Confiscation without Conviction for Membership of Mafia

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Independent Expert Opinion

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Paulo Pinto de Albuquerque

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I. Consultation

The proceedings are in connection with two domestic lawsuits (Criminal proceedings no. 1710/99 R.G.N.R. and Preventive proceedings no. 100/99 R.G.M.P.) and four applications lodged before the European Court of Human Rights (Application no. 29614/16, *Cavallotti v. Italy*, Application no. 44617/16, *Cavallotti v. Italy*, Application no. 44618/16, *Cavallotti v. Italy*, Application no. 47278/16, *Cavallotti and Others v. Italy*).

These proceedings raise several legal questions regarding the compatibility of preventive confiscation determined by the domestic courts based on the provisions of Laws no. 1423/1956 and no. 575/1965, as reformed until 2011, with Articles 6 and 7 of the Convention on Human Rights and Article 1 of Additional Protocol no. 1. The legal questions are mentioned in the graph below.

Application no. 29614/16 Cavallotti v. Italy	Article 1 of Protocol No. 1 – lack of foreseeable legal basis and disproportionate character of the confiscation
Application no. 44617/16 Cavallotti v. Italy	Article 6 § 2 – presumption of innocence Article 1 of Protocol No. 1 – lack of foreseeable legal basis and disproportionate character of the confiscation
Application no. 44618/16 Cavallotti v. Italy	Article 6 § 2 – presumption of innocence Article 1 of Protocol No. 1 – lack of foreseeable legal basis and disproportionate character of the confiscation
Application no. 47278/16 Cavallotti and Others v. Italy	Article 7 – confiscation without finding of liability Article 1 of Protocol No. 1 – lack of foreseeable legal basis and disproportionate character of the confiscation

Your role will be to provide a written independent expert opinion on Article 6 (presumption of innocence) and Article 7 (confiscation without finding liability) of the Convention on Human Rights and Article 1 of Additional Protocol no. 1 (lack of foreseeable legal basis and disproportionate character of the confiscation), for use in domestic proceedings and before the European Court of Human Rights.

Your independent expert opinion does not encompass the complaints relating to the unfairness of the proceedings under Article 6 of the Convention, other than the presumption of innocence (for example, the lack of public hearing and the unreasonableness of the time elapsed between the preventive seizure and the preventive confiscation) as well as the complaint relating to interference with Article 8 of the Convention (confiscation of family home).

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Independent Expert Opinion

II. Glossary

appartenente - member

appartenenza – membership

associazione di tipo mafioso – Mafia-type organisation

cauzione di buona condotta - bail for good conduct

Codice penale – Criminal Code

Codice di procedura penale - Criminal Procedure Code

confisca per equivalente - confiscation of assets by equivalent means

confiscazione - confiscation

concorrente esterno – accomplice

concorso esterno – external complicity

frode delle etichette - mislabelling of reality

giudice per le indagini preliminari – judge for the preliminary investigations

mafioso – participant or accomplice to Mafia-type organisation

messa a posto – extorsion (in Mafia slang)

misure cautelari - interim measures

misure di prevenzione patrimoniali – pecuniary preventive measures

misure di prevenzione personali - personal preventive measures

misure di sicurezza - security measures

obbligo si soggiorno nel comune di residenza – obligation to reside in the municipality of residence

ordinanza di custodia cautelare in carcere – pre-trial detention order

pena - penal sanction, penalty

pentito – informant who has decided to cooperate with the authorities

pericolosità sociale – social dangerousnness

pericolosità qualificata, specifica – qualified, special dangerousness

pericolisità commune, generica – common, ordinary dangerousness

pizzo – extortion money (in Mafia slang)

pizzini - notes

principio della vicinanza alla prova – principle of proximity of the evidence

principio di tassatività - principle of taxativity

proposto – proposed person

prova indiziaria – circumstancial evidence

sequestro – seizure

sequestro conservative - conservatory seizure

sezione per l'applicazione delle misure di prevenzione – section for preventive measures

sezione semplice – individual section of the court

sezione unite – plenary court

sorveglianza speciale di pubblica sicurezza - special public security supervision

Tribunale del riesame - Review Court

III. Introduction

1. The present case deals with the fight against organised crime and serious profit-making crime and one of the most important criminal policy instruments used for that purpose, namely the confiscation of assets of the suspected members of the criminal organisation, even in cases where it was not possible to obtain sufficient evidence for their conviction in criminal proceedings.
2. It is not by change that the setting of the facts is Italy. Italian authorities have been at the frontline of this fight since the early eighties of the last century, with the approval of so-called "Rognoni-La Torre" Law. It is true that the fight against mafia-type organisations in Italy costed the lives of heroic figures, like Pio La Torre, one of the material authors of the law, Judge Giovanni Falcone and Judge Paolo Borsellino. This is one side of the coin.
3. The other side of the coin is that the implementation of the "Rognoni-La Torre" Law by case-law and the further development of its scope by the legislator has produced a complex legal framework which occasionally has targeted innocent people.
4. Indeed, the present case is about the judicial saga of the Cavallotti family for over 27 years, during which the Cavallotti brothers were prosecuted for participation in a Mafia-type organisation and finally acquitted in criminal proceedings that lasted from 1998 to 2010 and subsequently had to endure the full force of the "Rognoni-La Torre" Law when their property was seized and confiscated in preventive proceedings for membership of a Mafia-type organisation that lasted from 1999 to 2019. Not considering this enough, the Italian State also confiscated the property of the younger members of the family, which was later returned to them.
5. The summary of the facts of the case already shows that it is of world-wide importance for the current debate on the implementation of Directive of the European Parliament and of the Council on asset recovery and confiscation, as well as of the United Nations against corruption and numerous soft law instruments from the World Bank, the Organisation for Economic Co-operation and Development, the United Nations Office on Drugs and Crime, the Financial Action Task Force, among others, which encourage the adoption of non-conviction-based confiscation and unexplained wealth orders.
6. The independent legal opinion is divided into two parts.

7. In the first part, I describe the factual circumstances of the case and the relevant legal framework and practice, including the relevant domestic, international, and comparative law and case-law and other pertinent domestic and international soft law instruments.
8. The second part of the Opinion addresses the questions put by the European Court of Human Rights to the parties in the pending three cases lodged by the Cavallotti family and other third parties who allegedly functioned as their strawmen.
9. The Opinion concludes with final conclusions and six annexes: Annex I with the presentation of the Author; Annex II with a table of the most important documents of the domestic criminal and preventive confiscation proceedings; Annex III with a table of the relevant Italian legislation; Annex IV with a table of the pertinent case-law of the Italian Constitutional Court, Council of State and Court of Cassation; Annex V with a table of the apposite international legislation, including legislative documents from the Council of Europe, the European Union, the United Nations and other international soft law materials; and Annex VI, with a table of the applicable case-law of the Court of Justice of the European Union and of the European Court of Human Rights.
10. The methodology of the Opinion will be that of an open-minded cross-fertilisation between the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union and the Italian Constitutional Court and Court of Cassation, which have played a major role in the configuration of preventive confiscation ever since it came into force. Hence, this methodology rejects the constitutional parochial understanding that Italian Constitution and law outlines a self-sufficient corpus of guarantees for preventive confiscation that has nothing more to learn from European human rights law, namely the European Charter of Human Rights and the Charter of Fundamental Rights of the European Union.
11. This Opinion contains extracts from provisions in force, repealed provisions and legislative preparatory works, as well as judgments, judicial decrees, and other procedural acts. Whenever available, I used an official translation. Otherwise, the translation into English is of my own responsibility. The original Italian version can be found on the internet. When no other reference is given, the Convention means the European Convention on Human Rights and the Court means the European Court of Human Rights.

IV. Facts

A. The circumstances of the case

1. The Criminal Proceedings no. 1710/99 R.G.N.R.

12. The Cavallotti are entrepreneurs who have been active since the early 1970s in the sector of the construction of strategic infrastructures, such as power lines, aqueducts, methane pipelines, roads, and sewers. They are six brothers, each of whom is present in family-run businesses. Co.m.e.s.t. s.p.a., the leading company of the business, obtained several concessions for the construction and management of the methane gas distribution network in various Sicilian municipalities.
13. On 6 November 1998, the Palermo Judge for Preliminary Investigations issued an order for pre-trial detention against Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito Cavallotti ("the first group of applicants") and other persons. The order for pre-trial detention was based on the statements of some informants and on some anonymous and undated notes believed to be linked to Bernardo Provenzano (considered at that time the leader of Cosa Nostra), which had been delivered by a mafioso who was playing both sides (Luigi Ilardo) to a Carabinieri officer (Michele Riccio), who himself was convicted of serious criminal offences. Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito Cavallotti were accused of being entrepreneurs involved in the system of public contract allocation manipulated by Cosa Nostra. The charge of bid rigging was based on the notes in which two of the applicants' companies were identified as targets of extorsion for the methane work to be conducted in certain Sicilian municipalities (Agira and Centuripe).
14. Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito Cavallotti were arrested on 10 November 1998 and formally charged with participation in a Mafia-type criminal organisation under Article 416-*bis* of the Criminal Code and – as regards Gaetano and Vincenzo – of bid-rigging under Article 353 of the Criminal Code.
15. By judgment no. 1176 of 21 March 2001, after two and a half years of pre-trial detention, including eight months in solitary confinement, the Court of Palermo acquitted the Cavallotti brothers with the formula because the fact did not exist, according to Article 530 of the Code of Criminal Procedure. The applicants regained their freedom.

16. According to the Court, they had been victims and not accomplices of the Mafia since the evidence "reveals a clear position of submission […] to the rules and demands imposed by the criminal organisation." Importantly, the Court affirmed that the mere subjection to payment of extorsion money and to rules imposed by Mafia "cannot be properly evaluated as proof of adherence to the associative bond or as a contribution to the consolidation of the criminal organisation" and that the mandatory nature of the inclusion of the Cavallotti in the Mafia-controlled environmental context was "attested by the impressive diffusion of the phenomenon in the Sicilian business world". According to the Court, in the absence of more specific elements, the payment of extorsion money cannot be considered as reprehensible conduct pursuant to Article 416-*bis* of the Criminal Code, otherwise the Court would have to reach, "if this were the case, the paradoxical conclusion that all entrepreneurs operating in the Sicilian provinces under Mafia control have been responsible for similar illicit conduct". Finally, the Court concluded that "[n]o specific unlawful conduct has been identified against the defendants aimed at pursuing the interests of the Mafia organisation or at consolidating the associative structure."
17. The Court of Appeal of Palermo overturned the acquittal by judgment n. 803 of 14 March 2002, a twenty-seven-page text, of which only five were dedicated to the Cavallotti brothers. Gaetano and Vincenzo Cavallotti were sentenced to four years and two months of imprisonment. Salvatore Vito Cavallotti to four years of imprisonment. They were also sentenced to jointly pay the legal costs, their own maintenance costs in prison, a five-year ban on public office, and, upon serving the sentence, supervised release for not less than one year.
18. The Court of Appeal's findings were based exclusively on the statements of the informants during police questioning. It did not consider the corrections made by the informants themselves during the procedure, let alone the evidence produced by the defence. The assessment of the evidence was exactly the opposite of that made by the first-instance Court: while the latter had considered the Cavallotti brothers as victims of Mafia, the Court of Appeal considered them as colluding entrepreneurs, although it could not determine how the Cavallotti brothers could have manipulated any concrete competition through the local Mafia bosses. The argument presented by the Court of Appeal is the following: "It is irrelevant that the clauses of the pact [between the Cavallotti brothers and the Mafia] were largely compulsorily and preventively arranged

by one of the contracting parties (the Mafia) […] because, from a legal perspective […] a state of necessity could never have arisen. […] Even if we admitted that the entrepreneur could not "work" without that pact, no one forced him not to change profession".

19. By judgment no. 1751 of 17 December 2004, the Court of Cassation annulled without referral the conviction of Gaetano Cavallotti and Vincenzo Cavallotti for the crime of bid-rigging, because it was extinguished by prescription, and annulled with referral to another section of the Court of Appeal of Palermo the conviction for the crime of Mafia association.
20. Firstly, the Court of Cassation declared the central piece of evidence of the accusation (namely, the statements made by Ilardo to Riccio without the presence of the defence attorney and the latter's summaries) to be unusable due to violation of Article 63 of the Criminal Procedure Code.
21. Secondly, with harsh words, the Court of Cassation considered that the Court of Appeal had violated the constitutional principle of the personal nature of criminal liability, because it fell into a "significant error of approach also in method, [that is to say] into the unacceptable trap of a «cumulative and generalised»" trial, following the well-known saying of «tarring everyone with the same brush»". The conviction was affected by "serious logical and legal gaps", since the appeal judges had deduced "in a purely and gratuitously presumptive manner" the Cavallotti brothers' sharing of the purposes of the Mafia association. In particular, the Court of Appeal had not provided the slightest explanation of what role the Cavallotti brothers had played, let alone explained "how, when and why" they had availed themselves of the intimidating power of the Mafia association. No evidence had been given to understand "what are and in what period should be placed the possible episodes" from which to deduce their Mafia participation. Furthermore, regarding the defence arguments, the Court of Appeal had offered "a reasoned response frankly contrary to the maxims of common experience, especially in the well-known climate of lacerating dangerousness, even vindictive, that typifies the Mafia association". In particular, the Cavallotti brothers had filed complaints for thefts and damage suffered on their construction sites. The Court of Appeal argued that the complaints were a sort of "excuse" with the aim of establishing a behaviour that could be favourably assessed to avoid possible judicial measures. The Court of Cassation criticised this reasoning, recalling that Mafia was vindictive towards those who rebelled.

22. By judgment n. 3784 of 6 December 2010, the Palermo Court of Appeal confirmed the acquittal of the first instance court delivered in 2001, affirming that the informants' statements were "unsuitable for evidentiary purposes", unusable "for the purposes of individualizing evidence", "extremely generic" and "intrinsically weak and generic". The synallagmatic pact between the victim and the Mafia association could not consist in the mere availability to pay extorsion money on the part of the victim. For the appeal judges, "[t]here is a lack of indicative evidence of counter-performance, of certain institutions of corporate or fiduciary relationship, of specific corporate contributions, including hidden ones, of fictitious headers. Not even such proof is offered by the convergent contribution in this proceeding of patrimonial or enterprise investigations."

2. The Preventive Proceedings no. 100/99 R.G.M.P.

23. By decree of 31 May 1999, upon the proposal of the Public Prosecutor, the section for preventive measures of the Court of Palermo determined the seizure, with a view to its definitive confiscation, of corporate and personal assets of the Cavallotti family. The proposal also concerned the application of special public security surveillance and the obligation to reside in the municipality of residence and was based on the same evidence invoked to request pre-trial detention in the criminal proceedings.
24. The Court of Palermo found that the first group of applicants was suspected of membership of a Mafia-type criminal organisation and based on their special dangerousness, seized all assets belonging to them or to their family members (Salvatore Cavallotti, Giovanni Cavallotti, Margherita Martini and Salvatore Mazzola; "the second group of applicants"). Procedurally, Gaetano, Vincenzo, and Salvatore Vito Cavallotti were held as proposed persons, and their family members were held as third parties. According to the Court, the Cavallotti brothers' business activities had been financed through proceeds considered illicit as they were the result of crimes against the Public Administration.
25. In particular, the Court of Palermo stated that "all the defendants are suspected of membership of Cosa Nostra Mafia association based on the investigations conducted in proc. 4696/96 NR DDA. Proceedings during which the defendants were served with a

preventive custodial order with specific reference to art. 416-*bis* of the Criminal Code […] based on reasons that are currently acceptable". More in detail, the Court added that "The Cavallotti are suspected of being fully involved in the illicit system of sharing public contracts, managed, in the Sicilian territory, by the Cosa Nostra Mafia association" and that "CAVALLOTTI Gaetano and CAVALLOTTI Vincenzo have been charged with serious indications of guilt in relation to the crime referred to in Articles 110, 353 of the Criminal Code, for having, in their respective capacities as sole director pro tempore of COMEST srl (now spa) the first, as sole director pro tempore of IMET srl the second (the collaboration with the president and legal representative *pro tempore* of the Soc. Coop. A r.l. IL PROGRESSO Pavone Giovanni) disturbed with violence or threats and in any case with promises, collusion and other fraudulent means, the tenders, and other private calls for tenders in which the companies IMET srl, COMEST srl (now spa) participated." Referring specifically to the criminal procedure, the Court affirmed that "According to the findings of the investigations carried out in the above-mentioned proceedings, the business group headed by the Cavallottis […] is said to be close to Mafia figures of the caliber of Benedetto Spera and Bernardo Provenzano, who are said to have ensured that they were awarded contracts and opened construction sites in territories controlled by various Mafia families." Finally, the Court of Palermo concluded that "[t]he close intertwining of relationship between the corporate entities membership of the Cavallotti group and the existence of a body of circumstantial evidence that suggests that those business activities were financed through proceeds that are considered illicit as they are the result of crimes against the public administration and were able to prosper also through the use of Mafia-style methods, requires seizure."

26. The seizure was ordered without any consideration of the necessary temporal correlation between the period of hypothesised social danger and the moment of the capital increase. Furthermore, no verification of the disproportion between the value of the assets and the income declared by the proposed persons or their activities was conducted.

27. On 23 July 1999, 17 September 1999, 8 November 1999, 28 November 2000, 19 February 2001, and 20 September 2001, upon recommendation of the court administrator, the Court of Palermo seized *ex officio* other assets deemed attributable to the first group of applicants.

28. By decree of 29 September 2011, the section for preventive measures, chaired by Judge Silvana Saguto, ordered the confiscation of the already seized assets and applied special public security surveillance to Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito Cavallotti with the obligation to stay in the municipality of residence for two years, imposing bail payment on each of them.
29. According to the domestic court, the Cavallotti businesses had become involved in the illicit allocation system of public procurement contracts since the second half of the 1980s, not only by participating in bid rotation within the so-called "province agreement" but, more importantly, by enjoying since the early nineties the constant support from the Mafia family of Belmonte Mezzagno, for methane works of considerable amounts carried out in various areas of the Sicilian territory. For the Court of Palermo, expert assessments had revealed that the works related to the methane projects in the municipalities of Agira, Centuripe, and Monreale had transformed the initial small individual construction businesses into a proper group composed of various companies.
30. All the seized assets were considered under the control of the first group of applicants. The assets were deemed to be of illicit origin because they were either the fruit or the reuse of Mafia-related enterprise. According to the domestic Court, neither the first nor the second group of applicants had demonstrated the adequacy between their incomes and the value of the assets. The disproportion was considered *per se* a sufficient element to apply confiscation.
31. Regarding the applicable standard of evidence, the Court of Palermo stated that the assessment of the evidence was not required "in terms of sufficiency […] and even less of gravity", the use "of maxims of experience equipped with empirical plausibility" being sufficient. Referring to the judgments delivered in the criminal proceedings, the Court added that "even if we want to believe that one should still evaluate the concrete reasons for the acquittal, it should be highlighted that, from reading the reasons for the conviction judgment of the Court of Appeal of Palermo of 14.3.2002 and of the judgment of annulment with referral for new examination, issued by the Court of Cassation on 12.17.2004, it does not appear that the criminal judgment was based on the same evidentiary material examined here nor was it found therein the evident lack of criminal liability of today's proposals".

32. On the figure of the member of a Mafia-type association, the Court of Palermo stated that it differed from that of the participant "not only on the evidentiary side but even from a substantive point of view". Regarding the substantive perspective, the Court noted that the addressees of preventive measures included those "suspected of membership in a broad sense to the Mafia association", namely the colluding entrepreneur. Regarding the evidentiary perspective, the Court underlined that the value of the individualizing evidence on behalf of each individual proposed person "cannot even be overestimated", because in the prevention proceedings one must "evaluate the conduct overall held by the proposed ones and not also their personal and penal responsibility for a specific fact".
33. According to the Court, the proposed persons were subjectively dangerous because "they contributed to the creation and subsequent affirmation on the market of a cohesive family group of companies subject to a unitary direction and making use of the intimidating force of the associative Mafia bond". When assessing the requirement of disproportion between the value of seized assets and the declared income or economic activity, the Court of Palermo added that the disproportion requirement "does not have necessarily to accompany the acquisition of the asset in a period concurrent with or subsequent to the manifestation of the proposed person's membership of the Mafia association or to the manifestation of generic social dangerousness."
34. Against the decree of the Court of Palermo, the applicants filed an appeal, grounded on the following reasons: Mr. Ilardo's declarations and the summary thereof made by Colonel Riccio, himself a convicted criminal, had been declared unusable by the Court of Cassation with judgment no. 12174/2005 for violating Article 63 of the Code of Criminal Procedure, thus nullifying the reasoning made by the appealed court regarding the alleged involvement of Provenzano in the phase preceding the awarding of the tenders for the methane projects in the municipalities of Agira and Centuripe; the appealed court had only considered the order for pre-trial detention and the conviction judgment and disregarded the fact that the latter had been annulled by the Court of Cassation and that the acquittal judgment issued in the referral trial had acquired *res judicata* status; the Palermo Court of Appeal had acquitted the first group of applicants of the offense under Article 416-*bis* of the Criminal Code using the formula "because the facts did not exist", which meant that the acquittal excluded the facts upon which their social dangerousness was based. As far as confiscation is concerned, the applicants argued that their businesses

were not Mafia businesses, and they had never been part of the illicit system public procurement contracts allocation and had mainly conducted business activities stipulating procurement contracts with private entities.

35. The confiscation decree was partially confirmed by the Court of Appeal decree no. 40 of 14 February 2014, although Prosecutor General Dr F. Cristodaro had requested the appellate judges not to apply the personal and patrimonial preventive measures. The Court of Appeal revoked the confiscation of certain assets seized on 19 February 2001 and confirmed the rest of the appealed decree.
36. The Court of Appeal noted that "with the judgment of the Court of Cassation of 17 February 2004, the charge of bid-rigging […] was determined with a decision of a procedural nature […], which, however, ruled that there were no elements on which to base a truly liberating decision on the merits of the accusation. Ultimately, already with this first judgment on the burden of responsibility attributed to the two CAVALLOTTI, the accusatory approach was deemed reliable and trustworthy (but not exhaustive for the purposes of the judgment of conviction, due to the passage of time) which was substantially based on the anteriority of the letters in which the attribution of the works to the Cavallotti companies was taken for granted even before the formal award (this circumstance can only be explained by an illicit manipulation of the tender in favour of the company awarded the works)."
37. The Court of Appeal also affirmed that "the criminal evidentiary data has ascertained […] the vastness of the radius of action (at the regional level) that the CAVALLOTTIs, with the help of "top exponents" of the Mafia, had managed to impress on their business activity". Furthermore, "from the same conclusion reached by the criminal judge to deny the existence of the guilt of the CAVALLOTTI defendants, one can extrapolate the concept that underlies Mafia membership […], that is, the existence for a certainly considerable time of a close relationship of contiguity, also from an economic perspective […] that has linked all the members of the CAVALLOTTI family to the Mafia leaders, in consideration of the undoubted (and proven) advantage […] that the CAVALLOTTIs have drawn from this indissoluble bond for the purposes of the economic affirmation of their businesses to the detriment of those of their competitors […]. In the specific context of the preventive measure [it is] sufficient that there is a concrete evidentiary substratum […] of the collusion that has linked the Mafia association and the person (or persons)

who, for personal gain, in the exercise of business activity, made agreements with Cosa Nostra, with the aim (also, but not exclusively) of facilitating its intrusive activity, linked to the control of the territory. In the case of the CAVALLOTTIs, this circumstantial evidence was certainly reached […]. It is taken as proved that the CAVALLOTTIs' businesses proliferated in the exercise of their activities thanks to the facilitations that were provided to them by the heads of the Mafia organisation."

38. The Court of Appeal added that, "since, as we have seen, these are private tenders or calls for bids that were already agreed upon and awarded through the rotation system that was managed by the Mafia organisation, it does not appear disputable that those who acquired an economic benefit from that system […] necessarily had to be an operational part of that illicit system."

39. For the Court of Appeal judges, "[i]t does not appear that the CAVALLOTTIs have engaged in any concrete conduct from which it is possible to deduce an effective detachment of the same from the Mafia association, of which they were part for a long time (in the 80s and 90s) to the point of maintaining criminal relations with top exponents of the organisation […], at whose service they had placed their entrepreneurial activity and from whom they received protection and cover to the point of modifying the ordinary rules in the attribution of tenders and calls for bids […], and thus proliferating in business activity, under the protective wing of Cosa Nostra. [The Cavallottis] have maintained long-lasting relationships with individuals of high Mafia calibre, carrying on business with them to enjoy lucrative advantages in the sector of Mafia-related entrepreneurship."

