 159/2011, also known as "Anti-mafia and prevention measures Code", which brings in a single legislative text the whole preexisting scattered legislative material. Now, the combination of "anti-mafia laws" and "prevention measures" suffers from an approximation by defect, since prevention measures are aimed at preventing not only mafia crimes, but also other types of crimes.

However, the choice of said terms is symptomatic of how, in recent decades, the anti-mafia sector has been the main field of application of these measures. Said "preventive phenomenon", which has equipped Italian legal system with a so called "third rail", is becoming more and more Italian legislature privileged tool to combat the most dangerous forms of crime.

In fact, Law Decree no. 7/2015, converted with amendments in Law no. 43/2015, strengthened and extended the toolbox of prevention measures concretely adoptable to combat terrorism, also international terrorism. In fact, art. 4, § 1, lett. d) of Anti-mafia Code, in the list of potential addressees of prevention measures, comprehend also the so called "foreign fighters", i.e. people that, operating alone or in groups, are engaged in preparatory acts, objectively relevant, directed to take part in a conflict in a foreign territory to support an organization which pursues terrorist purposes (art. 270sexies Italian Penal Code).

3. Pecuniary Prevention Measures.

As Beccaria said, *"it is better to prevent crime rather than punish them. This is the aim of every good legislation"*⁴.

For that reason, to ensure the prevention needs, sometimes it is necessary to impose measures that – regardless of the commission of an offense and even without the application of a penal sanction – restrict freedom of a person by imposing numerous requirements, to facilitate the control and supervision of the organs responsible for the protection of public safety. In this context, Italian Anti-mafia Code provides for preventive personal and financial measures, which – among warranty requirements and requirements of efficiency – limit two types of rights: the right to personal freedom (personal measures) and the right to property and business (pecuniary measures).

³ Corte Cost., no. 2/1956: measures of prevention are "jurisdictionalized" and liberation from the "suspect" is imposed.

⁴ C. BECCARIA, *On crimes and punishments*, 1764.

In this “protective” perspective, both national and conventional (ECHR), if the deprivation of liberty must be protected to the maximum extent, the right to property can be limited to certain conditions, when the general interest prevails, with a proportionate sacrifice. With specific reference to pecuniary preventive measures, it can be said that, today, despite the misgivings of doctrine and jurisprudence, it is emerging a sort of “Preventive Confiscation Act” and it is possible to identify principles of a general nature of the so-called “Process to the assets”, that, once ensured the necessary guarantees, enables the elimination from the legal economy of assets illicitly acquired by persons belonging to specific categories of danger.

The normative reference of pecuniary preventive measures is to be found in Title II of Book I of Legislative Decree no. 159/2011, which identifies and disciplines:

- a) seizure and confiscation;
- b) bail (and collaterals);
- c) Judicial administration of personal property and administration related to economic activities.

In particular, seizure and confiscation (principal pecuniary preventive measures) are able to “contain” the dangerousness of the person deprived of the goods with which he could commit crimes, and could also eliminate from the economic legal circuit, illegally acquired assets or “genetically illicit” assets which pollute legal economy⁵.

In this context, we can now say that “the prevention of crime is an ontologically necessary component of any organized society”⁶. However, since prevention measures are applied regardless of the commission of a prior offense, it is necessary to anchor said application on predetermined and clearly identified criteria, in order to avoid the prevention measures to be transformed into “penalties for suspect”, i.e. measures in fact used as a substitute for a criminal prosecution unfeasible for lack of the normal evidentiary requirements. To this end, Anti-mafia Code provides that the application of pecuniary preventive measures occurs when there are specific conditions of subjective and objective nature. Originally, the subjective condition for the application of pecuniary preventive measures was the prior application of personal prevention measures, by virtue of the so-called “principle of access”. In other words, the pecuniary measure was applicable only in conjunction with and subject to the application of a personal measure. Law Decree no. 92/2008, converted into Law no. 125/2008, has introduced another principle, that of “separated application”, which subsequently found “legitimacy” of case law also with the intervention of Italian Supreme Court⁷.

So, today pecuniary preventive measures can be applied regardless of the prior application of a personal measure, but it is necessary to prior ascertain, even indirectly, the existence of the conditions of personal measures⁸. With the affirmation of the principle of separated application, therefore, it is enhanced the idea that to be significant is not so much the quality of “social danger” of the holder per se, but rather the fact that he was such at the time of the purchase of the good. Which, accordingly, enhances the same preventive function of the seizure and prevention confiscation, aimed at preventing the realization of further offenses, pending the deterrent effect of the same ablation?

By that way, we passed from an approach centered on “dangerousness of the subject” to one based “on the illicit acquisition by a dangerous person” (or who has been dangerous), who bought the good just because “dangerous person”. In fact, Italian Supreme Court, in Joint Sections, recently enucleated the concept of “danger in rem”⁹, clearly outlining the relationship between person dangerousness and the “dangerousness” of the illicitly acquired good: “in the case of illicitly acquired assets, the character of dangerousness reconnects (...) to the subjective quality of those who have proceeded to their purchase.

⁵ F. MENDITTO, *Le misure di prevenzione patrimoniali: profili generali*, *Giur. It.*, 6/2015, 1534.

⁶ BRICOLA, *Forme di tutela “ante delictum” e profili costituzionali della prevenzione*, in *Pol. dir.*, 1974, ora in *Scritti di diritto penale*, vol. I, tomo II, 1997, 921.

⁷ Cass., I section, Feb 14, 2011, no. 5361; Cass., I section, May 10, 2011, no. 18327; Cass., VI section, Jan 10, 2013, no. 1282.

⁸ Cass., I section, Sep 23, 2013, no. 39204; Cass., I section, March 4, 2013, no. 10153.

⁹ A.M. MAUGERI, *La confisca di prevenzione: profili controversi nella più recente giurisprudenza*, *Giur. It.*, 6/2015, 1537.

It means that the social danger of the purchaser reverberates on the purchased good. (...) Such conclusion follows (...) by the presumption that the goods were bought with the proceeds of illegal activity (thus suffering from genetic unlawfulness or, as mentioned in the legal literature, from "ontological disease")¹⁰.

Therefore, in this presumptive context, it is of fundamental importance the temporal correlation, which means the relationship between social danger and the time of purchase of goods, in order to preserve the preventive nature of the anti-mafia confiscation, which otherwise would become a mere "punishment of the suspect", in contrast with constitutional guarantees in terms of economic initiative and protection of private property (arts. 41 and 42 of Italian Constitution) and with conventional principles, and notably with the provisions of art. 1, Protocol I, ECHR.

Therefore, in order to avoid the application of prevention measures based on mere suspicion or perhaps on charges of cooperating witnesses not supported by factual evidences, we can consider traditionally three subjective requirements:

- I. traceability of the person to one of the hazard categories outlined by the legislator;
- II. social dangerousness of the person considered "at large", including the ascertained predisposition to crime of a person whose personal criminal responsibility has not been proved;
- III. the relevance of the hazard.

As regards the requirement under I., the legislator outlined several forms of hazard, including the so-called "qualified dangerousness", represented by persons suspected¹¹ of involvement in a criminal association or the commission of serious crimes, and the so-called "common dangerousness", mainly constituted by people who also live in part of criminal trafficking and the profits of crime.

Furthermore, to verify the existence of requirement under II. ("social dangerousness"), it is needed a comprehensive assessment of the whole personality of the subject, as resulting from all the social events of his life, and the ascertainment of an unlawful and antisocial conduct, that makes necessary a specific control and action by public security police organs¹².

Moreover, the dangerousness has to be concrete and specific, and not merely potential, and, in the moment in which prevention measure is to be applied, it must be inferred from an empirical basis of elements of facts and behaviors – such as, among others, association with convicts, police reports, previous and current charges, ... - which, although in a circumstantial reconstructive context, worth to illuminate the whole personality of the subject¹³. Otherwise, the neutralization of no-more-actual disruptive behaviors would be lacking the necessary "rationality toward the goal" pursued by ante-delicatum prevention.

After the control over subjective requirements, for seizure (first) and confiscation (then), it is also necessary to fulfill the two objective requirements set out in arts. 20-24 Leg. Decree no. 159/2011: a) the direct or indirect availability of the asset by the proposed; b) a sufficient circumstantial illicit origin of the good.

- a) The availability must be considered in a substantial sense and it must be proved.

Direct availability can be deduced from formal ownership.

Indirect availability can only be proved if it is proved that the proposed is the actual owner of the good.