40. In the Court of Appeal judges' view, "[i]t does not appear that the CAVALLOTTIs have engaged in any concrete conduct from which it is possible to deduce an effective detachment of the same from the Mafia association, of which they were part for a long time (in the 80s and 90s) to the point of maintaining criminal relations with top exponents of the organisation […], at whose service they had placed their entrepreneurial activity and from whom they received protection and cover to the point of modifying the ordinary rules in the attribution of tenders and calls for bids […], and thus proliferating in business activity, under the protective wing of Cosa Nostra. [The Cavallottis] have maintained long-lasting relationships with individuals of high Mafia calibre, doing business with them in order to enjoy lucrative advantages in the sector of Mafia-related entrepreneurship."

41. The Cavallottis' business activity has a Mafia nature because they had "endured close personal and business relationships with the top exponents of the Belmonte Mezzagno Mafia district [...] to the point that only through the decisive role of these Mafia exponents did the CAVALLOTTIs manage to win important contracts [...]. Therefore, it must be considered established [...] that the business activity conducted by the CAVALLOTTIs in the period from the mid-1980s until the seizure of the assets was characterised as a Mafia enterprise". Having identified the period of Mafia contamination in the second half of the 1980s, the Court of Appeal stated that the assets acquired before this period were confiscated based solely on the criterion of disproportion while those acquired later were confiscated because they were considered fruit or reuse of illicit activity.
42. The appellate judges also reproached the proposed persons for "lack of unequivocal signals of regret", and not having undertaken "a responsible path of collaboration with the Judicial Authority" and, in doing so, for accrediting themselves as "subjects fully reliable" towards the Mafia.
43. The applicants appealed against the Court of Appeal judgment before the Court of Cassation. With the first ground of appeal, the applicants complained that the facts on which the Palermo Court of Appeal confiscation decree was based had been excluded by the acquittal judgment. With the second ground of appeal, an identical breach of law was denounced concerning the confirmed confiscation of all movable and immovable assets pertaining to the third parties (second group of applicants), regardless of the date of their acquisition, and of their effective availability to the proposed persons (the first group of applicants).
44. The confiscation decree became final with the judgment of the Court of Cassation no. 4305 of 2 February 2016, which rejected the Cavallottis' appeals. For the Court of Cassation, "[t]he acquittal was due to the lack of evidence of a «synallagmatic» relationship between the Cavallotti companies and the Mafia consortium (page 64 of the contested decree), on the basis of an argumentative assumption that – very little relevant in the perspective of organic participation – was evidently oriented towards the «residual» hypothesis of external complicity." Addressing the relationship between the criminal process and the prevention process, it stated that "«organic» participation is a minus compared to membership" and that "the acquittal pronouncement for Mafia participation cannot assume any automatic application in the prevention procedure" unless it

established the non-existence of the historical fact. Despite the acquittal sentence ascertaining the lack of a synallagmatic pact between the Cavallotti family and the Mafia, it remained proven an "unchanged background reality" understood as the "proximity of the Cavallotti, dating back to the years '80, to the top of Cosa Nostra." The exact wording of the Court of Cassation is the following: "Nevertheless, the background reality remained unchanged [...], that is, the Cavallottis' proximity, dating back to the 1980s, to the top of Cosa Nostra, up to the highest exponent, Bernardo Provenzano, who, while a fugitive, had «taken» the Cavallottis under his wing, to the point of expressly «recommending» them, by means of the so-called notes, for the assignment of public contracts and orders [...] the Cavallottis [were indicated] as a company close to the Mafia elite, from whose closeness they drew a source of enormous advantage, managing to win public tenders, for considerable sums, precisely thanks to Mafia intercessions [...]. The Cavallottis were included in the strategic plan for managing contracts, which Cosa Nostra adopted and controlled, according to a precise rotation, for the purpose of assigning the most lucrative contracts in the entire Sicilian region to the companies it liked."

45. Finally, the Court of Cassation validated the appealed court's application of the temporal correlation rule to confiscate assets acquired after the period of social danger and the paradigm of the Mafia enterprise to confiscate assets acquired before this period due to the impossibility of separating the lawful components from illicit ones within a corporate complex. All other exceptions were found inadmissible because they related to the illogicality of the motivation.
46. On 4 October 2017, the Cavallotti's brothers submitted to the Court of Palermo a request for revocation of the confiscation, adducing new evidence, such as statements made by the informant Giovanni Brusca on 12 December 2000 in the context of a criminal proceeding, regarding the meaning of the notes found in his possession at the time of his arrest which referred to the gasification works in the municipality of Monreale, in the part in which the informant stated that the Cavallotti brothers "had the possibility of being able to manage a job in Monreale. By management I mean having contact with the municipal administration, I do not know with whom and how, directly, without the need for the intervention of Cosa Nostra."
47. By decree of 3 May 2019, the Court rejected the request for revocation, considering new evidence only that which has arisen after the conclusion of the prevention procedure and

not that which can be deduced, but for any reason not deduced, within the scope of it. In any event, the informant Brusca's clarification regarding the methane gasification works was considered irrelevant because the mentioned notes were prior to the works' concession.

48. In light of the new criteria used by the experts in preventive proceedings no. 248/2011 and the newly found documents of the individual company Cavallotti Salvatore Vito, the applicants commissioned a consultant to reassess the income capacity of the Cavallotti brothers in relation to the value of the assets. The consultant demonstrated that, in light of the new criteria and the new accounting documents, there was no disproportion and that therefore the assets had to be returned. The accounting of the individual company, for example, demonstrated that the construction costs of the Cavallotti houses were not only lower than those hypothesised by the experts appointed by the court but had been borne by the individual company.
49. On this basis, the applicants appealed against the decree of 3 May 2019, but the Court of Appeal rejected the appeal with a decree of 22 June 2022, considering the case-law on new evidence that had been formed on the provision of Article 28 of the Anti-Mafia Code.
50. The Court of Cassation, with judgment no. 14265/2023, found the appeal inadmissible, recalling that it is not possible to contest the illogicality of the motivation in an appeal to the Court of Cassation in matters of preventive measures and adhering to the most restrictive jurisprudence about new evidence.

3. The Preventive Proceedings no. 248/2011 R.M.P.

51. On 22 December 2011, the section for preventive measures of the Court of Palermo, chaired by Judge Silvana Saguto, seized the company in which the sons of Gaetano Cavallotti, the sons of Vincenzo Cavallotti, and the wife of Giovanni Cavallotti were partners, accusing them of fictitious ownership of assets. The same happened in December 2013, with the company of Salvatore Vito's son and the companies of Salvatore Mazzola's sons, and in June 2014, with another company of Gaetano Cavallotti's sons and the company of Salvatore's sons. In July 2014, Italgas S.p.A. (a semi-public company with a

turnover of billions of euros) was placed under judicial administration, accused of having awarded contracts, through a regular tender, to the company of the applicants' sons.

52. The Court of Palermo appointed experts and asked them questions like those posed in the first proceedings. Two of these experts, Giovanni Giammarva and Attilio Masnata, had already been appointed in the first preventive proceedings, but in the new proceedings, these experts applied different criteria to evaluate family consumption, real estate values, and the impact of labour costs, and consequently, no disproportion was hypothesised. Consequently, by a decree of 3 May 2019, the section for preventive measures of the Court of Palermo revoked the seizure decrees, and the assets were returned to their legitimate owners.
53. On appeal by the public prosecutor and the Prosecutor General, the Court of Appeal of Palermo confirmed the appealed decree on 14 March 2022.
54. Finally, the Court of Cassation, with judgment no. 18762/2023, rejected the appeal of the Prosecutor General lodged against the Court of Appeal's decree.

B. Relevant legal framework and practice

1. Domestic law and case-law on NCB confiscation

a) The 1956 Law on personal preventive measures

55. The historical roots of patrimonial preventive measures are the consolidated Laws on Public Security approved by Royal Decrees no. 1848/1926 and no. 773/1931, which provided for confiscation without conviction, applied by the Prefect against collective entities suspected of conducting an activity contrary to the interests of the State. After the fall of the fascist regime, Legislative Decrees of the Lieutenant of the Realm no. 159/1944 and no. 134/1946 approved a measure of confiscation without conviction, applicable by the court to properties of citizens or their heirs who had betrayed their homeland by placing themselves spontaneously and actively at the service of the German invaders, as well as to profits deriving from participation or adherence to the fascist regime. The non-penal nature of the confiscation referred to in Article 1, paragraph 2 of the Legislative Decree of the Lieutenant no. 134 of 1946 as well as that referred to in Article 9 of the Legislative Decree of the Lieutenant of the Realm no. 159/1944 was confirmed by the

Constitutional Court, respectively, in judgments no. 29/1961 and no. 46/1964, with the effect of subtracting them from the *principle nullum crime, nulla poena sine legge praevia* (prohibition of unfavourable retroactive penal law).

56. In 1956, a new Law on personal preventive measures was approved, which provided for preventive intervention against certain categories of persons dangerous for security and public morality, targeting situations of common social marginality. With respect to these people, Law no. 1423/1956 determined that the police chief could deliver a warning to change conduct and an expulsion order from a municipality and the court could order special surveillance.
57. The Constitutional Court repeatedly confirmed the constitutional legitimacy of these measures. In judgment no. 2/1956 it held: "there is no doubt that 'persons presenting a danger to public order and safety or public morality' (section 157 of the Public Safety Act) constitute a threat to 'security' as defined above and as contemplated by Article 16 of the Constitution. […] To sum up, the expression 'health or security reasons' in the text of Article 16 of the Constitution must be interpreted as referring to facts posing a danger to citizens' security as defined above."
58. In judgment no. 27/1959, the Constitutional Court held that preventive measures satisfied the legitimate requirement laid down in the Constitution of guaranteeing "the orderly and peaceful course of social relations, not only through punitive criminal legislation, but also through a system of preventive measures intended to prevent the commission of future offences". It added that such measures were necessary and proportionate to the aim pursued, because the categories of individuals concerned were sufficiently restricted and specific.
59. In judgment no. 23/1964, the Constitutional Court held that preventive measures breached neither the principle of legality nor the principle of the presumption of innocence. It admitted that the principle of legality, enshrined in the Constitution in relation both to restrictions on personal liberty (Article 13) and to criminal offences and security measures (Article 25), was applicable to preventive measures, but the observance of that principle had to be reviewed in accordance with special criteria considering the nature and purposes of the measures concerned. Their preventive aims meant that they were not imposed based on a specific finding that a particular act had been committed, but rather on a pattern of conduct indicating a danger to society. The Constitutional Court held that as a result,

when determining the different categories of individuals concerned, the legislature had to use different criteria from those employed to define the constituent elements of a criminal offence and could also have recourse to presumptions, but the criteria applied had to correspond to objectively identifiable types of conduct. The approach to be adopted in defining preventive measures was different from, but no less strict than, the approach to defining criminal offences and penalties. In the specific case under scrutiny, the Constitutional Court concluded that the Law contained a sufficiently precise description of which types of conduct were held to represent a "danger to society" in the case of "idlers, those who are unfit for work and vagrants" and other categories of individuals. Concerning the principle of presumption of innocence, the Constitutional Court held that this principle did not apply, since preventive measures were not based on guilt and had no bearing on an individual's criminal responsibility, nor did the measures amount to a departure from this principle, given that an acquittal on grounds of insufficient evidence could never in itself justify a finding that a person posed a danger to society, since other factual indications of dangerousness had to be present.

60. Law no. 575/1965, containing "Provisions against the Mafia", extended the application of the preventive measures provided for by Law no. 1423/1956 to persons suspected of membership to Mafia-type associations (Article 416 of the Criminal Code), thus establishing a distinction between the categories of "common dangerousness" listed in the 1956 law and the new "qualified" dangerousness. The parliamentary preparatory works are telling about the purpose of the new legislation: the concept of "membership" should not be used to define a specific fact, loaded with criminal disvalue, of which it was not possible to obtain full proof, but had to be considered as a "starting point to then take measures and fight the mentality, the custom of the Mafia". Ultimately, the law targeted the mentality and the customs of a specific population group: "the bill under examination – while extending to the entire national territory – refers in particular to Sicily". Furthermore, the risk of abuse was already then obvious: "We will be forced to pass measures - which, if they are not unconstitutional or unlawful, will certainly have the character of exceptionality - to establish that the citizen, who has been acquitted three times for lack of evidence of a Mafia crime, must be imprisoned precisely for having been acquitted for lack of evidence." (See session of 25 May 1965, at the Chamber of Deputies,

Joint Commissions Interior II - Justice IV, relating to the discussion of the bill "Provisions against the Mafia", already approved by the Senate.)

61. In judgment no. 32/1969, the Constitutional Court pointed out that simply belonging to one of the categories of individuals designated by Law no. 1423/1956 was not sufficient ground for imposing a preventive measure. On the contrary, it was necessary to establish the existence of specific conduct indicating that the individual concerned posed a real and not merely theoretical danger.
62. Introduced in response to the emergence of extreme left-wing and right-wing political terrorism, Law no. 152/1975, on the "Provisions for the protection of public order", extended the provisions of Law no. 575/1965 to new categories of social dangerousness related to politically motivated crimes and set out the measure of temporary suspension of the administration of the defendant's assets, save for those intended for professional or productive activity, when the availability of the assets of the subjects included in the new categories of social dangerousness could facilitate their dangerous conduct. The new measure could last a maximum of five years with the possibility of extension.
63. In judgment no. 177/1980, the Constitutional Court declared incompatible with the principle of legality the category of those who "due to the demonstrations to which they have given rise, give well-founded reasons to believe that they are inclined to commit crime", since the excessive vagueness of this category "offered operators a space of uncontrollable discretion". The novelty of this judgment consisted "in its establishment […] of the binding function of the «category», as the foundation and limit of the index of dangerousness relevant as a prerequisite for preventive measures". Hence, the prognosis of social dangerousness could manifest itself only when the factual prerequisites provided for by law obtained and judicial verification of such prerequisites occurred.

b) The "Rognoni-La Torre" Law of 1982

64. In the introductory report of the new law presented by the Minister of the Internal Affairs on 20 November 1981, it is expressly emphasised that, with the introduction of preventive seizure and confiscation, the legislator wanted to "duplicate the system until [then] only criminal of conservatory seizure [provided for in Article 316 of the Code of Criminal Procedure], confiscation of assets [provided for in Article 240 of the Criminal Code], and

the bail for good conduct [provided for in Article 237 of the Criminal Code], with similar institutions intended to operate in a phase entirely prior to criminal proceedings". Preventive seizure "correspond[ed], in its essential lines, to that of a conservative type provided for in the Criminal Code but [...] differed from it in an accentuation of the precautionary function, being framed [...] in the preventive procedure". The legal basis for confiscation was found, instead, "in the dangerousness attributable to the property [...] for its own characteristics and for the relationship existing between it and the persons who dispose of it."

65. Accordingly, Law no. 646/1982, known after their proponents' names as the "Rognoni-La Torre" Law, introduced the crime of Mafia association with mandatory confiscation in the event of conviction. In addition, provision was made for preventive seizure and confiscation of property of those suspected of membership of Mafia-type associations, where the suspect did not demonstrate that the assets at his disposal derived from lawful activities. Preventive confiscation could be ordered only on condition that the person was also subjected to a personal preventive measure, the essential prerequisite for which was the actuality of the social dangerousness. The new law equated the proposal to apply the preventive measure with the exercise of criminal action, preventive proceedings with criminal proceedings and the decree applying confiscation with the criminal conviction sentence. The trial judge who tried the defendant for the offence under Article 416-*bis* of the Criminal Code applied, with the conviction judgment, the preventive measure.
66. In Ordinance no. 177/1988, the Constitutional Court declared manifestly inadmissible the question of constitutional legitimacy of Article 2-*ter* of Law no. 575/1965 as it did not allow preventive confiscation in case of the proposed person's death. By so doing, the Court acknowledged a strictly preventive function of confiscation which had no reason to exist without the current dangerousness of the subject who had control over the asset.
67. Law no. 327/1988 abolished the possibility of applying the obligation to reside in a municipality other than that of residence, repealed the category of idle and vagrants and established that the attribution of social dangerousness had to occur "on the basis of factual elements".
68. Law no. 256/1993 rephrased, regarding preventive seizure, the criterion of disproportion between the value of the assets owned and the official income. Previously, the disproportion had to be "significant", was related to the standard of living and apparent

or declared income and was a specification of sufficient evidence. In the updated version, the disproportion no longer had to be significant, was related to the economic activity conducted and was configured as an alternative to sufficient evidence.

69. By judgment no. 335/1996, the Constitutional Court stressed that preventive confiscation measures "do not have their rationale exclusively in the characteristics of the assets they affect. They are directed not only at assets as such, because of their suspected illegitimate origin, but at assets that, in addition, are in the possession of socially dangerous people [...]. The dangerousness of the asset, so to speak, is considered by the law to derive from the dangerousness of the person who can dispose of it." Hence, the purpose of confiscation was preventive, namely, to deprive dangerous persons of an asset that they could use to commit crimes. A further purpose was to "permanently remove the asset from the 'economic circuit' of origin, to place it in another, free from the criminal conditioning that characterizes the former".
70. During the nineties, the Court of Cassation started to overcome the link between personal and patrimonial measures, recognizing the legitimacy of patrimonial preventive measures also with respect to the heirs of the suspect predeceased to the formulation of a prevention proposal (Cass., I, 17 July 1995, D'Antoni), or defining in what terms patrimonial prevention proceedings could start, or continue, following the cessation of the effects of the personal prevention measure due to supervening circumstances (Cass., I, judgment no. 2654/1995).
71. This jurisprudential trend led to *Simonelli* judgment (Cass., Plenary, judgment no. 18/1996). The Court of Cassation departed from the Constitutional Court's understanding while deciding a case of absence of current social dangerousness of the proposed person because of his intervening death pending the preventive proceedings. Preventive confiscation was defined as an administrative sanction, equivalent to property security measure provided for in Article 240 of the Criminal Code: "Excluding, therefore, the punitive character of a criminal sanction and, likewise, that of a 'preventive' measure, confiscation can only be attributed to that '*tertium genus*' consisting of an administrative sanction, comparable (as to content and effects) to the security measure provided for by Article 240, first paragraph, of the Criminal Code: applied, by a non-reviewable choice of the legislator, within the autonomous prevention procedure provided and regulated by Law No. 575/1965 and subsequent amendments". Preventive confiscation was

independent of a conviction in criminal proceedings with the consequent applicability also in the case of acquittal, whatever its formula.

c) The 2008/2009 packages on public safety

72. Legislative Decree no. 92/2008 on "Urgent measures on public safety", replaced and modified by Law no. 125/2008, and Law no. 94/2009, containing "Provisions on public safety", changed profoundly the legal framework, with the following major reforms: the subjective extension of patrimonial measures to cases of generic dangerousness, also including those involved in criminal trafficking who habitually live off the proceeds of criminal activity and those suspected of the crime of fraudulent transfer of assets as new categories of dangerous subjects, the suppression of the necessary link between personal and patrimonial preventive measures and the extension of the criterion of disproportion between the value of the assets owned and the official income to preventive confiscation.
73. In judgment no. 93/2010, the Constitutional Court declared the unconstitutionality of Article 4 of Law no. 1423/1956 and of Article 2-ter of Law no. 575/1965, insofar as they did not allow, upon request of the interested parties, the procedure for the application of preventive measures to be carried out, before the tribunal and the court of appeal, in the form of a public hearing, invoking the Court's judgments of 13 November 2007, *Bocellari and Rizza v. Italy*, of 8 July 2008, *Perre and others v. Italy*, of 5 January 2010, *Bongiorno v. Italy*. The Court noted that "[t]his are, in other words, proceedings at the end of which the judge is called upon to express a judgment on the merits, capable of directly, definitively and substantially influencing the constitutionally protected rights of the individual, such as personal freedom (Article 13, first paragraph, of the Constitution) and property (the latter, among other things, attacked in a normally "massive" manner and in components of particular importance, as indeed in the proceedings *a quo*), as well as the freedom of economic initiative itself, affected by the measures, also seriously "incapacitating", foreseen for the person to whom the preventive measure is applied (in particular, by Article 10 of Law no. 575/1965). This gives specific emphasis to the needs whose satisfaction the principle of publicity of hearings is intended to satisfy."
74. In implementation of Law no. 136/2010, the Anti-Mafia Code was adopted by the Legislative Decree no. 159/2011, which provided for systematic regulation of preventive

confiscation, the applicable procedure and appeals and the relationship with criminal proceedings and patrimonial measures other than confiscation. The new legal framework provided for a public hearing at the request of the proposed person, time limits for the preliminary and the appeals phases and the possibility of revocation of the confiscation with the restitution made in the equivalent form provided by law. The law clarified that preventive seizure prevails over any form of criminal seizure. Hence, preventive seizure and subsequent confiscation can also be ordered in relation to assets already seized in the context of criminal proceedings.

75. In 2012, a radically different view was presented by the Court of Cassation in the *Occhipinti* judgment (Cass., V, judgment no. 14044/2013), which acknowledged the "objectively sanctioning nature" of preventive confiscation in a case referring to the applicability of Article 166 of the Criminal Code to preventive confiscation applied separately from personal preventive measures. This conclusion was reached by comparing preventive confiscation with confiscation by equivalent, which the Court of Cassation (I, judgment no. 11768/2012), had also considered as a measure of criminal nature, in accordance with the *Engel* criteria (see *Engel and Others v. the Netherlands*, no. 5100/71 and others, 8 June 1976). The justification for this new approach was that preventive confiscation had assumed a different purpose from its original one, coinciding with that of confiscation by equivalent, which means "to exclude that a subject can derive any economic benefit from illicit activities", disregarding the current dangerousness of the person and the causal link between illicit activity and property.

76. The tension in the case-law became obvious when the Court of Cassation delivered the *Ferrara* judgment (Cass., VI, judgment no. 39204/2013), which examined the reciprocal autonomy of personal and patrimonial preventive measures and the imposition of the later in the absence of the current dangerousness of the proposed person. In frontal contrast with the *Occhipinti* judgment, the Court of Cassation reaffirmed the non-punitive nature of preventive confiscation. Confiscation was equated to a security measure, submitted to the law in force at the time of its execution, under Article 200 of the Criminal Code. An unprecedented purpose was attributed to preventive confiscation, namely that of "preventing the legal economic system from being functionally altered by anomalous accumulations of wealth, regardless of the condition of the subject who then uses it in any way".

77. The *Spinelli* judgment (Cass., Plenary, judgment no. 4880/2014) intervened to solve the jurisprudential conflict on the nature of preventive confiscation. In a remarkable exercise of legal abstractionism, the judges stated that the discussion on the nature of measure "cannot be conducted on the side of factual reality", namely, on the side of the consequences that preventive confiscation decrees can and indeed do produce on their addressees, but "rather be oriented in a teleological dimension". Such consequences were considered as entirely irrelevant in legal reasoning because the "purpose [is] purely preventive beyond any possible 'para-sanctioning' reflection". The strictly abstract reflection led the Supreme Court judges to find, following the *Ferrara* judgment, that confiscation has the purpose of "withdrawing illicitly accumulated assets from the availability of certain individuals who cannot demonstrate their legitimate origin". But at the same time, the judges observed that "preventive confiscation is not a legal institution that has introduced a direct *actio in rem* into our legal system", because its purpose is always "to prevent the realisation of further criminal conduct, given the deterrent effectiveness of its abduction..., dissuade the affected individual from the commission of further crimes and lifestyles contrary to the rules of civil society".
78. The *Sottile* judgment (Cass., I, judgment no. 54119/2017) considered the confiscation of assets of an acquitted person "does not appear consistent – legally – neither with the now consolidated lines [of the Court of Cassation], nor with the contents of the – subsequent, compared to the appeal – judgment issued by the European Court of Human Rights in February 2017 in the case of *De Tommaso v. Italy*, which must be taken into duly account". In stringent terms, the Court of Cassation held that "the very notion of evidence of membership in a Mafia-style association (...), must be understood in its restrictive scope, with a rejection (...) of interpretative approaches aimed at degrading its meaning in terms of mere «ideological contiguity», commonality of «Mafia culture» or recognised «frequentation» with subjects involved in the association." More importantly, it recognised that, since preventive measures "fall within a broad sense of punitive measures", the "general principle of taxativity and determinacy of the normative description" must apply.
79. Law n. 161/2017 expanded once again the number of persons eligible for personal and patrimonial preventive measures, including those suspected of providing assistance to members of criminal and Mafia organisations, those suspected of criminal association

aimed at committing crimes against the public administration, those suspected of committing or attempting to commit crimes with the purpose of terrorism, those who carry out executive acts aimed at reconstituting the fascist party, those suspected of the crime of aggravated fraud for the purpose of obtaining public funds and those suspected of the crime of stalking. Other than the seizure *inaudita parte*, the new law clarified that the court may order the return of the file to the proposing body if it deems that it is not complete and eventually indicate further investigative acts to be conducted. The possibility of challenging the decree that orders or denies the seizure and the rejection of the request for confiscation even if the seizure has not yet been ordered was now admitted. Whenever it is not possible to proceed with the seizure of the assets, because the proposed person does not have direct or indirect disposal of them, even if they have been legitimately transferred at any time to third parties in good faith, the court may order the seizure and confiscation of other assets of equivalent value of which the proposed person has the availability even through a third party.