In fact, the concept of availability cannot be limited to the naturalistic or factual relationship with the good, but must be extended, as the civil notion of possession, to all those situations in which the asset itself falls within the sphere of economic interests of the subject, even if said subject exercises his powers through other people who directly use the asset.

¹⁰ Cass., Joint Section, Feb 2, 2015, no. 4880, (also known as "Spinelli case").

¹¹ The term "suspected", in this context, means that there is a high and qualified probability that the person has committed a crime.

¹² Cass., VI section, Feb 6, 2001, no. 12511 and Cass., V section, Jul 11, 2006, no. 40731.

¹³ Cass., Sez. V, 22 settembre 2006, n. 34150; Cass., Sez. Un., 29 ottobre 2009; Cass, Sez. I, 10 marzo 2010, n. 17932; Cass., Sez. I, 5 dicembre 2014, n. 6878.

Therefore, the requirement of availability, in the sense of indirect availability, opens the entrance into the system of prevention measures to a sort of *iuris tantum* presumption, based on the assumption that the proposed uses to register unlawfully obtained goods in the name of trusted persons (spouse, children, those who have lived the last five years with the proposed). Therefore, against said people, the police would carry out investigation and, consequently, said people would bear the burden of proving the exclusive availability of goods to avoid confiscation.

- b) The second requirement is the existence of sufficient evidence of the fact that the goods are the result of illegal activity or constitutes re-use of such an activity (including the disproportion between the value of assets and the declared income or the activity carried out).

The evidentiary standard required is not particularly high, since they are required sufficient clues leading to the illicit origin of the goods or to their re-use. It is not necessary to detect a “casual connection” between the unlawful behavior (which made it possible to place the prevented person in one of the hazard categories) and illicit proceeds, being sufficient the proof of the illicit origin of the goods.

The ascertainment of the disproportion must be operated on every single asset. Therefore, if the illegal circuit fits sums of money of indisputable lawful origin, the confiscation should be limited to the only portion of the good which comes from illegal activities. Instead, more complicated is the investigation in case of “business complex”, which proves particularly difficult splitting between any “healthy parts” referable to lawful business venture, and intake of illicit funds, thus being unavoidable to proceed to the confiscation of the entire “mafia corporation”¹⁴.

4. Prevention Measures and Supranational Legal System: Compatibility with European Convention on Human Rights.

In international legal systems, there is a greater focus on Italian preventive measures. Unlike the Italian experience, in fact, in which prevention procedure complements criminal trial, in other legal systems the fight against illegal assets takes place with the only criminal forfeiture – possibly with the form of “extended confiscation”, which allows apprehension of assets of disproportionate and unjustified value with respect to the offender’s income – as part of the process for ascertaining the commission of crimes and the imposition of penalties. In some systems of Anglo-Saxon countries, we find actions in rem, even disconnected from the ascertainment of criminal responsibility, which are developed through evidentiary mechanisms more similar to civil law than to criminal law.

In fact, in the UK, the confiscation procedure follows the condemnation, while in the US, according to civil forfeiture, it is sufficient the initial demonstration by the prosecution of a probable cause to shift the burden of proof on the defense, that must lead evidences of the “extra-criminal” nature of the good or of its belonging to an unsuspecting owner. In this case there is no question about the responsibility of the person, and the judgment on the opportunity of the confiscation is adopted on the basis of the statutory rule of preponderance of evidence, for which it prevails the part that can support its thesis with a degree of verisimilitude higher than the reliability of opposite hypothesis¹⁵.

Unlike the Anglo-Saxon legal systems, the essence of Italian legal system is the ability to attack illegally accumulated wealth, not only in the context of criminal process, with the “enlarged” confiscation, but also – and even before – with the preventive confiscation in a “criminal” but “simplified” procedure, which does not depend on conviction. Perhaps, this is the most significant peculiarity of Italian experience, where the aim of prevention measures is not to punish the person, but rather to acquire, in favor of the State, assets which, illegally entered in the availability of dangerous people, have to be subtracted to them, in order to prevent further manifestation of their dangerousness.

¹⁴ Cass., V section, Apr 14, 2014, no. 16311.

¹⁵ F. MENDITTO, *Misure di prevenzione, personali e patrimoniali, e compatibilità con la Cedu, con particolare riferimento all’ampliamento dei destinatari delle misure e all’introduzione del principio di applicazione disgiunta*, in www.questionegiustizia.it.

The application of this “confiscation without conviction” has caught, in recent decades, the attention of doctrine and jurisprudence, not only in Italy but also in other “supranational” systems, and posed the question of compatibility of prevention measures with European Convention on Human Rights. In this regard, it is known that European Court on Human Rights was always inclined to consider “anti-mafia” preventive confiscation as a measure of purely preventive nature, which could not be assimilated to the *matière pénale*.

In particular, no doubt arose about the compatibility of personal prevention measures with ECHR.

In fact, under the Convention, it is protected the inviolable right of each individual to personal liberty (see art. 5, § 1, ECHR), but it is also provided for that the individual can be legitimately deprived of this right if it is fulfilled one of the requirements listed in point a) to f) of art. 5 ECHR.

Similarly, “*in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*” (art. 2, Additional Protocol no. 4 ECHR), the right to personal liberty may suffer of limitations.

However, to ensure full respect for the rights guaranteed by the Convention, the European Court of Human Rights requires a concrete ascertainment of each case of application of depriving and/or limiting personal freedom measures, which cannot only consider the legal definition adopted by national law. In other words, to avoid the so-called “label fraud”, to distinguish between restricting measures and measures involving deprivation of personal freedom (a difference of degree and intensity, not only of nature or content), it is necessary to use quantitative criteria regarding the type, duration, effects, and manner of implementation of the imposed sanction or measure.

By virtue of these assumptions, the ECtHR has repeatedly considered the rules restricting personal freedom to be compatible with the Convention, but with emphasis on the need for action by the judicial¹⁶. More specifically, as regards Italian experience, that is relevant in here, in *Raimondo v. Italia* case (1994), ECtHR established that the disposed preventive measure has provoked a limitation of personal freedom compatible with art. 2 of Protocol no. 4 ECHR. The same conclusion was reached by the same Court in other cases¹⁷ – issued against Italy with respect to preventive measures –, analyzing which it is possible to define a personal preventive measure as “restricting” or “depriving” of liberty, i.e. compatible or not with art. No. 2 of Protocol no. 4 ECHR.

Now, as regards the compatibility of preventive measures of pecuniary nature with ECHR, the conventional reference is art. 1, Additional Protocol no. 1, ECHR, according to which any natural or legal person has the right to see his/its property protected. Said persons may be deprived of their property only for public utility causes and under specific conditions provided for by law and by the general principles of international law. Furthermore, the Convention also gives the signatory States the possibility to provide for and apply those laws that they deem necessary to control the use of property, to guarantee public interest and secure the payment of taxes and fines. The ECtHR, starting from the aforementioned article, has always considered pecuniary preventive measures extraneous to the notion of criminal matter as drawn up by its own case law. The judges in Strasbourg have always stated that the anti-mafia confiscation is a preventive measure and not a penalty, with the result that arts. 6 and 7 ECHR to the application process of the measure do not apply.

In fact, for the Court, the interference of States in the peaceful enjoyment of possession, allowed by the second paragraph of art. 1, Protocol No. 1, ECHR, is proportionate to the pursued legitimate aim: effective crime prevention policy. To achieve this goal, according to Strasbourg, the legislature must have a wide margin of maneuver, both on the decision to adopt a law to protect a problem (perceived of public interest by the State itself), both on the choice of application methods of such law. Moreover, the growing phenomenon of organized crime, which in the last years reached alarming proportions especially in Italy, strongly influenced the ECtHR in its decisions¹⁸. Therefore, in the Court’s rulings, the application process of pecuniary preventive measures was deemed substantially compatible with art. 1 of Protocol No. 1 ECHR, since the interference with the right to property has always been deemed proportionate to the pursued aim, namely the prevention of crimes, which – as already mentioned – is an essential task, legitimate and necessary in a democratic society.

¹⁶ ECtHR, Jan, 7, 1961, *Lewlesse v. Ireland*, and June 18, 1971, *De Wilde and others v. Belgium*.

¹⁷ See inter alia, ECtHR, Apr 6, 2000, *Labita v. Italy*.