80. In the *Gattuso* judgment (Cass., Plenary, judgment no. 111/2017), the Court of Cassation intervened to resolve the jurisprudential dispute on the subjective scope of the concept of membership to a Mafia-type association, admitting that the conduct of the external accomplice could be subsumed to the notion of membership, requiring that the person carries out "an action, even if isolated, that is characterised by being functional to the purposes of the association", but not "mere collaterality that does not materialize in symptoms of an individual contribution to the life of the association". The actuality of the individual dangerousness assessment was required also for the proposed person suspected of membership to Mafia-type association, being inadmissible the presumption *semel mafiosus, semper mafiosus* when lacking factual support, which could only be deduced from the analysis relating to the specific nature of the ascertained membership. In the case of an isolated functional action, the assessment of actuality would have to be anchored to specific elements regarding the possible repetitiveness of the contribution and the permanence of certain living conditions and common interests.

d) The Constitutional Court judgment no. 24/2019

81. In *De Tommaso v. Italy* [GC] (no. 43395/09, 23 February 2017), the Court held that Law no. 1423/1956 was couched in vague and excessively broad terms. Neither the categories of individuals to whom preventive measures were applicable (section 1 of the 1956 Law) nor the content of certain of these measures (sections 3 and 5 of the 1956 Law: especially obligations to "lead an honest and law-abiding life" and to "not give cause for suspicion") were defined by law with sufficient precision and clarity.
82. In its judgment no. 24/2019, the Constitutional Court shared partially the conclusions of the Grand Chamber judgment in *De Tommaso v. Italy* [GC], cited above, reproaching only the vagueness and lack of foreseeability of one category of suspects, those who "habitually engaged in criminal trafficking". According to the Constitutional Court, the expression "criminal trafficking" is not able to indicate with sufficient precision which criminal conduct can give rise to the application of special surveillance, in violation of the principle of legality. The provision referred to in letter a) of paragraph 1 of the Anti-Mafia Code was considered to be affected by a radical imprecision under two aspects: in terms of Articles 13 and 117, paragraph 1, of the Constitution, in relation to Article 2 of the Additional Protocol No. 4 to the European Convention on Human Rights, regarding the personal preventive measure of special surveillance; in terms of Articles 42 and 117, paragraph 1, of the Constitution, in relation to Article 1 of the Additional Protocol No. 1 to the European Convention on Human Rights, regarding the patrimonial preventive measures of seizure and confiscation. But the Constitutional Court also declared that the provision of letter b) of Article 1 of the Anti-Mafia Code concerning the category of those who, due to their conduct and standard of living, must be considered, on the basis of factual elements, to habitually live, even in part, with the proceeds of criminal activities, was not in conflict with the principle of legality, in view of the jurisprudential consolidation of the application of the impugned provision to crimes habitually committed, i.e. over a significant period of time, by the proposed subject, which must have actually generated profits for the latter which in turn constitute or have constituted the only income of the subject or a significant component thereof.
83. The most recent attempt to rethink the system of confiscation was made in the *Foffano* judgment (Cass., Plenary, judgment no. 13783/2025). According to the Plenary, confiscation is a measure subject to proportionality control, regardless of its formal label, i.e., direct, or equivalent. If the deprivation of assets is not directed towards mere

restoration but takes on a punitive connotation, in the sense that it has a worsening effect on the offender's financial situation, the proportionality control takes on a retrospective significance, particularly concerning the proportion of the overall sanction imposed relative to the seriousness of the individual act. If, on the other hand, the deprivation of assets is aimed at restoring the situation prior to the illicit act, the proportionality control has a prospective value and aims to verify the adequacy of the measure with the pursued purpose. Automatic and rigid measures can be indicative of disproportionality. Hence, the nature of the confiscation by equivalent derives from and depends on the nature of the direct confiscation it accesses: if the direct confiscation is of a "recoverable" nature (confiscation of the profit), the confiscation by equivalent will be restorative; if the direct confiscation has a punitive character (confiscation exceeding the profit), the confiscation by equivalent will be punitive.

2. International law, soft law, and case-law on NCB confiscation

a) Council of Europe

i. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

84. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime foresaw the States Parties' obligation to co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aimed at the confiscation of instrumentalities and proceeds. Cooperation could be refused if the request did not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought (Article 18, paragraph 4, letter d). According to the Explanatory Report, international co-operation should not be excluded in cases of non-conviction-based confiscation, provided however that a decision of a judicial nature exists or that a statement to the effect that an offence has or several offences have been committed is included in such a decision. The expression "decision of a judicial nature" was meant to exclude purely administrative decisions. Decisions by administrative courts were however included. The statements referred to in

the Convention did not concern decisions of a provisional nature. (Explanatory Report of CTS no. 141, paragraph 73)

85. The Convention provided the legal basis for initial attempts for international cooperation regarding the execution of requests for preventive confiscation outside of Italy. In the Crisafulli case, the French Court of Cassation admitted the execution of the preventive confiscation of a building located in French Antibes, ordered by a decree of the court of Milan on 17 December 1999, confirmed by a judgment of the Italian Court of Cassation of 19 March 2001. The French Court of Cassation considered that the confiscation decision was final and enforceable and that "the confiscated property could be confiscated in similar circumstances according to French law, in its Articles 131-21 and 324-7 of the Criminal Code". In other words, the French Court of Cassation equated the Italian preventive confiscation and the French confiscation penalty, concluding that the 1990 Convention simply required that the confiscation decision of the requesting State be final and enforceable, and that the circumstances of the execution of the measure be similar in the requested State and do not disturb public order (French Court of Cassation, judgment of 13 November 2003, no. 03-80.371).

ii. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism

86. The 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism updates the 1990 version. Article 3, paragraph 4, provides for an obligation ("shall") to adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by domestic law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law. This provision cannot be interpreted as an obligation to introduce the reversal of the burden of proof in a criminal prosecution to find the defendant guilty of an offence (Explanatory Report CETS no. 198, paragraph 72).
87. Article 23, paragraph 5, creates an obligation of means, not of result, in so far that it imposes on the States Parties ("shall") an obligation to co-operate "to the widest extent

possible under their domestic law" with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention. Indeed, the nature of this obligation of means is reinforced by Article 28, paragraph 4, letter d), which allows for refusal of cooperation if the request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought or the request relates to a confiscation order resulting from a decision rendered in absentia of the person against whom the order was issued and, in the opinion of the requested Party, the proceedings conducted by the requesting Party leading to such decision did not satisfy the minimum rights of defence recognised as due to everyone against whom a criminal charge is made. Article 28, paragraph 8, provides that the fact that the natural person against whom an order of confiscation of proceeds has been issued has died or the fact that a legal person against whom an order of confiscation of proceeds has been issued has subsequently been dissolved shall not be invoked as an obstacle to render assistance, without prejudice to the above-mentioned grounds for refusal.

iii. Venice Commission reports on confiscation laws

88. In several opinions delivered on confiscation laws, the Venice Commission of the Council of Europe has maintained that international and European standards suggest that civil forfeiture may be an effective tool to fight public corruption and prevent illicit acquisition of assets. The public interest of this measure justifies the application of a presumption of illicit origin of certain property, which shifts the burden of proof to the owner of assets: the competent authority has a duty to demonstrate that the assets may be of illegal origin, while the respondent may refute these allegations by presenting evidence to the contrary. However, the Venice Commission has insisted that this tool should be applied within reasonable limits and be accompanied by effective procedural guarantees. The courts should establish a substantive link between the assets in respect of which confiscation is

sought and the criminal offence and a definite temporal scope prior to the commission of the criminal offence within which it is possible to confiscate assets and should be prevented from making findings based on the presumption of illicit origin when the relevant evidence is inaccessible to the respondent for objective reasons [see for example, Venice Commission Opinion No. 1108/2022, CDL-AD(2022)048, p. 13, and Opinion No. 1187/2024, CDL-AD(2024)024, p. 14; for more details, see Council of Europe, Impact Study on Civil Forfeiture, 2013; Parliamentary Assembly of the Council of Europe Committee on Legal Affairs and Human Rights, Fighting organised crime by facilitating the confiscation of illegal assets. Analysis of Irish, Italian, Dutch, British systems, Report, Doc. 14516, 26 March 2018; and Council of Europe, The use of non-conviction-based seizure and confiscation, 2020].

b) European Union

i. The failed harmonisation of confiscation by Framework Decision 2005/212/JHA and the respective case-law

89. Within the European Union, Council Framework Decisions 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime and Council Framework Decision 2005/2012/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property linked confiscation to a conviction for a crime and the proof of the illicit origin of assets according to the evidentiary standard of criminal law, the judge having to be convinced beyond any reasonable doubt. Therefore, Article 2, paragraph 1, of Council Framework Decision 2005/212/JHA must be interpreted as not applying to a confiscation measure adopted following an act that does not constitute a criminal offence (Judgment of 9 March 2023, *Otdel "Mitnichesko razsledvane i razuznavane"*, C-752/21, ECLI:EU:C:2023:179), for example, an administrative offence (CJEU, judgment of 19 December 2024, *Sistem Lux*, C-717/22, ECLI:EU:C:2024:1041).
90. Moreover, Article 5 of Council Framework Decision 2005/212/JHA safeguarded that it did not have the effect of altering the obligation to respect fundamental rights and fundamental principles, including the presumption of innocence, as enshrined in Article 6 of the Treaty on the European Union.

91. The European Commission concluded that "the level of harmonisation introduced by this instrument was very low, and it has not removed the diversity of national legal confiscation regimes." [Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, COM (2016) 819 final, 21.12.2016, p. 4].

ii. The unsuccessful minimum rules on confiscation without conviction of Directive 2014/42/EU and the respective case-law

92. Based on the criminal law competence of the Union, enshrined in Articles 82, paragraph 2, and 83, paragraph 1, of the Treaty on the Functioning of the European Union, Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union introduced confiscation without conviction issued within the framework of criminal proceedings.
93. The original Commission proposal included a provision requiring Member States to enable non-conviction-based confiscation in circumstances where, following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction, but where this criminal conviction cannot be obtained because the suspect has died, is permanently ill or when his flight or illness prevents effective prosecution within a reasonable time and poses the risk that it could be barred by statuary limitations (Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, COM (2012) 85 final).
94. The European Parliament strongly supported going beyond it and introducing a general provision on non-conviction-based confiscation [European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, COM (2012) 0085 – C7-0075/2012 – 2012/0036(COD)), 20.05.2013, p. 22]. The Council did not support such a broad approach at the time and in the final version of the Directive the contested provision was replaced by Article 4, paragraph 2, which provided for confiscation when it is not possible to reach a conviction due to the illness or flight of the suspect or accused, when

criminal proceedings for a profit-generating offense have been initiated, provided that it is evident that such proceedings, if conducted regularly, would have ended in a criminal conviction.

95. Recitals seven, twenty-one and forty-one submitted confiscation measures to the principle of proportionality and recital twenty-one mentioned the balance of probabilities' standard of evidence, apparently only for extended confiscation. No reference was made to the principle of the presumption of innocence, nor to other defence rights (see on this point, critically, European Agency for Fundamental Rights, Opinion 03/2012 on the Confiscation of proceeds of crime, p. 7).

96. According to settled case-law, both Framework Decision 2005/212 and Directive 2014/42 do not cover national legislation on the confiscation of instrumentalities and proceeds resulting from illegal activities that is ordered by a court in a Member State in the context of or following proceedings that do not concern the finding of one or more criminal offences (CJEU, judgments of 19 March 2020, *'Agro In 2001'*, C-234/18, EU:C:2020:221, paragraphs 57 and 62; of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraphs 37, 39 and 41; and of 9 March 2023, *Otdel 'Mitnichesko razsledvane i razuznavane'*, C-752/21, EU:C:2023:179, paragraph 40). The scope of those legislative acts does not cover national proceedings which, although initiated on the basis of information that a person is accused of having committed certain criminal offences, are intended exclusively to establish whether assets have been obtained illegally and are conducted independently of any criminal proceedings brought against the person accused of committing the offences and of the outcome of such proceedings, and, in particular, of the possible conviction of that person (CJEU, judgments of 19 March 2020, *'Agro In 2001'*, C-234/18, EU:C:2020:221, paragraph 60, and of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraph 38).

97. Neither Framework Decision 2005/212 nor Directive 2014/42 can be regarded as governing proceedings which, although provided for by national rules of criminal procedure, are intended exclusively to determine whether assets have been obtained illegally on the basis of case file materials that were taken from proceedings concerning the finding of one or more criminal offences referred to in those acts, without the court

hearing the confiscation proceedings having the power, in the context of those proceedings, to find that such a criminal offence has been committed and without that finding being made in the course of the proceedings concerning the finding of one or more criminal offences (CJEU, judgment of 4 October 2024, *1Dream and Others*, C-767/22, ECLI:EU:C:2024:823, paragraph 80).

98. Article 4, paragraph 2, of Directive 2014/42 covers only the situation where a conviction is not possible due to the non-appearance of the suspected or accused person in certain circumstances, at least in the cases of illness or absconding of that suspected or accused person, but where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial. It follows that Article 4, paragraph 2, of Directive 2014/42 requires that it be possible for the question whether that criminal offence has actually been committed to be assessed by the court ordering confiscation (CJEU, judgment of 4 October 2024, *1Dream and Others*, C-767/22, ECLI:EU:C:2024:823, paragraph 88).

99. It is true that preventive confiscation proceedings according to Law no. 575/1965 and its amendments and the Anti-Mafia Code may be based on case file materials that are taken from criminal proceedings, but the preventive court does not have the power, in the context of preventive proceedings, to find that such a criminal offence has been committed.

100. The conclusion is obvious: preventive confiscation proceedings according to Law no. 575/1965 and its amendments and the Anti-Mafia Code do not fulfil the requirements of Framework Decision 2005/212 and Directive 2014/42.

101. The failed harmonisation of confiscation by Framework Decision 2005/212/JHA was aggravated by two unsuccessful instruments of mutual recognition of freezing and confiscation orders within the Union, Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, which covered ordinary confiscation and extended confiscation, the latter with wide discretion to refuse recognition. The Commission's implementation reports on Framework Decisions 2003/577/JHA and 2006/783/JHA had shown that the existing regime for mutual

recognition of freezing orders and confiscation orders was not "not fully effective", in view of "insufficient mutual recognition and sub-optimal cross-border cooperation". When adopting Directive 2014/42/EU, the European Parliament and the Council stated in a declaration that an effective system of freezing and confiscation in the Union is inherently linked to the well-functioning mutual recognition of freezing orders and confiscation orders.

102. On 21 December 2016, the Commission submitted a proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, based on Article 82, paragraph 1, letter a), of the Treaty on the Functioning of the European Union.

103. The draft Regulation provided the response to the shortcomings of the existing regime, covering all confiscation orders imposed by a court following proceedings in relation to a criminal offence and all freezing orders issued with a view to possible subsequent confiscation, and therefore all types of orders covered by Directive 2014/42/EU, as well as other types of orders issued without final conviction within the framework of criminal proceedings.

104. In addition to the types of confiscation already covered by the existing Framework Decisions, the draft Regulation intended to cover third-party confiscation and criminal non-conviction-based confiscation and no longer provided for wide discretion to refuse recognition in case of extended confiscation [for more details, EUROJUST Note on the Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders. A new legal framework for judicial cooperation in the field of asset recovery, 2020; and Freezing Orders and Confiscation orders: Effort for common standards, D2.1 Comparative Report on the implementations of Regulation (EU) 2018/1805].

105. The material scope of the draft Regulation was deliberately enlarged by the European Commission, with this justification:

> "The proposed Regulation will cover mutual recognition of all types of freezing and confiscation orders covered by the Directive. In addition, it will also cover orders for non-conviction-based confiscation issued within the framework of criminal proceedings: the cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified, or other cases where a criminal court can confiscate an asset without conviction when the court has

decided that such asset is the proceeds of crime. This requires the court to establish that an advantage was derived from a criminal offence. In order to be included in the scope of the Regulation, these types of confiscation orders must be issued within the framework of criminal proceedings, and therefore all safeguards applicable to such proceedings will have to be fulfilled in the issuing State." [Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, COM (2016) 819 final, 21.12.2016, p.5]

106. Among the four feasible options on the table, the Commission proposed option four that would require the recognition of non-conviction-based confiscation orders. Sub-option 4a (medium option) would go beyond option three and cover all types of criminal confiscation, including criminal non-conviction-based confiscation. Sub-option 4b (maximum option) would also include civil or administrative forms of non-conviction-based confiscation. The preferred option was sub-option 4a as it foresaw a new mutual recognition instrument with an extended scope covering all types of freezing and confiscation orders issued in the context of criminal proceedings. (Commission staff working document executive summary of the impact assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, Document ST_15816_2016_ADD_3, p. 3)

107. Coherently, recital eighteen of the Commission's proposal provided that the Regulation should be applied considering Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, 2016/343, 2016/800 and 2016/1919 of the European Parliament and of the Council, which concern procedural rights in criminal proceedings. For the Commission,

> "As sub-option 4a would cover all freezing and confiscation orders issued within the framework of criminal proceedings, criminal law safeguards would be applicable. This would include in particular the right to a fair trial enshrined in Article 6 ECHR, not only in its civil aspect (article 6, para. 1 ECHR) but also in its criminal part which protects the rights of the defence in criminal proceedings (article 6, para. 3 ECHR)." (Commission staff working document executive summary of the impact assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the mutual

recognition of freezing and confiscation orders, Document ST_15816_2016_ADD_3, p. 49)

108. The Commission Impact Assessment evaluated the Italian system of preventive confiscation: "this preventive confiscation system remains outside of the criminal justice system and belongs to administrative (punitive) law where substantial and procedural rules are looser."

109. The Presidency revised text of 19 September 2017 broadened even more the material scope of the Regulation, suggesting that Article 1, paragraph 1, of the draft Regulation would read "[…] a freezing order or a confiscation order issued by another Member State within the framework of proceedings in criminal matters". During the discussions in the COPEN Working Party (Working Party on Judicial Cooperation in Criminal Matters) Italy had suggested using the concept of Article 82, paragraph 1, of the Treaty on the Functioning of the European Union, which refers to "proceedings in criminal matters", with a view to include its system of preventive confiscation. In view of the reluctance of some States, the Presidency also amended recital eighteen of the draft Regulation in such a way as the procedural rights Directives which only apply to criminal proceedings, would also have to be applied to freezing and confiscation orders as regards the Member States bound by these Directives, including Italy.

110. On 29 September 2017, the Legal Service of the Council was asked to deliver an Opinion on

> "whether the extension of the material scope of the draft Regulation to freezing and confiscation orders issued within the framework of proceedings in criminal matters complies with the legal basis of Article 82(1)(a) TFEU and with fundamental rights guaranteed by the Charter, the European Convention on Human Rights ("ECHR") and the procedural rights Directives based on Article 82(2) TFEU. In case it does, this opinion will examine how an alternative drafting of the draft Regulation could ensure legal certainty so as to cover national legal systems of freezing and confiscation orders issued by any competent court within the framework of proceedings which are in relation to a criminal offence but not necessarily criminal." (Doc. 12708/17 LIMITE JUR 453 JAI 854 COPEN 288 DROIPEN 125 CODEC 1483)

111. The Legal Service relied on the following information provided by the Italian delegation:

> "As regards the Italian system of non-conviction based confiscation as described by the Commission in its Impact Assessment and by the Italian delegation in its contribution to the COPEN Working Party, the following elements should be underlined: (i) it is ordered by a criminal court in separate proceedings from the criminal proceedings and independently of a criminal conviction (ii) it is ordered on the basis of a determination of the danger the person poses to society upon strong evidence of guilt corroborated by information sources which are chosen according to the same rules of exclusion which apply to criminal evidence. […] The Italian Corte di Cassazione expressly stated that a confiscation order adopted at the end of the preventive confiscation procedure is substantially the same as if it were adopted in a criminal judgment (joint chambers, 29.10.2009-8.1.2010, no. 600)." (underline in the original)

112. But the Legal Service was clearly not convinced by the information provided by the Italian delegation:

> "[…] the CLS lacks the relevant information to be able to assess the conformity of the Italian system of preventive confiscation with the procedural safeguards that satisfy the essential characteristics of criminal procedure. The Italian delegation has however confirmed that similar procedural rights as those provided in criminal proceedings apply to that system. […] it is unclear from Recital 18 why and to what extent that system would have to comply with the procedural rights Directives. This should be clarified to remove further uncertainties, especially since the Italian delegation has recently confirmed that those procedural rights Directives would only apply to their preventive confiscation system to the extent that they are compatible with the object of the proceedings: the confiscation of illicit assets and not the liability of an offender."

113. In any event, the Legal Service warned that "the exclusion of mutual recognition of orders «within the framework of proceedings in administrative matters» or «within the framework of administrative proceedings» in Article 1(3) of the draft Regulation, may give rise to legal uncertainties, in particular as to whether the Italian system of preventive

confiscation is intended to be included in, or excluded from the scope of the draft Regulation."

114. On 8 November 2017, the Committee on Economic and Monetary Affairs of the European Parliament proposed that the Regulation should apply to all confiscation orders imposed by a court or a competent authority following proceedings in relation to a criminal, civil or administrative offence and all freezing orders issued with a view to possible subsequent confiscation. It should therefore cover all types of orders covered by Directive 2014/42/EU, as well as other types of orders issued without final conviction within the framework of criminal, civil and administrative proceedings.

115. In the opinion of the Committee, recital eighteen should be rephrased as follows:

> "Where non-conviction based confiscations constitute preventive confiscations following proceedings in relation to criminal activities, it is extremely important to ensure that the following strict conditions are met: non-conviction-based confiscations should only be imposed against a finite list of possible targets identified by law, such as suspects of organised crime or of terrorism; the prosecution should prove that the provenance of the property cannot be justified and that the property to be confiscated is either disproportionate with regard to the declared income or the activity carried out or is of illicit origin or the result of reinvestment of the proceeds of crime; and effective procedural safeguards should be in place in order to ensure that the targets of non-conviction-based confiscations have the right to a fair trial and the right to an effective remedy and that their presumption of innocence is respected." [Opinion on the proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM (2016)0819 – C8-0002/2017 – 2016/0412(COD), p. 5-6]

116. Remarkably, the Committee on Economic and Monetary Affairs of the European Parliament proposed that the principle of the presumption of innocence should be applied even to confiscation without a final conviction ordered within the framework of civil and administrative proceedings.

117. Neither the Committee on Legal Affairs [Opinion on the proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM (2016)0819 – C8-0002/2017 – 2016/0412(COD)] nor the

Committee on Civil Liberties, Justice and Internal Affairs proposed any substantive changes to the Commission draft in this regard [Report on the proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, 12.1.2018 - (COM (2016)0819 – C8-0002/2017 – 2016/0412(COD)].

118. The text of the draft Regulation as it resulted from the meeting of COREPER on 29 November 2017 changed the material scope of the Regulation and the procedural rights required for mutual recognition (Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders - General approach, Document ST_15104_2017_INIT). The Commission did not oppose this change.