¹⁸ ECtHR, *Andersson v Italia*, *Riela v Italia*, *Arcuri and others v Italia*, *Raimondo v Italia*, *Guzzardi v Italia* and *Paleari v Italia*

Therefore, according to European Court case law, mafia confiscation could not be considered as a punishment in a criminal sense, according to the three criteria identified in *Engel v. the Netherlands* (qualification in domestic law, nature of the sanction and severity of the penalty). Consequently, the “penal part” of art. 6 and art. 7 ECHR may not apply to preventive procedures given the purely pecuniary and preventive nature of such a procedure.

5. Criticism of Ecthr Case Law.

When analyzing the ECtHR case law in the field of preventive measures, it is possible to note some contradiction of theoretical and systematic nature. In fact, one side of the Court proves quite categorical in affirming the ontological punitive nature of confiscation. On the other hand, in the “thorniest” sector of organized crime, the same judges in Strasburg have proven more feeble, highlighting how such forms of crime create a particular social concern, such as to justify a particularly rigorous action, even beyond the narrow conceptual canons of *matière pénale* (ECtHR, *Bongiorno and others v Italy*, Jan 5, 2010).

By virtue of said “swinging” jurisprudence, it appears necessary a critical analysis of Strasburg case law, first of all because, in its judgements, the Court makes reference to Engel doctrine, but does not carry out a complete and deep examination of the real nature of preventive measures. An interesting stimulus to a critic analysis of the institute comes from the recent tendency of the Court to widen the range of domestic proceedings that can be considered “penal” in a “Conventional sense”.

Consider, for example, *Menarini Diagnostics v. Italy* (2011), in which the application of sanctions by the Italian Antitrust Authority (AGCM) was considered having criminal nature. Again, and more recently, consider *Grande Stevens v. Italy* (2014), in which the Court held that proceedings before Italian CONSOB (Italian regulation Authority for financial market) should be considered included in the autonomous notion of criminal matters.

Therefore, because of these changes in the orientation of the Strasbourg case law, it seems possible trying to propose an overall rethinking of the institute in exam in the context of the Convention. This cannot be separated from the reconstruction of the hermeneutic framework and, therefore, can only be activated by a more complete examination of the Engel criteria, real guidelines for the performer who wants to check the criminal nature or not of a procedure. Preliminarily, the Court finds that the three criteria are alternative and not cumulative, such that, for the applicability of arts. 6 and 7 ECHR it is necessary and sufficient even one of them.

As above stated, the first criterion is the classification of the institute made by domestic law.

Evidently, it is a “weak” criterion, certainly not decisive, especially when the State has not opted for the traceability to criminal matters.

Definitely more significant are the other two criteria.

The second criterion is the “nature of the offense” and needs a verification of the law structure and the identification of the subject of the same. The verification of a law structure implies ascertaining about the repressive, deterrent, or preventive purposes of the measures, and the evaluation of the degree of negative social value associated with the commission of the prohibited conduct. In other words, the law, to fit in criminal matters, should punish conducts that are considered illegal, should be connoted by a strong degree of negative social value, and must have repressive and deterrent purposes.

As regards the identification of the subjects of the law, we may consider that: if the law is applicable to everybody, said law has criminal nature; while, if the law becomes relevant only in relation to a particular status, then it has no criminal nature. The third and final criterion refers to the nature and severity of sanctions that can be imposed at the end of the proceedings.

The nature of the sanction can be identified by referring to the authority delegated to the imposition of sanction, the purpose of the same and the possible pertinence of relationship with the conduct constituting the offense. The severity however should be assessed taking into account the consistency of ablative measure and all additional and consequential effects of imposing said measure.

In this regard, recently, the Supreme Court, Joint Sections, in Spinelli case, with reference to confiscation, stated again that this measure is characterized by its polymorphism, since it is a "neutral, chameleon-like institute, capable of assuming different nature and physiognomy, depending on the regulatory regime that contemplates." Given confiscation polymorphism, different orientations faced in doctrine and case law. Sometimes it has been denied the punitive criminal nature of the preventive seizure. Some others – particularly in Occhipinti case – it have been stated the "objectively punitive" nature of the measure, by virtue of a substantial interpretation of the notion of criminal law given by the same ECtHR, which – as mentioned – requires to ascertain the nature of the sanction, beyond the formal qualification.

Therefore, in a conventional point of view, it seems possible to state that for the purposes of the Engel criteria, preventive measures can be regarded as measure having substantially a criminal nature. In fact, the legal classification given by domestic legislator to preventive measures (first criterion) can be considered dubious, and – by the way – it is not decisive for the attribution of a criminal nature to preventive measures. As for the structure of the law (second criterion), first of all it should be considered that the behaviors capable of stressing prevention process are various behaviors envisaged and punished by Italian Penal Code or other special laws. Therefore, the connection with a criminal offense is evident.

Moreover, what is relevant in the case of application of preventive measures is not a prognosis on the probable commission of crimes by the proposed, but the presumption that he has been or he is going to be engaged in criminal behavior, characterized by a high level of negative social value. It is therefore clear that the aims pursued by the entire system of prevention have eminently repressive and deterrent nature and, as such, are likely to be subsumed in criminal matters.

Furthermore, for what concerns the nature and severity of the "punishment" (rectius, measure) applicable at the end of the prevention proceedings (third criterion), the fact that the whole process is under the exclusive jurisdiction of a criminal court gives, without doubt, and evidence for the "penal" theory. As for the severity of the measure, it must be recognized that the ablative capacity of the seizure prior to the confiscation is the broadest under Italian law. In fact, it has the potential to affect every good related to the proposed, including assets held by the proposed, but registered under false names.

However, for the purposes of our research, in the analysis of ECtHR case law, it is of particular interest – mutatis mutandis – Varvara v. Italy case¹⁹, which was related to urban confiscation provided for in art. 44 of Italian Legislative Decree no. 380/2001 ("Consolidated Building Act"). Said decision is also important for the current and continuous debate around "anti-mafia" confiscation, perceived as "confiscation without conviction".

In said judgement, it is significant the partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, who – notoriously critical of sanction proceedings adopted by the various Italian authorities²⁰ – has recognized that "*The Court has hitherto avoided ruling on the point of principle of the compatibility with the Convention of confiscation without criminal conviction and enlarged confiscation. The questions arising have often been decided on the basis of secondary aspects of the legal regulations governing the measure implemented by the respondent State, or even on the basis of highly specific facts pertaining to each individual case, such as the total assets lost by the applicant. This casuistic approach has produced conflicting and inconsistent case-law.*"

Furthermore, "*beyond the contradictions in the various cases concerning measures which are substantially analogous, the Court affords weaker safeguards for more serious, indeed more intrusive, confiscation measures, and stronger guarantees for less serious confiscation measures. Some "civil law" measures and some "crime prevention" measures which disguise what is in effect action to annihilate the suspect's economic capacities, sometimes on threat of imprisonment should they fail to pay the sum due, are subject to weak, vague supervision, or indeed escape the Court's control, while other intrinsically administrative measures are sometimes treated as equivalent to penalties and made subject to the stricter safeguards of Articles 6 and 7 of the Convention.*"

¹⁹ ECtHR, *Varvara v Italy*, Oct 29, 2013.

²⁰ ECtHR, *Menarini Diagnostics S.r.l. v Italy*, 2011.

The opinion of Judge Pinto de Albuquerque is particularly significant and symptomatic of a variable ECtHR jurisprudence, about the true legal nature of confiscation, in between preventive and repressive purposes. Therefore, in the light of the above considerations and taking into account also the aforementioned opinion, it is not risky to bring the preventive measures in criminal matters, with devastating consequences for the – de facto independent and obliged – applicability of arts. 6 and 7 ECHR. In this perspective, preventive measures, which already in their original formulation appeared illiberal and disrespectful of the basic principles of substantial and procedural law, continue today to be applied at the end of a 'process of suspicion', which, among clues, presumptions and 'untyped' cases, has the function to replace insufficient evidence to convict and confiscate²¹.

Therefore, we cannot exempt from briefly highlight some critical aspects of the prevention proceedings with respect to the guarantees required in an "ordinary" criminal proceedings. It should first be considered that the proposal for the application of preventive measures can be advanced by the Public Prosecutor, the police commissioner and the Director of the Anti-Mafia Investigation Department. With respect to such "active" subjects of the proceedings under consideration, it would be appropriate and preferable to give only to the Public Prosecutor the power to initiate the preventive action, since the Public Prosecutor, by virtue of its institutional role, would be able to guarantee greater independence and legal/technical qualification.