119. According to the updated version of recital thirteen, the Regulation would apply to all freezing and confiscation orders issued within the framework of "proceedings in criminal matters." The concept of "proceedings in criminal matters", which differed from that of "criminal proceedings" used in the Framework Decision 2003/577/JHA, was intended to go beyond orders covered by Directive 214/42/EU, covering all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, including other types of order issued without a final conviction, and even orders following criminal investigations by the police and other law enforcement authorities.

120. Thus, the Regulation would cover classic conviction-based confiscation as well as extended confiscation and non-conviction-based confiscation if these are issued within the framework of criminal proceedings and police and other law-enforcement investigations. The reference to investigations by the police and other law enforcement authorities was an important novelty because it left room for non-conviction-based confiscation orders which do not require the formal opening of criminal proceedings. Yet the Regulation would still not apply to confiscation orders issued within the framework of proceedings in civil or administrative matters.

121. The contradiction between admitting investigations by other law-enforcement authorities, which are normally governed by administrative law, and rejecting proceedings in administrative matters is obvious. Pragmatically, the new text of recital eighteen confirmed that, in any case, the essential safeguards for criminal proceedings set out in the Charter of Fundamental Rights should apply to proceedings in criminal matters

that are not criminal proceedings, but which are covered by the Regulation, namely to investigations by the police and other law-enforcement authorities.

122. The Council's consolidated text added that "proceedings in criminal matters" was an autonomous concept of Union law interpreted by the Court of Justice of the European Union, "notwithstanding the case-law of the European Court of Human Rights" (Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders - Revised draft consolidated text, Document ST_8595_2018_INIT). This version was approved in the European Parliament first reading with considerable rephrasing which, nevertheless, did not affect the content (Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders - Outcome of the European Parliament's first reading, Document ST_12697_2018_INIT). The amended version became the definitive version.

123. The cost of fragmentation of European human rights law, with a higher degree of protection in Luxembourg than the one provided in Strasbourg, was explicitly accepted by the Union legislator, with the caveat "notwithstanding the case-law of the European Court of Human Rights." In light of the policy choice mirrored in recital eighteen, the said caveat meant that the observance of the essential safeguards for criminal proceedings set out in the Charter of Fundamental Rights was a fundamental requirement for mutual recognition of non-conviction-based confiscation orders, regardless of whether the European Court of Human Rights would apply or not the guarantees of the criminal limb of Article 6 to these orders. In simple terms, the European legislator expressly safeguarded Union law from any past, present or future jurisprudential temptation in Strasbourg to lower the human rights protection level offered to people affected by non-conviction-based confiscation orders, putting them under the protection of the essential safeguards for criminal proceedings set out in the Charter of Fundamental Rights.

124. It is true that preventive confiscation proceedings according to Law no. 575/1965 and its amendments and the Anti-Mafia Code may be based on police and law-enforcement investigations which may lead to a decree emanated by the court for preventive measures, and do not necessarily require the formal opening of criminal proceedings, but the essential safeguards for criminal proceedings set out in the Charter of Fundamental Rights, such as the principle of the presumption of innocence and the

right to silence, do not apply to preventive confiscation proceedings (for more details, Part IV-D-2-c-i). The inexorable conclusion is that preventive confiscation orders under Law no. 575/1965 and its amendments and the Anti-Mafia Code do not fulfil the requirements of Regulation 1805/2018.

125. The Ministry of Justice of Italy has a differente view on this subject (see *Circolare in tema di attuazione del Regolamento (UE) 2018/1805 relativo al riconoscimento reciproco dei provvedimenti di congelamento e di confisca*, 2024, p. 9). The Ministry's paper puts forward four arguments: first, they refer to Article 67, paragraph 3, of the Treaty on the Functioning of the European Union without further explanation; second, they refer to the content of recital thirteen of the Directive, here again without further explanation; third, they point out that

> "Title V of the TFEU distinguishes between «judicial cooperation in criminal matters» (Article 82(1) of the TFEU) and «judicial cooperation in civil matters» (Article 81(1) of the TFEU). Therefore, the concept of criminal matters can also be defined negatively, in the sense that it excludes civil matters as interpreted by the Court of Justice of the European Union,"

126. but this argument does not add anything to the debated issue of whether preventive confiscation proceedings are proceedings in criminal matters; fourth, and the sole truly elaborated argument, is that

> "the substantial and procedural characteristics of preventive measures now fully justify their reduction to the autonomous Union concept of criminal matters (competence of a specialised judicial authority with jurisdiction in criminal matters; assessment of dangerousness based on the connection to specific criminal cases and destined to result in an «evidentiary» assessment, typical of criminal matters; operation of the rules of evidentiary exclusion specific to criminal proceedings and recognition of all the essential guarantees and remedies specific to it)."

127. In other words, the Ministry of Justice of Italy is arguing that the main characteristics of preventive confiscation proceedings are so similar to those of criminal procedure that the former must be included within the scope of the Regulation, despite the fact that Italy pleads before the European Court of Human Rights the exact opposite view, i.e. that the fundamental traits of preventive confiscation proceedings are essentially

different from those of criminal procedure and therefore the former does not refer to a criminal charge for the purpose of Article 6.

128. To put it simply, the Government argue in Rome, as it did in the COPEN Working Party discussions in Brussels, that preventive confiscation proceedings are similar to criminal proceedings, and therefore Regulation 2018/1805 should apply to preventive confiscation, but the same Government plead in Strasbourg that preventive confiscation proceedings are not similar to criminal proceedings, so neither the criminal limb of Article 6 nor Article 7 apply.

129. Moreover, the Ministry's line of argumentation is puzzling, because it seems to be commenting on a different country than Italy. I will show below that the operation of the rules of evidentiary exclusion specific to criminal proceedings do not apply in preventive confiscation proceedings and the essential guarantees and remedies of criminal procedure are missing in preventive confiscation proceedings (see Part IV-C-2-c).

130. Hence, the Government's assertion that "our preventive measures too [would be] included in the scope of application of the Regulation" (§ 64 of their observations in the present case), because they do not require the establishment of a crime, not only contradicts the letter and the *travaux preparatoires* of the Regulation, but is also contradictory in itself: on the one hand, to justify confiscation against the applicants acquitted of the charge of participation in a Mafia-type association, they emphasize that preventive confiscation does not presuppose a crime and should not be framed within criminal matters; on the other hand, however, they include it in the category of measures subject to mutual recognition, presupposing its connection to specific criminal cases and aiming at an «evidentiary» assessment typical of criminal matters.

131. The Government want to eat the cake and have it.

iii. The new residual unexplained wealth order in the Directive (EU) 2024/1260

132. In 2019, the European Commission found out that 25 Member States had some form of non-conviction-based confiscation proceedings and 13 Member States had some form of *in rem*/unexplained wealth proceedings, with enormous differences in their domestic systems. *In rem* confiscation proceedings could be found, with limited scope, in Estonia, Germany, Ireland, Luxembourg, Slovakia, Slovenia and the United Kingdom and

unexplained wealth orders, also with limited scope, in Bulgaria, Greece, Ireland, Italy, Latvia, the Netherlands and Romania [see Commission staff working document, Analysis of non-conviction based confiscation measures in the European Union, Brussels, 12.4.2019, SWD(2019) 1050 final, p. 6, 18, 19].

133. The European Commission concluded that the previous legislative acts had "not fully achieved the policy objective of fighting organised crime through recovering its profits" and that "[t]he current scope of the Confiscation Directive thus fails to capture a wide area of criminal profits generating from offences organised crime is engaged with." Eurojust confirmed this negative assessment, while admitting "difficulties caused due to distinctive styles of preventive measures utilised in some national legislation in the pursuit of criminal assets, such as unexplained wealth, non-conviction-based orders, or civil confiscation orders. The difficulty becomes acute if national legislation in the requesting/issuing State is not reflected in the requested/executing State" (Report on Eurojust's Casework in Asset Recovery, 2019).

134. The situation required a new intervention of the European legislator.

135. On 25 May 2022, the Commission adopted its proposal on revising the asset recovery system, covering the eurocrimes, but also crimes harmonised at European Union level and a series of offences linked to organised crime. The new Directive should lay down minimum rules on tracing and identification, freezing, confiscation and management of property within the framework of proceedings in criminal matters. In this context, "proceedings in criminal matters" was again considered as an autonomous concept of Union law interpreted by the Court of Justice of the European Union, with the additional caveat that the concept was established notwithstanding the case-law of the European Court of Human Rights. According to the Commission, the concept covered all types of freezing and confiscation orders issued following proceedings in relation to a criminal offence and other types of orders issued without a final conviction, such as criminal investigations by the police and other law enforcement authorities.

136. Article 15 of the proposal extended the non-conviction-based confiscation of instrumentalities and proceeds, or property, in cases where criminal proceedings have been initiated but the proceedings could not be continued because of death of the suspected or accused person, immunity or amnesty, or expired time limits prescribed by domestic law. Confiscation without conviction is limited to criminal offences liable to

give rise, directly or indirectly, to substantial economic benefit and only as far as the national court is satisfied that all the elements of the offence are present.

137. Article 16 of the proposal established a new modality of confiscation of unexplained wealth linked to criminal activities, to be determined where confiscation was not possible pursuant to conviction-based confiscation, extended confiscation, and non-conviction-based confiscation provisions. The conditions of the new modality of confiscation were as follows: (a) the property is frozen in the context of an investigation into criminal offences committed in the framework of a criminal organisation; (b) the said criminal offence is liable to give rise, directly or indirectly, to substantial economic benefit; and (c) the national court is satisfied that the frozen property is derived from criminal offences committed in the framework of a criminal organisation. The Article did neither specify the applicable standard of proof, nor which party carried the burden of proof.

138. Article 23, paragraph 8, submitted expressly all forms of confiscation to the principle of proportionality:

> "When implementing this Directive, Member States shall provide that confiscation is not ordered to the extent it would be disproportionate to the offence committed or the accusation against the person concerned by the confiscation. When implementing this Directive, Member States shall provide that, in exceptional circumstances, confiscation is not ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person."

139. Importantly, recital thirty-three provided for additional safeguards, those of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union:

> "Freezing and confiscation orders substantially affect the rights of suspected and accused persons, and in specific cases of third parties who are not being prosecuted. The Directive should provide for specific safeguards and judicial remedies in order to guarantee the protection of their fundamental rights in the implementation of this Directive in line with the right to a fair trial, the right to an effective remedy and the presumption of innocence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union."

140. In addition, recital thirty-six provided that

"[t]his Directive should be implemented without prejudice to Directive 2010/64/EU of the European Parliament and of the Council, Directive 2012/13/EU of the European Parliament and of the Council, Directive 2012/29/EU of the European Parliament and of the Council, Directive 2013/48/EU of the European Parliament and of the Council, Directive (EU) 2016/343/EU of the European Parliament and of the Council, Directive 2016/800/EU of the European Parliament and of the Council and Directive (EU) 2016/1919 of the European Parliament and of the Council."

141. On 14 December 2022, the European Economic and Social Committee adopted its opinion, strongly encouraging the European Commission to take all necessary precautions during the transposition process "to prevent abuses in case of non-conviction-based confiscation measures in asset recovery proceedings" and calling for stronger standards for defendants' procedural rights and safeguards in the case of the newly introduced mechanism ensuring the confiscation of assets not directly linked to a crime listed in the Directive, but based on a suspicion of unlawful property/resulting from criminal activities, because "[d]espite the mandatory judicial procedure preceding the confiscation order and the burden of proof for the prosecution to link the asset in question to criminal activity, more guarantees are required to exclude any possible abuses during the procedure." [Conclusions 1.6 and 1.7 of the Opinion of the European Economic and Social Committee on 'Proposal for a directive of the European Parliament and of the Council on asset recovery and confiscation' (COM (2022) 245 — final) (2023/C 100/16)].

142. On 9 June 2023, the Council adopted its general approach (Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation - General approach, Document ST_10347_2023_INIT).The Commission's definition of the concept of proceedings in criminal matters was reviewed with a view to clarifying that the material scope of the Directive is without prejudice to the procedures that Member States may use to freeze and confiscate the property. The deletion of the two following sentences in recital seven is full of meaning: "The term covers all types of freezing and confiscation orders issued following proceedings in relation to a criminal offence. It also covers other types of orders issued without a final conviction. Proceedings in criminal matters could also encompass criminal investigations by the police and other law enforcement authorities." By so doing, the Council deliberately excluded from the

material scope of the Directive non-conviction-based confiscation orders which do not require the formal opening of criminal proceedings, namely those that result from investigations by the police and other law-enforcement authorities.

143. Article 15 no longer included immunity from prosecution and amnesty as grounds for confiscation without conviction. Confiscation without a prior conviction was limited to criminal offences liable to give rise, directly or indirectly, to economic benefit, and no longer to substantial benefit.

144. Article 16 was significantly changed. Confiscation of property should refer to assets identified in the context of an investigation in relation to a criminal offence and consideration should now be given to the fact that there is no plausible licit source of the property, or that the person is connected to people linked to a criminal organisation. Specific provision was made that this confiscation should not prejudice the rights of bona fide third parties. The clause of subsidiarity was made more flexible, since it was left to the discretion of the Member States to determine that the confiscation of unexplained wealth shall only be pursued where confiscation pursuant to Articles 12 to 15 was not possible and/or that the property to be confiscated must have been frozen in the context of an investigation in relation to a criminal offence committed within the framework of a criminal organisation.

145. On 18 January 2024, the Permanent Representatives Committee confirmed the agreement on the final compromise text of the draft Directive, as it was reached between the negotiating parties on 12 December 2023 (Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation - Letter sent to the European Parliament, Document ST_5854_2024_INIT).

146. In Article 15 the requirement that criminal offences should be liable to give rise, directly or indirectly, to substantial economic benefit, was reinstated, as well as that the court be satisfied that the instrumentalities, proceeds or property are derived from or directly or indirectly linked to the criminal offence in question. In Article 16 the mandatory clause of subsidiarity was recovered, since the States could only apply confiscation of unexplained wealth where confiscation was not possible pursuant to conviction-based confiscation, extended confiscation, and non-conviction-based confiscation provisions. Since conviction-based confiscation, extended confiscation and non-conviction-based confiscation can only be ordered when criminal proceedings have

been formally opened and within these proceedings, the clause of subsidiarity clearly mandates that the confiscation modality of Article 16 can only take place when criminal proceedings have been formally opened but it has not been possible to apply within those criminal proceedings any of the other confiscation modalities of Articles 12 to 15. Other than the deletion of the reference to police and law-enforcement authorities in recital seven, the European legislator gave another indication, in recital twenty-four, that unexplained wealth orders can only be issued when criminal proceedings into the offence have been formally opened, since Member States have leeway to decide to allow for confiscation of unexplained wealth to be ordered "separately from criminal proceedings into the offence". In other words, Member States must make confiscation of unexplained wealth conditioned to the formal opening of criminal proceedings into the offence, within which the requisites of conviction-based confiscation, extended confiscation and non-conviction-based confiscation must be tested, and only when those requisites do not obtain, unexplained wealth orders may be issued within or separately from those criminal proceedings into the offence. Any other interpretation would devoid the mandatory clause of subsidiarity of unexplained wealth orders of meaning.

147. On 12 March 2024, the Parliament approved at first-reading the amended Commission's proposal position, clarifying, with regard to Article 15, that the national court is satisfied that the instrumentalities, proceeds or property to be confiscated are derived from, or directly or indirectly linked to, the criminal offence in question, but no specific rules on the burden of proof and the standard of evidence are foreseen (Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation – Outcome of the European Parliament's first reading, Document ST_7509_2024_INIT). New recital thirty-five insisted that "[t]he subject matter of this Directive is limited to proceedings in criminal matters, and therefore this Directive does not apply to confiscation measures in proceedings in civil matters that Member States might have implemented."

148. On 13 March 2024, the European Parliament adopted the text of the Directive by 598 votes to 19, with 7 abstentions, with a clear expression of a European-wide consensus on the text approved. On 12 April 2024, the Council, for its part, also adopted the new text. On 2 May 2024, the new Directive was published in the Official Journal, and it entered into force on 22 May 2024.

149. Hence, in view of the recent developments in European Union law, it is evident that there is an emerging European consensus on the criminal law nature of preventive confiscation measures. Pushing forward the criminal policy choice made with Directive 42/2014, the European legislator explicitly imposes in Directive 1260/2024 the applicability of criminal procedure guarantees, including the principle of the presumption of innocence and the respect for defence rights (recitals 46 and 51 and the above mentioned *travaux preparatoires*), set out in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, to all forms of confiscation regulated by the Directive, including to non-conviction-based confiscation and also to the new confiscation of unexplained wealth. Logically, this implies the prohibition of the reversal of the burden of proof, of the drawing of detrimental inferences from the suspect person's silence, and of the civil procedure standard of evidence, like the balance of probabilities. From the above derives, also by logical implication, the applicability of criminal law guarantees, such as the prohibition of retroactive law to the detriment of the affected person and of *bis in idem*.

150. Both the new Directive and the Regulation refer to the concept of proceedings in criminal matters, but with one major difference. The material scope of the final version of the Directive is more restrictive than that of the Regulation and does not encompass non-conviction-based confiscation orders which do not require the formal opening of criminal proceedings, like preventive confiscation set out in Law no. 575/1965 and its amendments and the Anti-Mafia Code.

151. In sum, there are two fundamental traits that distinguish clearly preventive confiscation proceedings from the unexplained wealth order proceedings under Article 16 of the Directive, such as the fact that the latter has a residual material scope, while the former has a general one, and the latter is subsidiary to the other modalities of confiscation, while the former is not, since preventive confiscation proceedings can take place before, during, after and without criminal proceedings.

152. Although the emerging European consensus on the criminal nature of non-conviction-based confiscation has been building up for over ten years, Italian law and case-law did not incorporate it until today, remaining attached to the controversial Constitutional Court judgment no. 24/2019 and its interpretative design of preventive confiscation measures as a civil law instrument (see Part IV-C-2-b).

153. In light of this dissonance between the above-mentioned European consensus and Italian law and case-law, there are two options: either Italian jurisprudence acknowledges that criminal law and procedure guarantees apply to preventive confiscation set out in Law no. 575/1965 and its amendments and the Anti-Mafia Code, or the Italian legislator will have to create a new form of preventive confiscation which implements European Union law, equipped with proper criminal law and procedure guarantees. In any event, the Italian courts cannot expect mutual legal assistance in the European Union context in the execution of their current preventive confiscation orders, because these orders do not comply with European Union human rights law, namely the principle of presumption of innocence and the right to silence, and therefore do not fulfil the requirements of Regulation 2018/1805 of the European Parliament and of the Council on the mutual recognition of freezing orders and confiscation.

154. Italy risks being left alone in the European Union context if it keeps preventive confiscation as it stands. A significant example of this isolation is the judgment of the Court of Appeal of Aix-en-Provence of 28 March 2017, no. 2017/152, which decided not to order the execution in French territory of the Milan Court preventive confiscation decree of 3 June 2009, confirmed by decree of the Milan court of appeal of 14 April 2011, because the Italian criminal courts had subsequently acquitted the affected person, by judgments of 27 September 2010 and 11 September 2014.

c) United Nations

i. The United Nations Convention against Corruption

155. Article 20 of the United Nations Convention against Corruption invites the States Parties to consider the incrimination of intentional illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income, and eventually the confiscation of the issuing illicit proceeds. But this invitation is subjected to the constraints resulting from the constitution and the fundamental principles of each State Party's legal system.

156. Article 31, paragraph 8, provides that States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is

consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings. This recommendation does not address the issue of reversal of the burden of proof with respect to the constituent elements of an offence (see Technical Guide on the United Nations Convention against Corruption, p. 118). The Technical Guide interprets the provision openly insofar that it considers that it would be satisfied with extended confiscation, non-conviction-based confiscation, or unexplained wealth confiscation.

157. Article 54, paragraph 1, letter c), invites the States Parties to consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight, or absence or in other appropriate cases. There is neither a legal obligation to adopt such measures, nor to cooperate with States which have adopted such measures [see for further detail on implementation, Challenges, good practices and lessons learned, and procedures allowing the confiscation of proceeds of corruption without a criminal conviction from States parties that have implemented such measures in accordance with Article 54, paragraph 1, letter c), of the Convention, Note by the Secretariat, CAC/COSP/2021/15, 6 October 2021].

ii. The Stolen Asset Recovery (StAR) Initiative

158. Established in 2007, the Stolen Asset Recovery (StAR) Initiative is a partnership between the World Bank and the United Nations Office on Drugs and Crime (UNODC) to support countries in implementing Chapter V of the United Nations Convention against Corruption, which for the first time sets out the return of stolen assets as a fundamental principle. StAR works with developing countries as well as financial centers to bolster the recovery of stolen assets by improving the legal framework for asset recovery and providing training and technical assistance. StAR publications and knowledge products are practical guides, such as “Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery”, of 2023, and “Asset Recovery Handbook. A Guide for Practitioners”, second edition of 2021. These guides can be considered as valuable soft law materials, which encourage States to adopt non-confiscation-based confiscation.

3. Comparative law and case-law on NCB confiscation

159. In *Telbis and Viziteu v. Romania* (no. 47911/15, § 76, 26 June 2018), the Court reiterated the findings of *Gogitidze and Others v. Georgia* (no. 36862/05, § 105, 12 May 2015), according to which, firstly, common European and even universal legal standards can be said to exist which encourage the confiscation of property linked to serious criminal offences such as corruption, money laundering and drug offences, without the prior existence of a criminal conviction. The statement is equivocal: one does not know whether the Court is referring to binding "legal standards" or soft law materials that "encourage" confiscation without conviction. International soft law has long pushed this agenda forward, but international hard law is far from imposing such measures, with the notable exception of European Union law. Comparative law shows a multifaceted picture, with contradictory signs, as will be demonstrated below.

160. Secondly, according to the judgment mentioned, the onus of proving the lawful origin of property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings *in rem*. Comparative law does not confirm that this is the prevailing rule on the distribution of the burden of proof, and civil proceedings *in rem* are certainly not the most adopted model in Europe.

161. Thirdly, according to the Court, confiscation measures may be applied not only to the direct proceeds of crime but also to property, including any income and other indirect benefits obtained by converting, transforming the direct proceeds of crime, or intermingling them with other, possibly lawful, assets. Comparative law confirms that indirect benefits may be confiscated, only under strict legality and proportionality rules.

162. Finally, still according to the Court, confiscation measures may be applied not only to people directly suspected of criminal offences but also to any third parties which hold ownership rights without the requisite *bona fide* with a view to disguising their wrongful role in amassing the wealth in question. Comparative law confirms that third parties may be affected by confiscation, with observance of their defence rights, including their presumed innocence.

163. In Europe, non-conviction-based confiscation follows one of three models [see for further information, Report from the Commission to the European Parliament and the

Council, Asset recovery and confiscation: Ensuring that crime does not pay, Brussels, COM (2020) 217 final, 2.6.2020; Milieu Consulting SRL, Study on freezing, confiscation and asset recovery – what works, what does not work. Country chapters. HOME/2018/ISFP/FW/EVAL/0081, Luxembourg, 2021; European Parliamentary Research Service, Revision of Directive 2014/42/EU on the freezing and confiscation of the proceeds of crime and proposal for a new directive on asset recovery offices, 2022; and Basel Institute on Governance, Recovering Criminal Assets without a Criminal Conviction – Lessons from 10 Countries, 2022].

164. The first model is confiscation within the context of criminal proceedings when it is not possible to reach a final conviction. Criminal law and criminal procedure law apply to this modality. According to the above-mentioned statistical studies, this was the largely prevailing model following the implementation of Article 4, paragraph 2, of Directive 2014/42/EU.

165. The second model is confiscation through autonomous proceedings that aim at establishing an indirect link with a predicate criminal offence. Litigation on the origin of the property and on its lawful acquisition or possession is conducted according to the rules of civil procedure, including the applicable standard of evidence, and shifting the burden of proof from the State to the individual who owns or possesses the asset. Confiscation is imposed before, during or after criminal conviction, or even when no criminal action is brought against the affected person or the affected person has been acquitted of the predicate criminal offence. A few European States, like Bulgaria, Ireland, and Slovenia, went beyond Directive 2014/42/EU, and inserted this model in their national legislation, following similar confiscation laws in Colombia, South Africa, Switzerland, and the United States.