Another critical profile is the total absence of defensive guarantees during "personal" and "pecuniary" investigations, given that investigations are conducted by the police and the Public Prosecutor, who – in secret and without any confrontation – collect evidences that can be used in the subsequent process. This is in clear contrast with art. 24, paragraph 2 of Italian Constitution (full right to defense) and with the principle of "due process" which prescribes the respect of the right to confrontation during the evidence process (art. 111, paragraph 4 of the Constitution), as well as with the rules of "fair trial" referred to in art. 6 ECHR.

Moreover, the law does not prescribe a time limit for investigations and the duration of the process is considered not mandatory; which is in contrast with the prescription of a "reasonable time of the process", enshrined in art. 111, para 2 of the Constitution, and in the same art. 6 ECHR. As regards, instead, the need for a public hearing, it should be observed that the prevention procedure "evolved" in a conventional perspective, today providing the possibility for the proposed to request a public hearing, which – otherwise – ordinarily would be held with a typical chamber proceedings²².

In fact, before the current anti-mafia code, the Court of Human Rights had repeatedly criticized the Italian method of prevention, not providing the performance of the hearing in open court²³. Subsequent to those judgments, the Italian legislator complied with the conventional requirements, adopting article 7 of the Anti-Mafia code, which gives the proposed – as above mentioned – the possibility to ask for a public hearing. However, even if it is possible to identify some tepid attempts at adaptation of the prevention method to conventional instances, some critical issues remain unresolved.

In fact, to date, there is no reference to the general rules on evidence and to evidentiary prohibitions governing the matter of criminal trial. This results in an automatic, unquestioned and unquestionable eligibility of the acts of the public prosecutor and the police, assessable as evidence by the court in order to apply the preventive measure. On the contrary, the "ordinary" rules on evidence should find analogous application to the prevention proceedings, since they are not exceptional, but rather general provisions. A problematic additional connotation of the prevention process is the reversal of the burden of proof.

In fact, as already mentioned, the proposed also bears a presumption for the application of personal prevention measure, for which, the court that applies said measure also applies the confiscation of assets whose origin cannot be justified by the same proposed.

²¹ L. FILIPPI, *Profili processuali: dalla proposta al giudizio di primo grado*, *Giur. It.*, 6/2015, 1545.

²² Cass., V section, Feb 28, 2012, no. 7800.

²³ ECtHR, *Bocellari and Rizza v Italy*, Nov 13, 2007; *Perre v Italy*, July 8, 2008; *Bongiorno v Italy*, Jan 5, 2010; *Leone v Italy*, Feb 2, 2010; *Capitani and Campanella v Italy*, May 17, 2011; *Pozzi v Italy*, July 26, 2011; *Paleari v Italy*, July 26, 2011.

Said reversal of the burden of proof obviously contrasts with conventional and constitutional principles, such as among others the right to defense and the presumption of innocence. In particular, the latter constitutes, as well as a rule of judgment, also a defendant's treatment rule, of universal value, a guarantee for anyone who is subject to any punitive sanction proceedings, both by art. 11 of the Universal Declaration of Human Rights, both by art. 6 ECHR.

6. Conclusions

As already highlighted, the European Court of Human Rights has recognized that the purpose envisaged by mafia confiscation is to avoid that the use of the property by the person who is suspected of being part of a crime organization is aimed at procuring, for him or for the organization itself, offenses against the community benefits. Therefore, ECtHR judged legitimate – because not disproportionate to the end – the sacrifice of property rights. The European Court points out that the measure is part of a policy of prevention of crime and considers that, in implementing this policy, the legislator must have a wide margin of maneuver to rule both on the existence of a problem of public interest which requires to be ruled, both on the choice of application methods of such rules.

Ultimately, with a principle of general application, to the state it is guaranteed a large power to regulate confiscation requirements every time that is at stake, among different public interests, the "crime prevention", which is the essence of prevention measures.

However, the interest of the state to the prevention of crimes deemed particularly dangerous certainly cannot be pursued at the expense of the guarantees and the institutional and conventional general principles. To quote Gaetano Arangio-Ruiz, "the state can be severe in his right to punish [but] should not take away a person's freedom when it cannot judicially punish him"²⁴.

Therefore, it seems desirable that, starting from a rethinking of the ECtHR case law, the prevention process can come to a "renovation", eliminating the evidentiary restrictions, mutilation of defense and the absence of confrontation that, to date, still distinguish it.

²⁴ G. Arangio-Ruiz, *Istituzioni di diritto costituzionale*, Milan, 1913, 160.