166. The third model is confiscation through autonomous proceedings which aim at comparing the actual property a person has acquired against income declared by that person in order to identify any disparity between the two, obliging the respondent party with the burden of explaining the origin of any unexplained wealth. Establishing an indirect link to a predicate criminal offence is not necessary. The United Kingdom incorporated this model in their respective legislation (PoCA 2002, sec. 179B, sec. 179G, and 2017 Criminal Finances Act). It may target any politically exposed person, or any person connected with serious crime whose known sources of lawfully obtained income

are insufficient to obtain the assets held by him. The unexplained wealth order shifts to the holder of assets the burden of production of evidence that explains the source of the funds used to obtain those assets. The order to confiscate unexplained wealth and a civil recovery proceeding against the same assets may be cumulated.

167. Hence, comparative law confirms the above-mentioned findings under international law: there is no European consensus on non-conviction-based confiscation like that of Law no. 575/1965 and its amendments and the Anti-Mafia Code. It is true that the current situation is transitional since the Member States of the European Union still must bring into force the laws, regulations, and administrative provisions necessary to comply with Directive 1260/2024 by 23 November 2026. Depending on how the Directive will be implemented, the envisaged European consensus, at least within the European Union, will become a reality. If the Member States do not fail their task, as they did with the implementation of the 2014 Directive, the trend towards a consensus on a European model of non-conviction-based confiscation will have consolidated by the end of 2026.

4. Other domestic and international soft law materials on NCB confiscation

168. Financial Action Task Force (FATF) Best Practices on Confiscation Recommendation 4 requires States to consider adopting measures allowing proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property, to the extent that such a requirement is consistent with the principles of their domestic law. FATF Recommendation 38 requires States to ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property, including requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law [FATF Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery (2012), and along the same lines, see AIRE Centre and RAI (Regional Anti-Corruption Initiative),

Tools and Best Practices for International Asset Recovery Cooperation Handbook (2019), CARIN (Camden Asset Recovery Inter-Agency Network) Recommendations (2023), *GAFILAT Guía de Buenas Prácticas sobre Extinción de Dominio y Decomiso no Basado en Condena. Experiencia regional con los países del GAFILAT* (2024), OECD Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019), SWISS FEDERAL GOVERNMENT, BASEL INSTITUTE ON GOVERNANCE, WORLD BANK and UNODC Guidelines for the efficient recovery of stolen assets (2020), UNICRI (European Commission and the United Nations Interregional Crime and Justice Research Institute) Good Practices in accelerating the capture of illicitly-acquired assets (2024), *UNODC Model Law on Extinción de dominio*. Legal Assistance Program for Latin America and Caribbean (2011), and UNODC Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime (2012)].

IV. The Law

A. Preliminary observations

1. The scope of the consultation and the questions communicated by the Court

169. Law no. 575/1965 and its amendments were applicable law at the date of issuance of the seizure and confiscation decrees, respectively, 31 May 1999 and 29 September 2011.

170. According to Article 117, paragraph 1, of the Legislative Decree No. 159/2011, which established the transitional provisions for the matters regulated by Book I of the new Anti-Mafia Code ("Preventive Measures"), the new legislation does not apply to proceedings in which, on the date of entry into force of the decree (13 October 2011), a proposal for the application of the preventive measure has already been formulated; in such cases, the previous provisions continue to apply. This rule set aside the principle of retroactive applicability of the provisions on preventive measures to conduct carried out

before their entry into force, as well as the principle of *tempus regit actum* with regard to the applicability of procedural provisions.

171. Hence, the provisions of Law no. 575/1965 and its amendments were still applicable to the confiscation proceedings on the dates of issuance of the Court of Appeal decree (14 February 2014) and the Court of Cassation judgment (12 November 2015).

172. I am not called to express my opinion on the compatibility of the domestic courts' decrees and judgment with Italian legal and constitutional framework.

173. I am also not called to express my views on whether these decrees and judgment comply with the European Union legal and constitutional framework, namely with Articles 48-50 of the Charter of Fundamental Rights of the European Union.

174. I have been consulted to express my opinion on the specific questions put by the Court to the applicants, which relate to the legal requisites for preventive seizure in Article 2-*ter* of Law no. 575/1965 and its amendments, namely: a) the proposed person belongs to a category of generic or qualified dangerousness, namely membership to a Mafia-type association, b) the suspect person possesses directly or indirectly certain assets, c) the value of such assets and the declared income or economic activity are disproportionate, and d) the assets are the result of illegal activities or constitute the reinvestment thereof. In case of preventive confiscation, the same Law referred to requisite b) in slightly broader terms: the suspect person appears to be the owner or to have the availability in any capacity of certain assets.

175. I will limit my analysis to the exact legal requisites relevant to the specific questions put by the Court and will take into due account the fact that the applicable law was modified between the dates of issuance of the seizure and the confiscation decrees. Occasionally, I will also refer to the provisions of the novel Anti-Mafia Code, whenever they are of relevance to the clarification of previous law and case-law.

176. The scope of each of the questions put by the Court needs clarification.

177. The first question seems to assume that only the so-called second *Allen* aspect of the principle of the presumption of innocence related to the protection of the person's reputation once the criminal proceedings have concluded would apply in the present case, and implicitly that the first *Allen* aspect of the principle of the presumption of innocence related to the role of this guarantee in the context of criminal proceedings related to, for example, the distribution of the burden of proof and the use of presumptions, does not

apply in the present case (see on these two aspects of the *Allen* test, *Allen v. the United Kingdom* [GC], no. 25424/09, 12 July 2013). By logical implication, this would mean that the preventive confiscation proceedings under scrutiny are not determinative of a criminal charge according to the *Engel* criteria.

178. The Government interpreted the first question in this way (see paragraph 77 of their Observations).

179. Yet the applicants complained that the entire preventive proceedings, including the 1999 decree of seizure issued when the criminal proceedings were still pending, breached their presumption of innocence, namely by the unfair distribution of the burden of proof and the use of excessive presumptions. In addition, for the correct determination of the fairness of the domestic proceedings, the first *Allen* aspect of the principle of the presumption of innocence is more important than the second one, and the Court should not escape discussing and deciding fully the exact question put by the applicants.

180. Hence, the Court is called to determine not only whether the 2011 confiscation decree, the 2014 court of appeal decree and the 2015 Court of Cassation used language that reflected the judges' opinion that the first group of applicants were guilty of the crimes of which they had been finally acquitted by the 2010 court of appeal judgment, and by so doing tarnished their social reputation, but more broadly whether the entire preventive proceedings, lodged against the proposed persons in 1999 and terminated in 2015, were respectful of their presumption of innocence.

181. Ultimately, the applicants question the Court whether the principle of the presumption of innocence applies to the entire preventive confiscation proceedings or, put it the other way around, whether these proceedings refer to the determination of a criminal charge and therefore are subjected to the Article 6 § 2 principle. To answer this question properly, one should address the *Engel* criteria first, and subsequently the first aspect of the *Allen* test.

182. Yet the subsequent question on Article 7 addresses the nature of preventive confiscation as a penalty. The discussion of both legal questions – whether preventive confiscation proceedings are determinative of a criminal charge and whether preventive confiscation is a penalty – overlap in many regards.

183. For logical reasons, when replying to the second question formulated by the Court, I will first address the substantive question of the nature of preventive confiscation as a

penalty and consequently draw the logical consequences for the procedural question whether preventive confiscation proceedings are determinative of a criminal charge.

184. This means that I will leave open the procedural question of the applicability of the *Engel* criteria to the preventive confiscation proceedings lodged against the applicants when dealing with the first question formulated by the Court and will proceed with the analysis of the language used and the reasoning reflected in the pertinent decrees and judgment delivered by the domestic courts, for the purposes of analysing both the first and the second aspect of the *Allen* test.

185. The third question formulated by the Court is complex. Other than the traditional issues of lawfulness, necessity, and proportionality of the interference with the applicants' peaceful enjoyment of possessions, the third question includes five other specific questions related to the factual details of the case. I will also obviously address the question of the legitimate aim of the interference which the Court did not put the parties.

186. Regarding the specific questions I note that question (a) (whether, considering the acquittal of the first group of applicants of the charge of participation in a Mafia-type criminal organisation, the finding of special dangerousness and the subsequent confiscation of assets were justified) raises the *magna quaestio* of the principle of autonomy between criminal proceedings and preventive confiscation proceedings.

187. Question (b) (whether the domestic authorities showed that the assets formally owned by the second group of applicants actually belonged to the first group of applicants in a reasoned manner, on the basis of an objective assessment of the factual evidence, and without relying on a mere suspicion) discusses the second requisite of preventive confiscation (the suspect person possesses directly or indirectly certain assets), the problem of third-party protection and the legal presumption of illicit transfer to close relatives.

188. Question (c) (whether the domestic authorities showed that the confiscated assets could have been of wrongful origin in a reasoned manner, on the basis of an objective assessment of the factual evidence, and without relying on a mere suspicion, also in light of the date of their acquisition) addresses the fourth requisite of preventive confiscation (the assets are the result of illegal activities or constitute the reinvestment thereof) and the jurisprudential principle of temporal correlation between the period of the hypothesised social danger and the moment of the capital increase.

189. Question (d) (whether the reversal of the burden of proof as to the lawful origin of assets acquired many years earlier imposed an excessive burden on the applicants) examines the complex web of interrelated presumptions imposed by domestic courts on the applicants and how it impacted their procedural situation.

190. Finally, question (e) (whether the applicants were afforded a reasonable opportunity of putting their arguments before the domestic courts and whether the latter duly examined the evidence submitted by the applicants) focuses on the fairness of the preventive confiscation proceedings in view of possible shortcomings regarding evidence collection and examination and the inequality of arms between the parties.

2. The questions communicated pursuant to Article 54 § 2 of the Rules

a) The Government's exception based on the non-applicability of Article 6 § 2 of the Convention

191. The Government argue that the applicants failed to prove the existence of a sufficient and qualified link between criminal proceedings and prevention proceedings, and therefore Article 6 § 2 of the Convention is not applicable in its second *Allen* aspect. The Government add that such a link is excluded by the domestic legal system, because the preventive proceedings are an entirely autonomous procedure from the criminal one, as much in the object of ascertainment as in the type and standards of evidence, as in the outcome of the judgments.

192. I refer to my previous explanation regarding the sequence of my responses to the Court's questions. Even assuming that the first question formulated by the Court only refers to the second *Allen* aspect, as the Government assume, I am of the view that the exception raised by the Government is closely linked to the merits of the complaint, since it implies the discussion of the language and the reasoning of the decrees and the judgment delivered by the domestic courts in the preventive proceedings no. 100/99 and, more broadly, the *magna quaestio* of the principle of the autonomy of criminal and preventive proceedings, which is addressed in question 3 (a) formulated by the Court.

193. I find that the question of the existence of a sufficient and qualified link between criminal proceedings and prevention proceedings is intricately linked to the merits of the complaint and therefore consider that the Government's objection should be joined to the merits of the applicants' complaint.

b) The Government's exception based on the six-month time limit

194. The Government further argue that, regarding the violation of the presumption of innocence, in its second *Allen* aspect, the application is inadmissible on the ground that the six-month time limit has been exceeded, in relation to the "alleged violations perpetrated in the preventive decisions of first and second degree" (see paragraph 79 of their Observations).

195. Again, I stress that the applicants complained of the violation of the presumption of innocence during the entire preventive proceedings, including the lack of remedy provided by the Court of Cassation for the violation committed by the first and second instance courts. In the present case, the applicants correctly filed an appeal within the six-month period from the deposit of the 2015 Court of Cassation judgment. The Government also invokes compensatory action, without any specific details on its legal grounds and concrete availability to the applicants.

196. Hence, it seems to me that the exception is ill-founded.

B. On Article 6 § 2 of the Convention

1. General principles

197. The first question put by the Court mentions *Allen v. the United Kingdom* [GC], cited above. Yet in *Allen* the applicant's conviction for manslaughter was quashed on the ground that it was "unsafe" because new evidence might have affected the jury's decision had it been available at trial. Pursuant to section 2, paragraph 3, of the Criminal Appeal Act 1968, the quashing of the applicant's conviction resulted in a verdict of acquittal being entered. According to the domestic courts, the legal criteria for compensation for a

miscarriage of justice were not met in the case. The Cavallotti case has no similarity to the circumstances of *Allen v. the United Kingdom* [GC], cited above. As it will be demonstrated, the circumstances of the Cavallotti case are different from all other Italian preventive confiscation cases previously determined by the Court and very close to *Geerings v. the Netherlands*, where confiscation was based on a judicial finding that the applicants had derived advantage from offences of which they had been acquitted. Hence, the reference in the first question to the Dutch case is justified.

198. It is notable that at § 125 of *Gogitidze and Others v. Georgia*, cited above, the Court, based on the authority of both *Allen* and *Geerings,* observed that the second, more extensive, aspect of Article 6 § 2 of the Convention is engaged when confiscation takes place after the relevant criminal proceedings have ended with an outcome other than conviction:

> "In this connection the Court observes that the forfeiture proceedings *in rem* in the present case did not take place after the criminal prosecution of the first applicant, but on the contrary preceded it. Consequently, the second, more extensive, aspect of Article 6 § 2 of the Convention, the role of which is to prevent the principle of presumption of innocence from being undermined after the relevant criminal proceedings have ended with an outcome other than conviction (such as acquittal, discontinuation of the criminal proceedings as being statute-barred, the death of an accused, and so on), is of no relevance in the present case (see *Allen v. the United Kingdom* [GC], no. 25424/09, §§ 103 and 104, ECHR 2013; *Geerings v. the Netherlands*, no. 30810/03, §§ 43-50, 1 March 2007; *Phillips*, cited above, § 35; and *Lagardère v. France*, no. 18851/07, §§ 58-64, 12 April 2012)."

199. This paragraph seemed to formulate a statement of principle, according to which after the criminal proceedings have ended with an outcome other than conviction, any subsequent forfeiture proceedings would raise an issue under Article 6 § 2 and eventually undermine it. The Court's case-law does not provide clearly defined general principles to answer the first question. In particular, the Court's case-law regarding cases of confiscation without conviction in Italy is plagued by the casuistic attachment to the specific circumstances of each individual applicant, which does not facilitate the extrapolation of general principles.

200. There is visible contradiction in recent case-law, involving different interpretations on the applicability of Article 6 § 2 to confiscation without conviction. The findings are contradictory in *GIEM SRL and Others v. Italy* [GC], no. 1028/06 and Others, 28 June 2018*, Balsamo v. San Marino*, no. 20319/17 and 21414/17, 8 October 2019, *Episcopo and Bassani v. Italy*, no. 47284/16 and 84604/17, 19 December 2024, and *Garofalo and Others v. Italy* [dec.], no. 47269/18 and others, 21 January 2025, on the applicability Article 6 § 2 to confiscation without conviction and, if applicable, on how it should be applied: *GIEM SRL and Others* and *Episcopo and Bassani* found the provision applicable and violated, *Balsamo* found it applicable but not violated, and *Garofalo and Others* found it not even applicable. These profoundly opposing views were denounced by the national judge in a dissenting opinion joined to *Episcopo and Bassani*, who suggested to the respondent Government to request the Grand Chamber intervention in the said case. The national judge is right. This situation of serious legal uncertainty and conflicting Chamber judgments, between themselves and with a Grand Chamber judgment, requires the intervention of the Grand Chamber.

2. Application of the general principles to the present case

a) The language and reasoning of the 1999 Palermo Court decree

201. The first group of applicants are individuals without a criminal record, who have never absconded, nor have been intercepted with individuals belonging to criminal associations, were acquitted of the charge of participation in a Mafia-type association on the merits with the formula "because the fact does not exist", not due to insufficient evidence. Nonetheless, they were considered members of a Mafia-type association, having presumably derived advantage from this membership, and consequently subjected to a wide-raging decree of preventive confiscation of assets.

202. The 1999 Palermo Court seizure decree used clearly incriminating language that relied directly on the pre-trial detention order in the then pending criminal proceedings. In particular, the Palermo Court stated that "all the defendants are suspected of membership of the Cosa Nostra Mafia association **on the basis of the investigations conducted in proc. 4696/96 NR DDA**. Proceedings during which the defendants were

served with a preventive custodial order with specific reference to art. 416-*bis* of the Criminal Code […] **on the basis of reasons that are currently acceptable**". More in detail, the section for preventive measures added that "[t]he Cavallotti are **suspected of being fully involved in the illicit system of sharing public contracts**, managed, in the Sicilian territory, by the Cosa Nostra Mafia association" and that "CAVALLOTTI Gaetano and CAVALLOTTI Vincenzo have been charged **with serious indications of guilt in relation to the crime referred to in Articles 110, 353 of the Criminal Code**, for having, in their respective capacities as sole director pro tempore of COMEST srl (now spa) the first, as sole director pro tempore of IMET srl the second (the collaboration with the president and legal representative pro tempore of the Soc. Coop. A r.l. IL PROGRESSO Pavone Giovanni) disturbed with violence or threats and in any case with promises, collusion and other fraudulent means, the tenders, and other private calls for tenders in which the companies IMET srl, COMEST srl (now spa) participated." Based on the same evidence of the criminal proceedings, the judges affirmed that "**[a]ccording to the findings of the investigations carried out in the above-mentioned proceedings**, the business group headed by the Cavallottis […] is said to be close to Mafia figures of the calibre of Benedetto Spera and Bernardo Provenzano, who are said to have ensured that **they were awarded contracts and opened construction sites in territories controlled by various Mafia families**." Finally, the domestic court concluded that "[t]he close intertwining of relationship between the corporate entities belonging to the Cavallotti group and the existence of a body of circumstantial evidence that suggests that those business activities were financed through proceeds that are considered illicit as **they are the result of crimes against the public administration** and were able to prosper also through the use of Mafia-style methods, requires seizure." (my bold)

203. In other words, for the Palermo Court, Cavallotti's assets had to be seized in view of subsequent confiscation because they were the fruit of the crimes of Mafia association and bid-rigging, which presupposed that the Cavallotti were guilty of the crimes attributed to them in pending criminal proceedings but contested by the detained Cavallotti brothers.

b) The language and reasoning of the 2011 Palermo Court decree

204. The 2011 Palermo Court confiscation decree used even more clearly incriminating language, indicating an explicit presumption of guilt of the proposed persons for the commission of the crimes of which they had been finally acquitted one year before. Every time the confiscation decree referred to the Cavallotti brothers' inclusion in the context of Mafia entrepreneurship, it presupposed their guilt for the crimes contested in the then already closed criminal proceedings. The following sentences are illuminating:

> "the social dangerousness of the proposed […] **concretely expressed in the prolonged involvement in the sector of Mafia-related entrepreneurship**, […] can be considered to exist"; "**The context contaminated by Mafia logic and methods in the acquisition of contract work, which has characterised the entrepreneurial undertakings of the present proposed persons since the 1980s**, has found further support in other converging and significant circumstantial evidence"; "that the present proposed persons have carried out their business activities by **interfering in the Mafia business system since the second half of the 1980s** […] finds firm support in significant documentary data". (my bold)

205. Regarding the note concerning the works in Agira and Centuripe, the confiscation decree expressly referred to the 1998 pre-trial detention order and derived from it that the Cavallotti brothers could be charged with a criminal offence for which they had already been finally acquitted:

> "In the [pre-trial detention] order on the point it is noted […] that: "the content of the aforementioned note is clearly symptomatic of the interest that the fugitive has in the CAVALLOTTI company, and the illicit aspects connected to it are equally evident." **[…] It follows […] that CAVALLOTTI […] can be charged with the criminal offence referred to in art. 353 of the Criminal Code** […]. It must also be highlighted, in relation to the charge of Mafia association, that the singular interest shown by PROVENZANO towards the companies headed by CAVALLOTTI […] **is certainly indicative of the fact that they fall within the business circuit controlled by him** and that the owners of those companies are in any case close to the person who is currently the highest representative of the Cosa Nostra organisation." (my bold)

206. In other words, the preventive judges took the robes of the criminal judges and found the proposed persons guilty of a specific criminal offence.

207. Regarding another note, the confiscation decree again referred expressly to the pre-trial detention order considering the proposed persons guilty of the crimes for which they had been finally acquitted: "In this regard, the [pre-trial detention] order **convincingly** noted that: «This letter further confirms PROVENZANO's interest in the CAVALLOTTI company.»" (my bolded word). The confiscation decree did not limit itself to recalling the pre-trial detention order as a mere procedural fact that the prevention judge must consider evaluating the overall personality of the person proposed. On the contrary, by using the adverb "convincingly", the judges delivering the confiscation decree shared the content of the pre-trial detention order, implicitly considering the statement as true in terms of criminal liability, i.e, that the Cavallotti were guilty of the crimes attributed to them in the criminal proceedings.

208. The judges of the prevention measures section openly assumed the criminal liability of the Cavallotti brothers when they stated that, from the conviction and the subsequent annulment with referral in the criminal proceedings, the lack of criminal liability had not been "evidently" established: "From reading the reasons for the conviction sentence of the Court of Appeal of Palermo of 14.3.2002 and the annulment sentence with referral for new examination, issued by the Court of Cassation on 17.12.2004, **it does not appear […] the evident non-existence** of criminal liability of today's defendants" (my bolded word). To say that the lack of guilt is not "evident" means to hypothesize serious doubts regarding guilt. Since there is no evidence of the lack of criminal liability, serious doubts remained for the judges regarding the applicants' guilt.

209. The Court of Appeal went further when it described "a cohesive family business group subject to a unitary management and **availing itself of the intimidating force of the Mafia association bond**" and affirmed that "the suspects have had long-standing personal and business relationships with several leading figures of the Cosa Nostra Mafia association **in order to enjoy lucrative advantages in the Mafia-related business sector**", or that "the Cavallotti companies **have been involved in the system of illicit-Mafia division of contracts** since the second half of the 1980s, not only by participating in the rotation of tenders within the so-called provincial agreement, but, and above all, by enjoying the constant support of the Belmonte Mezzagno Mafia family since the first half

of the 1990s" or even that "the current proposed persons, by carrying out the methane gas works **with the support of the Mafia association, have also fully interfered** in those political-administrative environments in contact with certain exponents of Cosa Nostra to disturb the awarding of the works". (my bold)

210. In the Italian legal system, the entrepreneur who uses the intimidating force of the associative bond in the performance of his economic activity is guilty of the crime of participation in a Mafia association or of external complicity, depending on how the subjective element of the *affectio societatis* is expressed in the specific case. To say that an entrepreneur used that force implied that the entrepreneur is guilty of one of the two crimes. Likewise, the entrepreneur who, from his relations with the Mafia association, derives any lucrative advantage is a person criminally responsible for participation or, at least, external complicity, which the Court of Appeal unhesitatingly imputed to the proposed persons. Participating in the rotation of tenders within an illicit agreement constitutes the crime of bid-rigging in the Italian legal system. Conducting contract work with the covert support and economic resources of a Mafia association can abstractly constitute multiple crimes such as Mafia association but also money laundering, as provided for by Article 648-*bis* of the Criminal Code. The Court did not refrain from referring to the commission of other serious criminal offences, beyond participation in a Mafia-type association, as proven facts of which the proposed persons were guilty.

211. Finally, according to domestic judges, the Cavallotti brothers suffered the confiscation of all their assets based on their "intrinsically criminal" conduct. The confiscation decree could not be clearer: "from the ascertainment of such an **intrinsically criminal** business situation, the confiscation of the entire business and of the entire business complex will follow, as the integral «fruit or reinvestment» of illicit activity." The adjective "criminal", in the Italian language, indicates a conduct (act or omission) foreseen and punished by law as a most serious offence. In addition, the adjective "intrinsically", in the Italian language, means that the reproached conduct is in essence criminal, its high blameworthiness been unequivocal. The domestic judges themselves described the conduct reproached to the Cavallotti brothers as in essence criminal. Hence, there cannot be any mislabelling of the Cavallotti brothers' conduct as a mere illicit enrichment requiring a measure of civil nature or a *tertium genus* measure of administrative nature.

212. The decree's reasoning therefore presupposes that the Cavallotti brothers, in the exercise of their business and through their companies, committed the most serious criminal offences sanctioned by relevant criminal provisions. If the judges of the section for preventive measures themselves concluded that preventive confiscation was the adequate legal response to the proposed persons' "intrinsically criminal" conduct, they could at least have accorded them the benefit of the doubt, which they did not. On the contrary, the preventive judges presumed the proposed persons' criminal guilt with an astonishingly one-sided approach to the evidence produced in the criminal proceedings. The judges of the prevention measures division did not provide any reason they recalled the 2002 conviction and the annulment sentence of the 2004 conviction and not the acquittal judgments of 2001 and 2010. They purely ignored the acquittal judgments and their exemplary motivation and, most importantly, the definitive character of the acquittal delivered by judgment of 2010, when they stated in the 2011 confiscation decree that "there was no clear lack of criminal liability".

213. I find that the true sense of these statements in the specific circumstances in which they were made is unequivocal and they mean that the court considered the once accused persons as guilty of the crimes of which they had been acquitted (compare *Petyo Petkov v. Bulgaria*, no. 32130/03, § 90, 7 January 2010).

c) The language and reasoning of the 2014 Court of Appeal decree

214. The 2014 Court of Appeal decree compounded the violation of Article 6 § 2 of the Convention, with expressions of explicit or implicit acknowledgment of guilt of the proposed persons, whom the Court even censured for not having repented their guilt.

215. The Court of Appeal noted that

> "with the judgment of the Court of Cassation of 17 February 2004, the charge of bid-rigging […] was determined with a decision of a procedural nature […], which, however, ruled that there were no elements on which to base a truly liberating decision on the merits of the accusation. Ultimately, already with this first judgment on the burden of responsibility attributed to the two CAVALLOTTI, the accusatory approach was deemed reliable and trustworthy (but not exhaustive for the purposes of the judgment of conviction, due to the passage of time) which

was substantially based on the anteriority of the letters in which the attribution of the works to the Cavallotti companies was taken for granted even before the formal award (**this circumstance can only be explained by an illicit manipulation of the tender in favour of the company awarded the works**)." (my bold)

216. For the Court of Appeal, the Cavallotti brothers are guilty of the crime of bid-rigging. In fact, the judges recalled not only that this accusation had become time-barred, but that the 2004 judgment of the Court of Cassation substantially shared the accusatory approach, excluding that in this case there were elements on which to base an acquittal.

217. The Court of Appeal judges of the preventive measures took for granted that the tender for the gasification of the municipalities of Agira and Centuripe was manipulated. In fact, to comment on the (false) statement that the note is prior to the awarding of the tender, the Court of Appeal judges use the word "*solo*" (only). The word "*solo*" is used in this context as an adverb to indicate that there are no alternative interpretative hypotheses to that of the tender in question being illegally manipulated. This is equivalent to saying that Gaetano Cavallotti and Vincenzo Cavallotti are in fact criminally responsible for the crime of bid-rigging and that they have not been punished in criminal proceedings only because the statute of limitations has expired. In other words, the decree in this passage did not express the doubt regarding guilt for the crime of bid-rigging, already incompatible with the principle of the presumption of innocence, it goes beyond that, it expressed the certainty of such criminal guilt.

218. The Court of Appeal also affirmed that "the criminal evidentiary data **has ascertained** […] the vastness of the radius of action (at the regional level) that the CAVALLOTTIs, with the help of "top exponents" of the Mafia, had managed to impress on their business activity". (my bold)

219. Expanding a business activity with the help of top exponents of the Mafia constitutes a criminal offence in Italy. If the criminal judges had ascertained this, which they did not, the Cavallotti brothers would have been convicted. Based on the evidence produced in the criminal proceedings, the Court of Appeal judges for the preventive measures ascertained criminal guilt which the judges in the criminal proceedings did not.

220. The Court of Appeal judges for the preventive measures went even further and denied the Cavallotti brothers the status of victims of extorsion, based on their assessment

of the evidence produced in the criminal proceedings: "To believe […] that the figure of the CAVALLOTTIs can be classified not as active parties in the system of division of contracts but rather as victims of the Mafia, constitutes a **clear distortion of the elements acquired during the long criminal trial**." (my bold)

221. According to the court for preventive measures, the criminal trial does not reveal that the Cavallotti brothers were victims of the Mafia but, but on the contrary, that they had benefited ("active parties") from the illicit system of division of contracts. Also in this case, it must be emphasised that participating in a system of illicit division of contracts constitutes a criminal offence in Italy. If the participation of the Cavallottis in that system had been ascertained in the criminal trial, the Cavallottis would have been convicted. Saying that the Cavallottis were "active parties" implies their guilt for that same criminal offence. The Court of Appeal judges for the preventive measures set aside the criminal courts' assessment of the evidence produced in the criminal proceedings and made their own assessment of that same evidence, reaching the opposite conclusion.

222. On whether the definitive acquittal of the proposed persons excluded the existence of a synallagmatic pact between the Cavallotti family and the Mafia, the Court of Appeal asserted that

> "from the same conclusion reached by the criminal judge to deny the existence of the guilt of the CAVALLOTTI defendants, one can extrapolate the concept that underlies Mafia membership […], that is, the existence for a certainly considerable time of a close relationship of contiguity, also from an economic perspective […] that has linked all the members of the CAVALLOTTI family to the Mafia leaders, in consideration of the **undoubted (and proven)** advantage […] that the CAVALLOTTIs have drawn from this indissoluble bond for the purposes of the economic affirmation of their businesses to the detriment of those of their competitors […]. In the specific context of the preventive measure [it is] sufficient that there is a concrete evidentiary substratum […] of the collusion that has linked the Mafia association and the person (or persons) who, for personal gain, in the exercise of business activity, made agreements with Cosa Nostra, with the aim (also, but not exclusively) of facilitating its intrusive activity, linked to the control of the territory. In the case of the CAVALLOTTIs, this circumstantial evidence was **certainly** reached […]. **It is taken as proven** that the

CAVALLOTTIs' businesses proliferated in the exercise of their activities thanks to the facilitations that were provided to them by the heads of the Mafia organisation." (my bold)

223. For the Court of Appeal judges, the evidence produced in the criminal proceedings proved as an undisputed fact ("undoubtedly", "proven", "certainly") that the Cavallotti brothers had been benefited by the Mafia and the success of their businesses depended on the facilitations provided to them by Mafia. The unfair advantage that the entrepreneur derives from his relations with the Mafia association constitutes the essential core of the notion of a colluding entrepreneur. The colluding entrepreneur is the one who pays the Mafia association to obtain an unfair advantage (*qui certant de lucre captando*) while the victim entrepreneur, who assumes a merely passive attitude, pays the extorsion money to avoid unjust damage (*qui certant de damno vitando*). To state with certainty that the Cavallottis obtained an advantage means to recognize them as criminally responsible. Here too, the language used in the 2014 decree went well beyond the level of a suspicion regarding the criminal responsibility of the Cavallottis and manifestly took the form of a true judgment of unequivocal guilt, based on the exact same evidence that had been produced before the criminal courts.

224. The Court of Appeal added that, "since, as we have seen, **these are** private tenders or calls for bids that were already agreed upon and awarded through the rotation system that was managed by the Mafia organisation, **it does not appear disputable** that those who acquired an economic benefit from that system […] necessarily had to be an operational part of that illicit system." (my bold)

225. For the Court of Appeal, it was undisputable that the tenders that the Cavallottis won were rigged. Rigging a tender constitutes the crime of bid-rigging. The Cavallottis were, for the Court of Appeal, an active part of the illicit system of dividing up contracts and, by logical exclusion, were not victims of the Mafia, because they obtained an economic benefit from the crime of bid-rigging, of which they were guilty.

226. In the Court of Appeal judges' view,

"[i]t does not appear that the CAVALLOTTIs have engaged in any concrete conduct from which it is possible to deduce an effective detachment of the same from the Mafia association, of which **they were part for a long time** (in the 80s and 90s) to the point of maintaining criminal relations with top exponents of the

> organisation […], **at whose service they had placed** their entrepreneurial activity and **from whom they received** protection and cover to the point of modifying the ordinary rules in the attribution of tenders and calls for bids […], and thus **proliferating in business activity, under the protective wing of Cosa Nostra**. [The Cavallottis] have maintained long-lasting relationships with individuals of high Mafia calibre, **doing business with them in order to enjoy lucrative advantages** in the sector of Mafia-related entrepreneurship." (my bold)

227. In this passage, the decree stated that the Cavallottis were part of the Mafia association. "Being part" of a Mafia association is the very essence of criminally relevant participation. In this case, the linguistic expression used by the judges takes on immense importance considering the conceptual difference that the judges of preventive measures have attributed to the concepts of "participation" (relevant for criminal law purposes) and "membership" (relevant for prevention law purposes). The expression "*far parte*", in the Italian language, evokes the concept of participation, a participant is a person who is part of something. Since the participant is responsible for the crime punishable under Article 416-*bis* of the Criminal Code, the decree, declaring that the Cavallottis "are part of the Mafia association", has expressed a judgment of criminal guilt. It is also evident that statements such as "proliferating in business activities, under the protective wing of Cosa Nostra", "doing business with [individuals of high Mafia calibre] to enjoy lucrative advantages in the sector of Mafia-related entrepreneurship" and "modifying the ordinary rules in the attribution of tenders and calls for bids" imply a judgment of guilt for the crimes of Mafia association and bid-rigging, respectively. As the Court of Cassation put is in the *Sottile* judgment, "the improper expansion of the meaning of the term used by the legislator as a connotation of conduct - where membership evokes «being part of» or at least making a concrete contribution to the group - would not only be illegitimate in itself, but would also be a harbinger of an unacceptable exposure of the internal system to new complaints of violation of the conventional parameters, an aspect that must guide the interpretative activity towards lines of compatibility, in the complex framework of the relationships between the sources of production and interpretation of the law".

d) The language and reasoning of the 2015 Court of Cassation judgment

228. The 2015 Court of Cassation judgment did not remedy the violation. On the contrary, it reinforced the presumption of criminal guilt of the Cavallotti brothers by considering proven a "background reality":

> "Nevertheless, the **background reality remained unchanged** [...], that is, the Cavallottis' proximity, dating back to the 1980s, to the top of Cosa Nostra, up to the highest exponent, Bernardo Provenzano, who, while a fugitive, had "taken" the Cavallottis under his wing, to the point of expressly "recommending" them, by means of the so-called notes, for the assignment of public contracts and orders [...] the Cavallottis [were indicated] as a company close to the Mafia elite, from whose proximity they drew a source of enormous advantage, managing to win public tenders, for considerable sums, precisely thanks to Mafia intercessions [...]. The Cavallottis were included in the strategic plan for managing contracts, which Cosa Nostra adopted and controlled, according to a precise rotation, for the purpose of assigning the most lucrative contracts in the entire Sicilian region to the companies it liked."

229. In the present case, the functional contribution characterizing the fact of membership of a Mafia-type association could only result from the consideration of concrete benefit for the Cavallotti brothers resulting from the alleged bilateral pact, consideration that had been expressly excluded in the criminal proceedings. The 2004 Court of Cassation judgment concluded that the appealed judges did not provide "the slightest explanation of what role the Cavallotti brothers had actually played, let alone explained «how, when and why» they had availed themselves of the intimidating power of the Mafia association", and the 2010 Court of Appeal judgment concluded that "[t]here is a lack of indicative evidence of counter-performance, of certain institutions of corporate or fiduciary relationship, of specific corporate contributions, including hidden ones, of fictitious headers". Although the 2004 Court of Cassation judgment and the 2010 Court of Appeal judgment had excluded the historical fact on which to base the concept of membership of a Mafia-type organisation, the 2015 Court of Cassation explicitly assumed that historical fact, considering it as a "background reality" and reproaching the applicants for not having repented that background reality nor changed life.

230. Remarkably, in 2015, the Court of Cassation could establish a long-standing historical fact understood as a "proximity of the Cavallotti, dating back to the years '80, to the top of Cosa Nostra", of which the same Court of Cassation in 2004 could not find any evidence. It is a *lapalissade* that the more time passes from the facts, the less probable it is to discern the truth from the evidence of these facts. Under this light, it is hardly convincing that, thirty-five years after the facts, the 2015 Court of Cassation judgment could be more equipped to ascertain the "background reality" of this case than the 2004 Court of Cassation judgment and to rewrite history based on the exact same evidence submitted eleven years before.

3. Preliminary conclusion

231. I find that the above-mentioned words and expressions are not an unfortunate slip of tongue (contrast with *Englert v. Germany*, no. 10282/83, §§ 39 and 41, 25 August 1987, *Allen v. the United Kingdom*, cited above, § 126, and *Cleve v. Germany*, no. 48144/09, §§ 54-55, 15 January 2015). On the contrary, these are explicit and repetitive expressions of the profound conviction of the preventive judges that the evidence adduced in the criminal proceedings could uphold the finding of criminal liability of the Cavallotti brothers, clearly suggesting that the criminal proceedings could and should have been determined differently (*Neallon and Hallam v. the United Kingdom* [GC], nos. 32483/19 and 35049/19, § 168, 11 June 2024).

232. The Government admit that membership and participation are "linked to the same criminal phenomenon" (see paragraph 89 of their Observations) and consider that domestic court decisions may have concretely, by means of certain "suggestions", reflected the opinion of guilt, but pretend to counterbalance the value of these "suggestions" with the "specific context and function of the preventive proceedings" (see paragraph 92 of their Observations). It is plain to see that the Government do not make much effort to explain the "suggestions" of guilt by the domestic courts, since the counterbalancing argument they present does not explain why the preventive judges should have free hand to make the said "suggestions" of guilt while reviewing the factual determination of non-existence of guilt made by the criminal courts.

233. In view of the above, I believe the exception raised by the Government is ill-founded and that there has been a violation of Article 6 § 2 of the Convention.

C. On Article 7 of the Convention

1. General principles

234. The starting point for any assessment of the existence of a "penalty" is to ascertain whether the measure in question was ordered following a conviction for a "criminal offence." However, that criterion is only one of the relevant criteria, and the lack of such a conviction by the criminal courts is not sufficient to rule out the existence of a "penalty" within the meaning of Article 7 (*G.I.E.M. S.R.L. and Others v. Italy* (merits) [GC], cited above, §§ 215-219). Other factors may be deemed relevant in this respect, such as the nature and purpose of the measure in question, the procedures linked to its application and execution, as well as its severity (*Welch v. United Kingdom*, cited above, § 28, *Jamil v. France*, no. 15917/89, § 31, 8 June 1995, *M. v. Germany*, no. 19359/04, § 120, 17 December 2009, and *Del Río Prada v. Spain* [GC], no. 42750/09, § 82, 21 October 2013).

235. Recently, preventive confiscation was the subject-matter of *Garofalo and Others v. Italy*, cited above. It is important to note that the said judgment refers to the Anti-Mafia Code applied in the domestic proceedings, while the Cavallotti case refers to the provisions of Law no. 575/1965 and its amendments, which do not exactly share the same content.

236. In the said judgment, the Court is not entirely correct when it pretended that "in the light of the 2008-09 reforms, the measure has lost its original preventive purpose (in the strict sense) and changed in nature. In particular, confiscation measures can now be imposed independently and autonomously from preventive measures applied in respect of individuals (see paragraphs 20 and 25 above), irrespective of the "current danger" to society posed by the individual concerned (see paragraph 21 above), and even in the event of the death of the latter (see paragraph 25 above), thus also when the assets concerned are owned by individuals who are not, and never have been, a danger to society." (*Garofalo and Others v. Italy*, cited above, § 120). Neither the Constitutional Court nor the Court of Cassation admit the application of preventive measures to a person who has

never been a danger to society. In case of death of the suspect person, the domestic courts admit that the suspect person must have been dangerous at least at the time of acquisition of the illicit asset and that his dangerousness must have been transmitted to the asset.

237. But the Court is correct when it stressed that "the measure has significantly changed in nature. In its original formulation, it was based on a prognostic assessment: the assessment of whether the individual could be presumed to have committed criminal offences had as its aim a risk assessment of whether further offences would be committed in the future. In its current formulation, by contrast, the measure is based on a diagnostic assessment: the domestic authorities must ascertain whether, during a specific period of time, the individual concerned could be presumed to have committed crimes and whether, during that period, he or she had acquired assets and property whose lawful origin could not be demonstrated." (*Garofalo and Others v. Italy*, cited above, § 121)

238. The Court concluded that preventive confiscation has a restorative nature and therefore it is not a penalty under Article 7 of the Convention. Before evaluating the Court's arguments, I will first delve into the details of Italian law and case-law.

2. Application of the general principles to the present case

a) The characterisation of the contested measure under domestic law and case-law

239. The black letter of Law no. 575/1965 and its amendments gave a clear indication of the criminal nature of preventive confiscation. In its version in force on 31 May 1999, it provided for seven references to the Criminal Code (in Articles 2-*sexties*, 3-*quarter*, 7 and 9) and, in its version in force on 29 September 2011, for six references to the Criminal Code (in Articles 3-quarter, 7, and 9). Article 18 of Law no. 152/1975, which enlarged the personal and material scope of application of Law no. 575/1965, included criminal law concepts, such as "preparatory acts", "principals, instigators and financiers". The same concepts can be found in Article 4 of the Anti-Mafia Code. The language of the law is clearly indicative of the high social blameworthiness of the suspect's conduct, a factor that likewise forms the basis for serious criminal penalties. To put it in figurative terms, the legislator represents the addressee of these provisions as a person involved in the practice of criminal activities, not of civil or administrative illicit conduct.

240. Importantly, the law equated the status of the proposed person to that of the person subjected to criminal proceedings. Article 3-*quarter* and 3-*quinquies* of Law no. 575/1965, in force at the time of the confiscation decree, provided for the temporary suspension of the administration of assets of suspect persons, with consequent appointment of a judicial administrator, when, "following the investigations referred to in Article 2-*bis* or those carried out to verify the dangers of infiltration by Mafia-type crime, there is sufficient evidence to believe that the exercise of certain economic activities, including entrepreneurial ones, is directly or indirectly subjected to the conditions of intimidation or subjugation provided for in Article 416-*bis* of the Criminal Code or that it may, in any case, facilitate the activity of persons against whom one of the preventive measures referred to in Article 2 has been proposed or applied, **or of persons subjected to criminal proceedings** for one of the crimes indicated in paragraph 2 […]." (my bold) The same provision is included in Article 34, paragraph 1, of the Anti-Mafia Code.

241. Article 2-*ter*, paragraph 4, of Law no. 575/1965, as amended by Article 10, paragraph 1, letter d) of Decree-Legislative no. 92/2008, introduced preventive confiscation per equivalent, thus allowing for confiscation of assets of licit origin which have no causal link with the dangerousness of the suspect person and the rule of temporal correlation and are only targeted by virtue of the need to punish a conduct: "If the person against whom the preventive measure is proposed disperses, distracts, hides or devalues the assets in order to evade the execution of the seizure or confiscation orders on them, the seizure and confiscation concern **money or other assets of equivalent value**. The same procedure is followed when the assets cannot be confiscated because they were legitimately transferred, before the execution of the seizure, to third parties in good faith." (my bolded words) The provision is transposed to Article 25 of the Anti-Mafia Code.

242. Other legal sources confirm the criminal nature of preventive confiscation by equating it to a criminal sentence.

243. Article 2 of Decree of the President of the Republic no. 223/1967 determines the loss of the right to passive and active suffrage for individuals subject to preventive measures, on par with those criminally convicted.

244. Article 30 of Law no. 646/1982, in force at the time of the confiscation decree, imposed certain communication obligations to "**persons convicted by a final sentence**

for one of the crimes provided for in Article 51, paragraph 3-*bis*, of the Code of Criminal Procedure or for the crime referred to in Article 12-*quinquies*, paragraph 1, of Legislative Decree No. 306 of 8 June 1992, converted, with amendments, by Law No. 356 of 7 August 1992, **or** already subjected, by a final provision, to a preventive measure pursuant to Law No. 575 of 31 May 1965 […]" (my bold).

245. Article 34, paragraph 3, of Law no. 155/1990, as amended by Article 2, paragraph 8, of Law no. 94/2009, in force at the time of the confiscation decree, provided that "[T]he final provisions with which the judicial authority applies preventive measures or grants rehabilitation pursuant to Article 15 of Law no. 327 of 3 August 1988 are entered **in the court record according to the methods and forms established for criminal convictions**." (my bold) A similar provision is incorporated in Article 81, paragraph 3, of the Anti-Mafia Code.

246. In addition to the court recording, the law establishes a system of anti-Mafia communications and information for the public administration, which was initially run by the prefect and is today governed by the National Database for Anti-Mafia Documentation, fully operational since 7 January 2016. According to Article 10, paragraphs 2 and 7, of the Decree of the President of the Republic no. 252/1998, in force at the time of the confiscation decree, when, following the checks ordered by the prefect, elements emerged relating to attempts at Mafia infiltration in the companies or businesses concerned, the public administration to which the anti-Mafia information was provided could not stipulate, approve or authorise contracts or subcontracts, nor authorise, issue or in any case permit concessions and disbursements. An attempt at Mafia infiltration was inferred: "a) **from an interim measure order or an arraignment order, or a conviction, even if not definitive,** for one of the crimes referred to in Articles 629, 644, 648-*bis*, and 648-*ter* of the Criminal Code, or from Article 51, paragraph 3-bis, of the Code of Criminal Procedure; b) from the proposal for the application or the application of one of the measures referred to in Articles 2-*bis*, 2-*ter*, 3-*bis* and 3-*quater* of Law No. 575 of 31 May 1965." (my bold) A similar provision is incorporated in Article 84, paragraphs 3 and 4, letters a) and b), of the Anti-Mafia Code.

247. Article 122, paragraph 2, of the Procurement Code, approved by Legislative Decree no. 36/2023, provides that contracting authorities shall terminate a procurement contract if the contractor "has received a definitive order requiring the application of one

or more preventive measures as per the anti-Mafia code and the related preventive measures, as per Legislative Decree no. 159 of 6 September 2011, **or has received a final conviction for the crimes** referred to in Chapter II of Title IV of Part V of this Book." (my bold)

248. In view of the above, there is not a shadow of a doubt that the black letter of domestic law equates persons subjected to preventive confiscation and persons convicted of criminal offences, as well as preventive confiscation measures and criminal penalties, which must be recorded in the exact same manner and impose the exact same communication obligations. Both criminal and preventive confiscation can be replaced by confiscation per equivalent, targeting assets of licit origin that have no causal link with the dangerousness of the suspect person. The law goes even further, equating a non-final conviction to a non-final preventive confiscation order for the purpose of barring the accused or proposed person from having access to public procurement. For the law, a proposed person in preventive confiscation proceedings has the exact same legal status of an accused person under an interim measure or arraigned for trial in criminal proceedings. Hence, the characterisation of preventive confiscation under domestic law as a criminal penalty is unequivocal.

249. Nevertheless, the characterisation of preventive confiscation under domestic case-law is still today a question open to debate. In the non-to-distant past, the Court of Cassation stated, in the *Simonelli* and the *Auddino* judgments, that preventive confiscation has neither criminal nor preventive nature. For the Plenary, it is a *tertium genus* of administrative nature, with effects and contents like the confiscation provided for by Article 240 of the Criminal Code (respectively, Cass., Plenary, judgments no. 18/1996, and no. 57/2007). This opinion could not hide away its merely rhetorical nature since confiscation orders are not under administrative law and are not appealable to administrative courts.

250. On the contrary, in the *Occhipinti* judgment, the Court of Cassation, quite realistically, underlined that preventive confiscation has an "objectively punitive" nature, considering therefore inadmissible its retroactive application to the detriment of the proposed person (Cass., V, judgment no. 14044/2013). Yet, in 2014, based on a strictly abstract approach and the peculiar principle of the immanent dangerousness of the asset, the Plenary of the Court of Cassation changed course in the *Spinelli* judgment and again

excluded the criminal nature of preventive confiscation, for obvious criminal policy reasons related to the intended retroactive applicability of the preventive confiscation reform of 2008-2009 (Cass., Plenary, judgment no. 4880/2014). The judgment delivered seemingly contradictory statements, admitting, on the one hand, the "objectively dangerous" nature of the asset which derived *eo ipso* from the subjective dangerousness of the suspected person, but rejecting, on the other hand, the "introduction of a direct *actio in rem* into our system". The unconvincing Plenary judgment was questioned by the *Sottile* judgment (Cass., I, judgment no. 54119/2017), which recognised that, since preventive measures "fall within a broad sense of punitive measures", the "general principle of taxativity and determinacy of the normative description" must apply.

251. Against this complex background, the Constitutional Court had the challenging task of reading logic into the inconsistent Supreme Court case-law. By judgment no. 24/2019, it recalled that the original purpose of patrimonial preventive measures was not to remove intrinsically dangerous assets but rather to target assets in the possession of socially dangerous individuals. Following the 2008-2009 security packages, seizure and confiscation would have changed their physiognomy, assuming the same purpose as the extended confiscation referred to in Article 240-*bis* of the Criminal Code. The purpose specifically pursued would be the protection of the correct functioning of the market, which could be contaminated by the persistence of illicitly accumulated wealth. The new purpose of preventive confiscation would not, however, have changed its legal nature, which remained restorative of the situation that would have arisen in the absence of the illicit acquisition of assets.

252. Ultimately, for the Constitutional Court, preventive confiscation has civil nature, explicitly assimilated to the *in rem* confiscation examined by the European Court of Human Rights in *Gogitidze and Others v. Georgia*, cited above. Since crime does not constitute a valid title of purchase, confiscation could not lead to a punishment of the affected subject but could only have the effect of depriving him of something that he could not have acquired lawfully. Articles 41 and 42 of the Italian Constitution could be invoked to justify such limitations of the right to property and private economic initiative to prevent criminal infiltration into the economic system, and this to protect the correct functioning of the market.

253. For the above reasons, the characterisation of the contested measure under domestic law and case-law is contradictory. One needs to delve deeper into the domestic jurisprudential debate to assess the nature and purpose of the contested measure. That is what I propose to do next.

b) The nature and purpose of the contested measure

254. The interdependence of the purposes of criminal penalties and preventive measures is exposed by the law itself. Article 2-*ter*, paragraph 9, of Law no. 575/1965, provided for a rule of prevalence of confiscation determined in preventive proceedings over confiscation determined in criminal proceedings in case of concurrence of both. This rule was reversed by Article 30, paragraphs 1, 2 and 3, of the Anti-Mafia Code, with the opposite rule of prevalence of confiscation determined in criminal proceedings over confiscation determined in preventive proceedings in case of concurrence of both. The key point that I want to make is that, by establishing an obligatory substantive correlation between both types of confiscation, the legislator acknowledged that they pursue the same legal purpose.

255. This substantive correlation between the purposes of criminal penalties and preventive measures is further to be seen in Article 166, paragraph 2, of the Criminal Code, according to which a conditionally suspended sentence cannot, in any case, constitute the sole ground for the application of preventive measures. Furthermore, when the execution of the preventive measure is suspended due to service of a penalty, there must be a revaluation of the dangerousness of the suspect person at the start of the execution of the measure, according to Article 14, paragraph 2-*ter* of the Anti-Mafia Code, as amended by Article 4 of Law no. 161/2017, which followed the indication of the Constitutional Court judgment no. 291/2013 to legislate on the issue. The consequences of preventive measures, moreover, are intended to persist even after the cessation of the personal measure until the granting of rehabilitation**,** subject to demonstrating eloquent signs of good conduct, in accordance with the criteria of Article 178 of the Criminal Code (Cass., II, judgment no. 14529/2023) and the applicable provisions of the Code of Criminal Procedure (Article 15, paragraph 3, of Law no. 327/1988 and Article 70, paragraph 3, of the Anti-Mafia Code).

256. It is precisely because preventive measures and criminal penalties pursue the same legal purpose that the law acknowledges a prejudicial effect to conditionally suspended sentence in preventive proceedings and a revaluation of the requisites of the preventive measure must occur after the service of a penalty, even for the purposes of rehabilitation. Hence, these substantive provisions show that the guilt of the proposed person is not irrelevant for preventive confiscation.

257. Nonetheless, lately, domestic case-law has focused on the allegedly macroeconomic purpose of the contested measure, that is, the removal from the economic circuit of goods of illicit origin, which is not logically dependent on the prognosis of social dangerousness of the proposed person. According to this case-law, the purpose of preventive confiscation is no longer the original one, attributed by the Rognoni-La Torre law, that is, to prevent a dangerous person from exploiting his assets to commit crimes, because then it would be useless to confiscate the assets of non-dangerous or even deceased people. It is impossible to prevent the crimes of a person who is not currently socially dangerous, and even less the crimes of a deceased person.

258. On the other hand, if the purpose of preventive confiscation were to defend the market and free competition from the permanence of goods of illicit origin, it would be contradictory with the preventive confiscation's vocation for definitiveness. If a decree imposing personal preventive measures is by nature temporary, the decree imposing confiscation envisages the definitive expropriation of the illicit asset by the State, a legal consequence which only very exceptionally can be reversed. The potentially definitive character of the expropriation operated by preventive confiscation is logically incompatible with the thesis of removal of dangerous assets from the market to protect free competition, unless it would be assumed that the removed assets were, not only "objectively dangerous", but also permanently dangerous, even when they were under State administration. Such assumption is irrational legal fiction without any support on reality.

259. As a matter of rationality, one should add that it is highly contestable to assume that in cases of common dangerousness there is always an illicit enrichment, let alone that this illicit enrichment endangers the market and free competition. There is no factual support for such an assumption, which appears irrational. This evidently puts at stake the thesis that in such cases the patrimony of the suspect person must be confiscated to defend

the market and free competition from the permanence of goods of illicit origin. To assume that the thief who lives of his pickpocketing activity in the streets of Rome is a danger to the market and free competition and that the goods of illicit origin in the availability of the thief could insidiously infiltrate and endanger the licit economy in Italy is irrational legal fiction.

260. In sum, the Constitutional Court judgment no. 24/2019 tried to harmonize the *Spinelli* and the *Occhipinti* methodological approaches, by acknowledging a metamorphosis of a measure originally aimed at State control of social marginalisation but subsequently converted into a form of State control of unexplained, suspicious wealth. It failed because they are irreconcilable.

261. The judgment no. 24/2019 contradicted the *Spinelli* judgment insofar that the restorative purpose, affirmed by the Constitutional Court, is analogous to that which the *Occhipinti* judgment had highlighted to recognize the objectively punitive nature of confiscation ("depriving the offender of any economic benefit derived from criminal activity"). However, the restorative purpose had been excluded by the *Spinelli* judgment to reaffirm its preventive nature. In addition, the Constitutional Court´s assimilation of preventive confiscation to the *Gogitidze and Others* confiscation and, therefore, to a civil law instrument, expressly contradicted the *Spinelli* judgment, according to which preventive confiscation had not introduced an *actio in rem* into the Italian legal system.

262. The Consulta judges went so far as to acknowledge the "undoubtedly punitive dimension" of preventive measures, like the *Occhipinti* and the *Sotttile* judgments did, but they diminished this dimension in terms of a "collateral consequence of measures whose essential purpose is the control, for the future, of the social dangerousness of the person concerned: not the punishment for what they have done in the past". The strictly abstract approach of the Court of Cassation in the *Spinelli* judgment is incompatible with the *Engel* criteria insofar far that it did not take into consideration the drastic consequences of the measure. The exact same abstract approach tainted the Constitutional Court´s thesis of the lesser importance of the "collateral consequence" of preventive confiscation. By putting forward the thesis of constitutionally admissible collateral damages, the constitutional judges in 2019 neglected the lesson of their predecessors when they underlined nine years before, in the groundbreaking judgment no. 93/2010, that preventive confiscation "attacked in a normally "massive" manner and in

components of particular importance" the right to property and the freedom of economic initiative and also had "seriously «incapacitating» consequences".

263. Hence, the Constitutional Court's advanced purpose of the contested measure fails to convince, not only because it is based on irrational legal fiction, as demonstrated above, but worse still, because it downgrades the disgrace of human beings targeted by preventive confiscation to mere "collateral damage" of the State policy to control alleged social dangerousness.

264. In this context, alleging the restorative purpose of preventive confiscation to deny its punitive nature can only result from an unforgiven misunderstanding of basic criminal law principles. As a matter of principle, the purpose of restoring the situation existing before the crime is one of the traits that qualify the retributive theory of punishment since the Modern Age and the eruption of Enlightenment in criminal law science.

265. Ever since Immanuel Kant the retributive theory of punishment affirms that retribution aims at restoration of the *status quo ante*, and restoration is the sole logical and ontological form of true retribution. Preventive purpose is *eo ipso* denied when the pursued purpose of the measure is restoration because the restoration of the *status quo ante* looks to the past, i.e., to the situation existing before the alleged illicit enrichment, and not to the future. Preventive confiscation is built on the assumption of the commission of past profit-making criminal offences for which it is not possible to obtain sufficient evidence for the conviction of the proposed person and has therefore a rather old-fashioned retributive connotation.

266. The thesis of the restorative-retributive nature of preventive confiscation finds confirmation in the case-law where the confiscation is ordered not only of illicitly acquired assets but also of assets of proven legitimate origin, namely when targeting an alleged Mafia enterprise even vis-à-vis the proven legality of the initial invested capital (Cass., V, judgment no. 16311/2014), or the land of proven lawful origin on which there is a building constructed with funds of suspicious origin (Cass., V, judgment no. 49479/2009), or the share capital (including the social shares of third parties), despite the lawful origin of the funds used for the subscription of the shares, where the substantial availability of the company by the proposed person is ascertained (Cass., II, judgment no. 9774/2015). This caselaw shows how far the Constitutional Court's appeal to a "reasonable congruity" (judgment no. 24/2019) between the confiscated assets and the

concrete illicit profits derived from crime is from jurisprudential reality, and how close this reality is to full blown *omnimodus* confiscation that impoverishes the proposed person more than he has enriched himself.

267. But this is not all.

268. There is another extraordinary feature of preventive confiscation that goes beyond Modern-Age retributive-restorative punishment, which was fundamentally a form of personal responsibility. Like the Middle-Age kin (*Sippen*) liability, preventive confiscation can target the family or clan who supposedly share the responsibility for a crime, or an illegal act committed by one of its members, even after his death, justifying a form of collective punishment. The cherry on the cake of this Middle-Age-like instrument of repression of social dangerousness is the admissibility of confiscation of the assets inherited by the suspect person's heirs, who are called to the proceedings to put forward the defence against the "immanent" dangerousness of the assets of the deceased person (Constitutional Court judgments no. 21/2012 and no. 216/2012, considering that there is no violation of Articles 24 and 111 of the Constitution). The surreal character of these proceedings is only aggravated when domestic courts confiscate assets that the deceased person had in his availability through third persons who are not even his heirs but allegedly acted as figureheads of the *de cujus* by the time of his death (Cass, Plenary, judgment no. 12621/2017).

269. Thus, the purpose of impugned confiscation is not preventive, but restorative-retributive in essence, envisaging a form of Middle-Age-like *Sippenhaftung* punishment of the suspect person that can potentially be transmitted to his heirs and any person who surrounded him by the time of his death.

c) The procedures involved in the making and implementation of the contested measure

270. Articles 2-*bis*, 2-*ter*, 4 and 9 of Law no. 575 of 1965, in the version in force on 31.5.1999, included five references to the provisions of the Criminal Procedure Code. In the version in force on 29.9.2011, it included six references to the Criminal Procedure Code in Articles 1, 2-*ter*, 2-*quarter*, 4, and 10. Most importantly, Article 2-*ter* provided that the confiscation procedure may be started or continued when the person is subjected

to a custodial security measure or probation and seizure and confiscation may also be ordered in relation to assets seized in criminal proceedings, but the related effects are suspended for the entire duration of the same and are extinguished if the confiscation of the same assets is ordered in criminal proceedings.

271. The applicability of provisions of the Criminal Procedure Code to confiscation proceedings and the interchangeability between criminal confiscation provided by the Criminal Procedure Code and preventive confiscation provided by Law no. 575/1965 speak volumes about the criminal nature of preventive confiscation.

272. The legislator is even clearer in the domestic legislation implementing the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. Article 1, paragraph 3, letter d), of Decree Legislative no. 137/2015 defines the proceedings for the application of preventive confiscation according to the Anti-Mafia Code as "criminal proceedings": "d) confiscation decision: **a provision issued by a judicial authority within criminal proceedings, which consists in definitively depriving a benefit of a subject, including** confiscation measures ordered pursuant to article 12-sexies of the legislative decree of 8 June 1992, n. 306, converted, as amended, by law 7 August 1992, n. 356, and those arranged pursuant to articles 24 and 34 of the code of anti-Mafia laws **and prevention measures, referred to in legislative decree 6 September 2011, n. 159, and subsequent modifications**" (my bold).

273. The analysis of the proceedings involved in the making and implementation of the contested measure confirms this indication given by the black letter of the law.

274. The preliminary investigation phase of the prevention proceedings is not regulated; indeed, it is the realm of pure discretion of the investigatory authorities. Case-law excludes its jurisdictional nature, and the rules aimed at safeguarding the defence rights (Cass., judgment no. 1149/1990). Not only does the law not provide for any form of guarantee for the suspect in the investigation phase, but it does not even provide for a maximum term for the duration of the investigations, with the possibility that the suspect person is investigated for years and years (Cass., II, judgment no. 11315/2022). Indeed, preventive confiscation is not subjected to any prescription limit. The exercise of preventive action is purely discretionary, contrary to criminal action which is obligatory according to Article 112 of the Italian Constitution.

275. The judge for the prevention measures is not bound by any criteria for the selection of the material collected by the public prosecution, including in criminal proceedings, such as telephone conversations tapped in criminal proceedings where the proposed person had been acquitted (Cass., V, judgment no. 37659/2008), minutes of evidence produced in criminal proceedings (Cass., I, judgment no. 27147/2016) and pre-trial detention orders (Cass., VI, judgment no. 10931/2017), and can exercise *ex officio* the power of inquiry to collect new evidence and even to determine the seizure of new assets. The evidence collected by the public prosecutor during secret criminal or preventive investigations can prevail over that collected in the trial, since the principle of immediacy does not limit the judge in preventive proceedings.

276. As a matter of domestic judicial policy, the sharing of evidence between criminal and preventive proceedings is even promoted by the governing bodies of the judiciary and the public prosecution. The High Judicial Council "must with conviction emphasize the need that, within the scope of the respective autonomies, we proceed towards agreed solutions, through protocols and practices that go in the direction of the rationalisation of resources, the sharing of information sources and the reasoned identification of priorities and objectives." (Consiglio Superiore della Magistratura, *Risoluzione in materia di attività degli uffici giudiziari nel settore delle misure di prevenzione antiMafia e dell'aggressione ai patrimoni illeciti*, Deliberation of 13 September 2017, p. 13, which validated the best practices' guide of the Procura della Republica Distrettuale di Bologna, *Nuova disciplina delle misure di prevenzione. Problematiche organizzative ed operative*, Deliberation of 10 November 2017, p. 5).

277. Furthermore, when there are assets under seizure in criminal proceedings for which confiscation has not been ordered, and the criminal action has been dismissed, the trial judges transmit the documents to the Public Prosecutor and the National Anti-Mafia Prosecutor for the application of preventive measures and the preventive procedure may take place before the same judge who has already ordered the criminal seizure: the causes of incompatibility provided by the Criminal Procedure Code to safeguard the impartiality of the judge do not apply (Cass., I, judgment no. 6521/1997, and I, judgment no. 15684/2002).

278. The principle of correlation between the contested charge and the sentence, set out in Article 521 of the Criminal Procedure Code, does not apply to preventive confiscation

proceedings. If facts different from those indicated in the proposal emerge, the judge modifies the title of social dangerousness without previously proceeding to the relative contestation. This means that a person may undergo seizure for a hypothesis of qualified dangerousness, but having such a type of dangerousness been excluded by the evidence offered by the defence in trial, their assets may be confiscated anyway on the grounds of generic dangerousness, and thus, without having had the opportunity to defend themselves on that point. In other words, the judge can function as a disguised prosecutor in trial, replacing the actual prosecutor with his own new dangerousness hypothesis.

279. Preventive confiscation decrees can be appealed to the Court of Cassation only for violation of the law (Cass, II, judgment no. 5807/2017), while with respect to extended confiscation, defects in motivation can also be deduced (Constitutional Court judgment no. 106/2015), which means that the former decrees may very well be based on illogical motivations.

280. Finally, although the act concluding the preventive procedure has the substantive nature of a judgment, the preventive *res judicata* operates *rebus sic stantibus*: the preventive procedure can in fact be opened, closed, and then reopened indefinitely if new facts and new provisions arise (Cass., I, judgment no. 6515/1997).

281. In sum, by implementing a model of strictly inquisitorial inspiration, the domestic law and case-law set aside in preventive confiscation law some guarantees of the Italian Criminal Procedure Code. It is not clear why preventive confiscation proceedings should dispose of less guarantees of a fair and adversarial trial than criminal proceedings. It is also not clear why the "principle of jurisdictionalisation", affirmed in the Constitutional Court's judgment n. 93/2010 and based on which it acknowledged the right of the proposed person to request a public hearing, did not lead to the acknowledgment of the more important right to impugn illogically motivated confiscation decrees before the Court of Cassation. If extended confiscation and preventive confiscation are "species of a single genus" (Constitutional Court judgment no. 24/2019, and already judgment no. 291/2013), it is also not clear why the Court of Cassation power of control over them should be different.

282. Only with some degree of hypocrisy could one argue that the difference between procedural guarantees of preventive confiscation proceedings and of criminal proceedings is an argument in favour of the non-punitive, non-criminal nature of

preventive confiscation. On the contrary, the Middle-Age-like, strictly inquisitorial nature of preventive confiscation proceedings is a compelling argument in favour of the punitive, criminal nature of preventive confiscation.

d) The severity of the contested measure

283. Article 10 of Law no. 575/1965 (in the version in force on 31 May 1999 and 29 September 2011, respectively, date of the seizure decree and date of the confiscation decree) gave a clear indication of the severity of the legal consequences of the contested measure, which produce detrimental effects on the personal sphere of the individual concerned which go much further than the mere deprivation of the unjust enrichment derived from crime. Paragraph 5-*ter* of Article 10 extended the consequences provided for individuals subject to preventive measures to individuals criminally convicted of serious offenses under Article 51, paragraph 3-*bis* of the Criminal Procedure Code. Similar provisions can be found in Article 67 of the Anti-Mafia Code.

284. In view of the severity of these effects, it would sound like pure pharisaism to argue that preventive confiscation is not a penalty because it can never be converted into a measure entailing a deprivation of liberty, like criminal fines (see below, I will come back to this argument). The effects of preventive confiscation are well-known to any adult in Italy: it affects drastically constitutional and human rights, such as the right to property and the right to private economic initiative, since it can target an amount of assets that exceeds any presumed net criminal profit, and the right to social reputation, since it has a strongly stigmatizing effect. The present case shows how dramatically the patrimonial, family and personal lives of the proposed persons can be affected and the Strasbourg Court should not ignore these effects, as it did in the *Garofalo and Others* case, when it considered decisive the restorative purpose of the confiscation measure but found irrelevant its imposition by a criminal court and, especially, its severity.

285. The same regrettable approach was adopted by the Court in *Balsamo v. San Marino*, cited above, §§ 60-65, which also did not apply Article 7 to a confiscation of the seized sum of 1,920,785.50 euros, plus a confiscation per equivalent of 490,000 euros, considered to have illicit origins imposed at the end of the criminal proceedings against

the applicants, despite their acquittal on money laundering charges for lack of intention. The Court's argument that the amount in question "is not sufficiently severe as to warrant its classification as a criminal penalty" (§ 64) is astonishing. But what really strikes the sensitivity of any criminal lawyer is the argument that "it has been established that the funds have an illicit origin, and the applicants are aware of that now" (§ 62), implying that the subjective element of the criminal offence of money laundering had been proven in the same criminal proceedings where it had been discarded. It is worrying that the European Court embarked on a determination *ex post facto*, indeed *post factum absolutus*, of the missing *mens rea* of the applicants, which is clearly indicative of the truly punitive nature of the confiscation.

286. Hence, the Article 7 criteria for qualification of preventive confiscation as a penalty are fulfilled in the present case, and consequently also the *Engel* criteria to consider preventive confiscation proceedings as proceedings determinative of a criminal charge for the purposes of Article 6, §§ 1 to 3. If the wording of the law is clearly indicative of the criminal nature of preventive confiscation, the most relevant Supreme Court and Constitutional Court case-law is not, leaving room for different interpretations by different courts. In domestic case-law, the purpose of protection of the correct functioning of the market and free competition is based on illogical legal fiction, aimed at rhetorically safeguarding the constitutional compatibility of preventive confiscation with the right to property and private economic initiative, since there is no explicit constitutional basis for preventive measures. The purposeful restorative connotation of the interference, according to domestic case-law, uncovers its truly retributive, i.e, punitive nature. The legitimisation of the effects of preventive confiscation still operates, according to case-law, by means of an equation with extended confiscation, but this equation only strengthens the punitive nature of the former since the latter, although independent of a concrete link between the assets and a crime, still presupposes the conviction for a profit-making crime, with the substantial ascertainment of a specific crime, beyond a reasonable doubt in the context of a fair criminal trial with the burden of proof of guilt on the Public Prosecutor and the presumption of innocence of the accused person.

3. Preliminary conclusion

i. On the *Garofalo and Others* decision as a precedent for the present case

287. Since the Court must go beyond appearances and autonomously assess whether a specific measure is, substantively, a penalty within the meaning of Article 7 § 1 (for example, *Welch v. United Kingdom*, cited above, § 27, and *Jamil v. France*, cited above, § 30), and in the view of the above considerations, my preliminary conclusion is that preventive confiscation is a penalty and preventive seizure is an interim measure to apply such penalty, which come within the material scope of Article 7 and, by implication, of the criminal limb of Article 6.

288. I am aware that my conclusion differs from that of the Court in *Garofalo and Others v. Italy*, cited above. After having delved into the details of Italian law and case-law I am now able to evaluate the arguments of the Court.

289. Regarding the classification of preventive confiscation in domestic law, I dispute the Court's allegation that the type of confiscation measures at issue are currently qualified under domestic law as mainly restorative in nature. In this context, I reiterate that there is not a shadow of a doubt that the black letter of domestic law equates persons subjected to preventive confiscation and persons convicted of criminal offences, as well as preventive confiscation measures and criminal penalties, and I add that that I reached this conclusion based on the analysis of provisions of domestic Law which the Court failed to consider.

290. Regarding the nature of preventive confiscation, the Court put forward three arguments to demonstrate that the measure is not punitive and presents characteristics that distinguish it from criminal penalties.

291. Firstly, the Court noted that the degree of culpability of the offender is irrelevant for fixing the amount of the assets to be confiscated and preventive confiscation is independent from the imposition of criminal sanctions. As demonstrated above, preventive and criminal confiscation are intertwined, and preventive and criminal proceedings are interdependent in domestic law in as much as they share the same purpose, including in terms of the rehabilitation requirements of both the convicted and the proposed persons, and therefore the guilt of the proposed person is not irrelevant for

preventive confiscation. Again, the Court did not consider the relevant provisions of domestic law in this regard.

292. Secondly, the Court stressed that preventive confiscation is specifically directed at the profits of the crimes presumably committed by the individual who is considered to fall under one of the subjective categories provided for by law, even though there is no conclusive evidence of those crimes, and it can never be converted into a measure entailing a deprivation of liberty. There are two unrelated arguments here, both apparently right, but in substance wrong. As was abundantly shown above, preventive confiscation entails severe legal consequences which go much beyond the neutralisation of illicit profits. The fact that preventive confiscation can never be converted into a measure entailing a deprivation of liberty is not in itself decisive, as the type of penalty applicable does not deprive an unlawful act of its inherent criminal nature (*Öztürk v. Germany* [Plenary], no. 8544/79, § 53, 21 February 1984; *Kadubec v. Slovakia*, no. 27061/95, § 52, 2 September 1998, *Ziliberberg v. Moldova*, no. 61821/00, § 33, 1 February 2005, and *Nicoleta Gheorghe v. Romania*, no. 23470/05, § 26, 3 April 2012). If the Court, quite rightly, considered the gravity of sanctions applicable by the Competition and Market Authority (*Menarini Diagnostics SRL v. Italy*, no. 43509/08, 27 September 2011) and by the Securities Commission (*Grande Stevens and Others v. Italy*, no. 18640/10 and others, 4 March 2014), which are not convertible to deprivation of liberty and whose imposition is not dependent on the prior pronouncement of a conviction for a criminal offense, in order to find that they fall within the autonomous notion of criminal matters, it is to be expected that preventive confiscation, which can produce even more damaging effects, be considered as falling within the same notion.

293. Thirdly, the Court added that preventive confiscation appears to be the expression of an increasing international consensus on the use of confiscation or similar measures to remove assets of unlawful origin from economic circulation, with or without a previous finding of criminal liability. I respectfully submit that the Court's analysis of international law and particularly of the European Union legal landscape is deficient, as demonstrated above.

294. Regarding the purpose of preventive confiscation, the Court did not consider it necessary to rule definitively on whether preventive confiscation retained, after the 2008-2009 reform, a preventive function in the general sense. Quite correctly, the Court

reiterated that the general aim of prevention, inherent in the purpose of guaranteeing that crime does not pay, is also consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment.

295. Regarding the newly founded restorative purpose, the Court presented three arguments. This is the core of the Court's argumentation, and with all due respect I disagree with it. In my view, there is a fundamental misunderstanding underlying the Court's reasoning.

296. Firstly, the Court considered that the wording of the relevant legislation, as interpreted in the domestic case-law, strongly suggests that the measure in issue is directed against property rather than the affected person. Other than contradicting the *Spinelli* judgment and neglecting the teachings of the Constitutional Court judgment no. 291/2013, this argument is not compatible with the above analised provisions of Article 2-ter, paragraph 9, of Law no. 575 of 1965, Article 30, paragraphs 1, 2 and 3, of the Anti-Mafia Code and is hardly compatible with Article 166, paragraph 2, of the Criminal Code and Article 14, paragraph 2-ter of the Anti-Mafia Code, as amended by Article 4 of Law no. 161/2017.

297. I add that the Government themselves equate the purpose of preventive confiscation proceedings and criminal proceedings because the assessment of dangerousness is based on the connection to specific criminal cases and is destined to result in an «evidentiary» assessment, typical of criminal matters (see *Circolare in tema di attuazione del Regolamento (UE) 2018/1805 relativo al riconoscimento reciproco dei provvedimenti di congelamento e di confisca*, 2024, p. 9).

298. Secondly, the Court argued that the confiscation in question could be applied exclusively in respect of assets that were presumed to have originated in unlawful activities, owing to the lack of evidence showing their lawful origin. This argument cannot prevail, because it contradicts Article 2-*ter* paragraph 4 of Law no. 575/1965, as amended by Article 10, paragraph 1, letter d) of Decree-Legislative no. 92/2008, and Article 25 of the Anti-Mafia Code, which provide for the admissibility of preventive confiscation by equivalent of legally obtained assets. Furthermore, the argument neglects to consider the Court of Cassation long-lasting case-law regarding the confiscation of legally obtained assets which are incorporated in a Mafia enterprise.

299. Thirdly, the Court invoked the rule of temporal correlation according to which the measure could be applied only in respect of assets acquired by the individual concerned during the period in which he or she had presumably committed criminal offences entailing unlawful profits, thereby showing that this measure aimed to prevent unjust enrichment based on the commission of criminal offences. This argument is faulty in many regards. As it will be demonstrated below, it neglects to consider that the rule of temporal correlation does not apply across all forms of preventive confiscation and, where applicable, it has been limited by the case-law itself (see Part IV-D-2-c-ii).

300. Regarding the severity of the contested measure, the Court held, in the *Garofalo and Others* case, that preventive confiscation was a "measure of relative severity" and added that, "irrespective of the value, the confiscation is only applicable to property of which the legal origins cannot be traced. In particular, it is limited to those assets in respect of which, owing to the danger to society posed by the individual when they were acquired and the discrepancy between those assets and the individual's lawful income, there is a legally justified presumption that they are the profits of crime." Again, the Court ignored that preventive confiscation is not limited to assets of illicit origin, since it can reach assets of proven licit origin, in accordance with the case-law on Mafia enterprise, which was abundantly used by the domestic courts to justify the general scope of the confiscation decrees in the Cavallotti case.

301. Finally, regarding the proceedings for the adoption and enforcement of the contested measure, the Court noted that it was imposed by special divisions of courts of criminal jurisdiction, but diminished the significance of that fact, with two justifications, namely that it is a common feature of several jurisdictions for criminal courts to take decisions of a non-punitive nature and that the confiscation order in the *Garofalo and Others* case was made in special confiscation proceedings, and the assessment of whether to impose it was based on relevant evidence in the absence of a successful rebuttal.

302. I note that the argument of the competence of criminal courts to adjudicate on preventive confiscation proceedings, which the Government used to affirm their nature as proceedings in criminal matters (see *Circolare in tema di attuazione del Regolamento (UE) 2018/1805 relativo al riconoscimento reciproco dei provvedimenti di congelamento e di confisca*, 2024, p. 9), was downplayed by the Court as irrelevant for the purpose of qualifying preventive confiscation as a penalty.

303. In any event, I regret that the Court satisfied itself with a simplistic approach to this important point, by addressing only the competence of criminal courts, but failing to consider the clear indication given by the black letter of domestic law of preventive confiscation proceedings as criminal proceedings and the multiple features of preventive confiscation proceedings that indicate its strictly inquisitorial nature. In the present case, the strict inquisitorial nature of preventive proceedings by the domestic criminal courts strongly impacted the fate of Cavallotti family's defence. I will demonstrate below that the applicants were not afforded a reasonable opportunity of putting their arguments before the domestic courts and the latter did not examine properly the evidence submitted to them (see Part IV-D-2-c-iv. and v.).

304. In sum, all criteria point to the same conclusion, but even assuming for the sake of argument that a separate analysis of each criterion does not allow a clear conclusion to be drawn as to the existence of a criminal charge, a cumulative approach should be adopted (among many authorities, *Bendenoun v. France*, no. 12547/86, § 47, 24 February 1994), and under this holistic light there is no doubt that preventive confiscation should be considered as a penalty.

305. In view of the above, I conclude that the findings of *Garofalo and Others v. Italy* need to be reviewed in the light of the domestic provisions mentioned above, and that review must conclude that preventive confiscation as provided for in Law no. 575/1965 and its amendments is a penalty under Article 7 of the Convention.

ii. On the complaint regarding the concept of membership of a Mafia-type association

306. Having reached the above preliminary conclusion, I must now deal with the applicants' complaints regarding Article 7. The applicants argue that their qualification as socially dangerous persons on account of membership of a Mafia-type association, after having been acquitted of the charge of participation in a Mafia-type association, violates Article 7.

307. They are right, for two main reasons: firstly, the notion of membership of a Mafia-type association is too vague to satisfy the threshold of precision put by Article 7 and, secondly, it contradicts the principle of personal responsibility underlying Article 7.

308. The concept of membership of a Mafia-type association is not clear in domestic law and case-law. The state of legal uncertainty is openly confessed by the judges themselves: "it is actually controversial whether, for the purposes of preventive measures, the concept of 'membership' to a Mafia association should be understood in a broad sense, not being able to be identified with that of 'participation' in the association [...] or should be understood in a strict sense, as insertion within the criminal associative structure with modalities entirely overlapping to those described by Article 416-*bis* of the Criminal Code" (Cass., I, judgment no. 43046/2003).

309. According to the restrictive interpretation trend, "the evaluation required to the judge must be based on specific symptomatic elements of participation" as "the quality of being a prevention suspect coincides with that of an associate required for the application of criminal sanctions, according to the theory of the so-called double track, and the difference between the two figures consists only in the different probative level required to affirm their ontological existence" (Cass., II, judgment no. 44326/2005). On these grounds, it was considered that "the evaluation required to the judge must be based on specific symptomatic elements of participation in a 'qualified' criminal association" (Cass., I, judgment no. 2019/1995). Hence, the preventive judge "cannot [...] base his evaluation exclusively on elements whose recurrence in relation to a subject has been excluded by a final judgment of the criminal judge" (Cass., V, judgment no. 23041/2002). This trend culminated in the *Gaglianò* judgment (Cass., VI, judgment no. 3941/2016), which censured "the extensive application [of the notion of membership understood as functional contiguity], which ends up expanding the category of subjects deemed dangerous in a qualified manner for preventive purposes beyond the limits set by the Legislature". It required, for the first time, "a factual contribution from the proposed person to the activities and development of the criminal association, under penalty of further expansion of the concept of membership, already extended beyond the textual scope, to an indefinite and above all detached area from any material conduct attributable to the person concerned". The novelty lied in the fact that, while before a mere functional contiguity was sufficient, it is now specified that such contiguity must be understood "in the sense that the proposed person must provide a 'factual contribution' to the activities and development of the criminal association." "Constraints of close kinship, personal contacts, although significant for the existence of undeniable relationships with members

of the criminal group, and even serious past offenses (extortion)" are not considered sufficient for 'membership.'

310. On the contrary, according to the broad interpretation trend, the legal concept of membership to a Mafia-type association "encompasses the contiguity to the association itself which - even without integrating the typical criminal act of the subject who is organically involved (with a managerial role or not) in the Mafia association - is functional to the interests of the criminal structure and at the same time denotes the specific social dangerousness that underlies the preventive treatment" (Cass., I, judgment no. 5649/2002) and "[a]ll those areas of contiguity - from external complicity to the varied expressions of co-interest - that must be pursued to remove any form of active solidarity with the phenomenon of organised crime, which constitutes fertile ground for its affirmation and rooting in the territory" (Cass., I, judgment no. 1563/2015).

311. In the midst of this unstable case-law, the Plenary of the Court of Cassation intervened, in the *Gattuso* judgment, admitting that the conduct of the external accomplice could be subsumed to the notion of membership, but not "mere collaterality that does not materialize in symptoms of an individual contribution to the life of the association", requiring that the person carries out "an action, even if isolated, that is characterised by being functional to the purposes of the association" (Cass., Plenary, judgment no. 111/2017, with reference to Cass., I, judgment no. 54119/2017). Situations of ideological contiguity, commonality of 'Mafia culture' or recognised acquaintance with individuals involved in the Mafia-type association would not suffice.

312. The year after, in another case, the Court of Cassation considered the rejection of a request to revoke the confiscation justified despite the subsequent acquittal judgment (Cass., II, judgment no. 27855/2019). The Court deemed that confiscation was based on different and previous facts compared to those evaluated in the criminal trial.

313. Summing up, the Plenary of the Court of Cassation did not overcome the jurisprudential inconsistencies, let alone solved the lack of precision and predictability of the practice, because it did not clarify whether external complicity constitutes the insurmountable limit of contiguity that can be censured in the context of prevention proceedings and, if yes, whether it is still possible to qualify as member of the Mafia-type organisation the person acquitted from the accusation of external complicity or any form of expression of co-interest, like making himself available through the Mafia-binding

pledge (Cass., Plenary, judgment no. 36958/2021, which held that that pledge was not sufficient for convicting someone of the offence of participation in a Mafia-type association).

314. The Plenary left the door wide open for the courts to confiscate assets belonging to acquitted persons, at least when different and previous facts compared to those adjudicated in the criminal trial are at stake in the prevention proceedings (for such an example, Cass., I, judgment no. 43826/2018) or when the same facts have been found not proved in the criminal trial, for lack of evidence (for such an example, Cass., V, judgment no. 17946/2018).

315. The said case-law is logically unsustainable. Article 416-*bis* punishes a bond of loyalty that involves the conscious sharing of the criminal association's goals and the factual contribution to their pursuit. The contribution sufficient to integrate the criminal offence is expressed either in direct affiliation or in conduct of external assistance (external complicity). A sentence of acquittal excludes any participation, internal or external, direct, or indirect, in the criminal association. If the dangerousness of the person coincides with the danger represented by the contribution to the associative activity, the exclusion of any such contribution implies logically the exclusion of the dangerousness of the person.

316. It could be argued that the two types (member and external accomplice) differ only in the degree of ascertainment of the same fact. In this case the problem would shift from the substantive law discussion on the compatibility of each of these concepts with the principle of legality to the even more controversial procedural law discussion on the satisfaction of the burden of proof regarding each one of these conducts. On the one hand, the jurisprudence requires that the determination of membership must be based on elements of a factual nature, that is, on objectively and concretely identifiable circumstances, with the exclusion of mere suspicions, insinuations and conjectures; on the other hand, however, it specifies that that determination does not require individualizing evidence, of the gravity, precision and concordance required by Article 192 of the Criminal Procedure Code (Cass., Plenary, judgment no. 13426/2010, and, I, judgment no. 23641/2014). This variable evidentiary standard applicable in preventive proceedings is not compatible with the principle of procedural legality. In addition, when the evidence needed to prove the concept of membership is placed in an “intermediate”

position in which the available proof must go beyond the stage of conjectural, unprecise and non-concordant evidence but does not have to reach the level of truly individualizing evidence, there is serious risk that the evidence sufficient for the purpose of activating the preventive procedure is degraded in reality to the rank of mere suspicions. By so doing, pretending that the member is someone different from the participant and the external accomplice, without explaining precisely what the functional contribution of the member should consist of and how it should be proven, is an elusive line of argumentation, which only provides an irremediably vague, and thus illusory, legal safeguard.

317. By the same token, it could be argued that the prevention judgment and the criminal trial would have a different perspective because the prognosis of social dangerousness must be made with an *ex ante* angle while in the criminal trial the evaluation must be made with an *ex post* angle, according to the *Mannino* case-law (Cass., Plenary, judgment no. 33748/2005). Here again, the linguistic argument does not convince because the prognosis of the prevention judge is ultimately grounded on a retrospective, hindsight judgment (Cass., I, judgment no. 23641/2014: "the prevention judgement […] is fuelled first and foremost by the assessment of historically appreciable facts which in turn constitute indicators of the possibility of placing the proposed person in one of the criminological categories prescribed by law"). According to the law itself, the hindsight judgment of the prevention judge consists of a diagnosis of conduct producing illicit enrichment that is intended to be sterilised, and this diagnosis looks to the past, that is, to the proven or unproven illicit origin of the assets, and not to the future. Moreover, playing with words *ex ante/ex post* does not hinder the fact that any prognosis, to be convincing to a court of law, must be based on solid past facts and the less solid the past facts considered the less reliable the prognosis is.

318. Hence, the profound and long-standing differences in the domestic case-law have not been solved by the internal mechanism to overcome inconsistencies in the case-law, triggering a violation of Article 7.

319. The analysis of the domestic decisions in the preventive proceedings against the Cavallotti family provides abundant evidence of this violation. The law in the books, read alone or in conjunction with the law in action, did not provide a precise and predictable basis for the application of the impugned confiscation measure in the present case.

320. According to the 2011 confiscation decree, the member of a Mafia-type association differed from that of the participant "not only on the evidentiary side but even from a substantive point of view." However, regarding this substantive point of view, the only thing the Court had to say was that the addressees of preventive measures included those "suspected of membership in a broad sense to the Mafia association." The Court said nothing about what should be understood by "membership in the broad sense" but simply indicated that the colluding entrepreneur falls into this category. Here is the reasoning of the Court:

> "The inclusion of the owner of such a company among those suspected of membership of a Mafia organisation can be considered to exist […] when a close bond is established between the entrepreneur and the organisation that lasts over time and from which mutual advantages arise. […] Such conduct cannot therefore fail to be framed in probabilistic terms at least in the figure of external competition in a Mafia association […] (in this sense, Cass. Pen. Plenary, 30.10.2002, no. 22327, Carnevale).[…] "the "colluded" entrepreneur, on the other hand, does not limit himself to paying the sums requested as extorsion money, but in pursuing his own profit-making purpose, tends to impose himself on the market and to win over the competition using the intimidating force of the Mafia organisation as an ordinary instrument of action. **Therefore, it can be conclusively affirmed** that the social dangerousness of the present proposed persons is qualified by their membership of the Cosa Nostra Mafia association […] in the sense described above of prolonged, active, and advantageous inclusion in the context of collusive Mafia entrepreneurship." (my bold)

321. The confiscation decree explained the concept of a colluding entrepreneur and the criteria developed by criminal jurisprudence to distinguish this type of crime from the figure of an entrepreneur who is a victim of a Mafia association. The Cavallotti membership of Mafia as an index of their qualified dangerousness is expressed precisely in the form of a colluding entrepreneur. The confiscation decree, recalling the relevant criminal jurisprudence, recognised that a colluding entrepreneur is a person guilty of at least the crime of external complicity with a Mafia association. Considering an entrepreneur socially dangerous because he is a colluding entrepreneur implicitly meant assuming that the entrepreneur in question is guilty of at least external complicity in Mafia

association, a crime punishable by the combined provisions of Articles 110 and 416-*bis* of the Criminal Code. After describing the category of the colluding entrepreneur, the confiscation decree brings the Cavallotti brothers under it, using the conjunction "therefore." "Therefore", in the Italian language, is a conjunction that gives a deductive-conclusive value to a sentence or a sequence of speech with respect to what was said previously. Using this conjunction after having associated the colluding entrepreneur with external complicity and before the statement that the Cavallotti brothers belong to the Mafia means recognizing that they, as colluding entrepreneurs, were responsible at least for the crime of external complicity in Mafia association.

322. Furthermore, the confiscation decree simply ignored the principle of personal social dangerousness, by stating that the value of the individualizing evidence on behalf of each individual proposed person "cannot even be overestimated", because in the prevention proceedings one must "evaluate the conduct overall held by the proposed ones and not also their personal and penal responsibility for a specific fact". According to the confiscation decree, the proposed persons were subjectively dangerous because "they contributed to the creation and subsequent affirmation on the market of a cohesive family group of companies subject to a unitary direction and making use of the intimidating force of the associative Mafia bond." It is impressive that the confiscation decree did not care to give the minimum hint to who did what and when. No detail was provided on who used the "intimidating force", when it was used and how it was used. Nothing.

323. When assessing the requirement of disproportion between the value of seized assets and the declared income or economic activity, the confiscation decree correctly stated that this requirement is independent from that of illicit derivation of the assets, but then added that the disproportion requirement "does not have necessarily to accompany the acquisition of the asset in a period concurrent with or subsequent to the manifestation of the proposed person's membership to the Mafia association or to the manifestation of generic social dangerousness." Consequently, the decree arbitrarily determined the start of the period of dangerousness vaguely in the mid-80s in spite of the first presumed manifestation of dangerousness had allegedly occurred only in 1995 regarding the events related to the natural gasification of the municipalities of Agira and Centuripe, but confiscated assets that had been acquired by the first group of applicants before the mid-80s, such as Icotel SPA, which was established in 1972. In other words, the line of

argumentation of the 2011 confiscation order is founded on an assumption of collective guilt, which went back in time more than forty years. Furthermore, this passage of the confiscation decree's reasoning neatly demonstrates the arbitrariness of the temporal correlation requirement, as it further developed below.

324. The 2014 Court of Appeal decree considered that "it is sufficient to invoke the constant jurisprudence of legitimacy that this Court shares: 'the concept of membership to a Mafia-type association [resolves] into a situation of contiguity with the association itself that [...] is functional to the interests of the criminal structure'". No reference was made to proof of an active contribution.

325. Despite the 2010 acquittal judgment ascertaining the inexistence of a synallagmatic pact between the Cavallotti family and the Mafia, the 2015 Court of Cassation judgment found that it remained proven a "background reality" understood as a "contiguity of the Cavallotti, dating back to the 80s, to the top of Cosa Nostra." For the Court of Cassation, "the concept of 'membership' [includes] all those areas of contiguity – from external participation to the various expressions of co-interest – that must be pursued to remove any form of active solidarity with the phenomenon of organised crime, which constitutes fertile ground for its affirmation and rooting in the territory". Also in this case, no concrete contribution by the members to the Mafia-type association was required. The ambiguity of the Court of Cassation's reasoning in the present case, referring to a totally fluid, extra-legal concept of "contiguity", and to the all-encompassing "various expressions of co-interest", is telling of the lack of precision and foreseeability of the concept of membership to a Mafia-type organisation.

326. In sum, the Cavallotti case is an emblematic example of preventive confiscation imposed in view of the collective responsibility of the proposed persons for unidentified expressions of co-interest with the Mafia, in an undisclosed time and place. The individual responsibility of each accused Cavallotti brother that could not be determined in criminal proceedings was replaced, in an exercise of judicial creativity of the preventive judges, by a Middle-Age-like kind of *Sippenhaftung* of the entire family.

327. Unfortunately, neither the 2014 Court of Appeal decree nor the 2015 Court of Cassation judgment remedied the violation of Article 7. In view of the above, I am of the view that there has been a violation of Article 7 of the Convention.

D. On Article 1 of Protocol No. 1 to the Convention

1. General principles

328. *Gogitidze and Others v. Georgia*, cited above, is still today the leading authority on the legality, the legitimate aim, and the proportionality of the interference with the right to property caused by non-conviction-based-confiscation. This Georgian case is apparently important for the purposes for the present opinion for two reasons.

329. First, because § 107 of the said judgment cited Italian cases to state that whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Second, the Georgian case is precisely the one case that the Constitutional Court judgment no. 24/2019 took as a role-model for preventive confiscation based on the Anti-Mafia Code and Law no. 575/1965 and its amendments, considering the case "particularly meaningful" and "operating on the basis of presumptive mechanisms similar to those provided for in the Italian legal system" (§ 10.4.2 of the judgment).

330. As in previous case-law, the Court reiterated in the Georgian case that where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" within the meaning of Article 6 § 1 of the Convention judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1.

331. In this case, the confiscation provided for in Article 21, paragraphs 5 and 6 of the Georgian Code of Administrative Procedure required the prior allegation of a criminal charge and could only affect public officials and persons considered linked to them. In that case, confiscation concerned assets estimated at 450,000 euros and a house and had preceded the criminal proceedings in which one of the applicants had been convicted of abuse of authority and extortion. The confiscated house, which one of the applicants had seized through coercion, was returned to the aggrieved party.

332. The Court found that the civil proceedings *in rem* through which the applicants - one of whom had been directly accused of corruption in a separate set of criminal proceedings, and two other applicants were presumed, as the accused's family members, to have benefited unduly from the proceeds of his crime - had suffered confiscations of their property, could not be considered to have upset the proportionality test under Article 1 of Protocol No. 1, because it was reasonable for all three applicants to be required to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets. Article 6 § 2 was not applicable *ratione materiae* because the domestic civil proceedings *in rem* did not concern a determination of a criminal charge.

333. To compare the Georgian case with the judicial saga of the Cavallotti is incorrect and unfair. Neither the legal framework nor the factual circumstances of these cases could be said to share some similarity. In *Gogitidze and Others v. Georgia*, cited above, confiscation was applied upon condition that a public official had been accused of having committed specific crimes such as money laundering, extortion, embezzlement, and others, during his tenure (*Gogitidze and Others v. Georgia*, cited above, § 51). In Italy, preventive confiscation based on qualified dangerousness is independent of the accusation of a specific crime. The effects of confiscation to the applicants in the Georgian case (deprivation of less than 450.000 euros) are minor compared with the draconian, life-long financial and non-financial impact of the preventive proceedings in the lives of the Cavallotti family.

334. In addition, the Court has repeatedly affirmed that confiscation measures are a legitimate restriction to the right to property as long as adequate procedural safeguards, such as the right of fair hearing and right to a remedy, are in place, and this applies not only to conviction-based confiscation [*Van Offeren v. the Netherlands* (dec.) no. 19581/04, 5 July 2005] and extended confiscation (*Phillips v. United Kingdom*, no. 41087/98 5 July 2001), but also to non-conviction-based confiscation (*M. v. Italy*, no. 12386/86, 15 April 1991).

335. Here again, it is neither correct nor fair to compare the Cavallotti judicial saga with any of the previous confiscation cases regarding the procedural limb of Article 1 of Protocol No. 1, in view of the grave disregard to the defence rights that the Cavallotti had

to endure in the preventive confiscation proceedings, as I will demonstrate in the next chapter.

2. Application of the general principles to the present case

a) Lawfulness of the interference

336. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. This means, in the first place, compliance with the relevant provisions of domestic law (see, among others, *Zlínsat, spol. s r.o., v. Bulgaria*, no. 57785/00, §§ 97-98, 15 June 2006). In the present case, Law no. 575/1965 and its amendments provided for the forfeiture of the applicants' property.

337. However, the requirement of lawfulness also means compatibility with the rule of law. It thus presupposes that the rules of domestic law must be sufficiently precise and foreseeable (see *Hentrich v. France*, no. 13616/88, § 42, 22 September 1994, and *Beyeler v. Italy* [GC], no. 33202/96, § 109, 28 May 2002), and that the law must provide a measure of legal protection against arbitrariness (see *Zlínsat, spol. s r.o.*, cited above, § 98).

338. I have already assessed one fundamental aspect of the lawfulness of preventive seizure and confiscation under the heading of Article 7, and I concluded that the boundaries of the concept of membership of a Mafia-type association are inadmissibly vague, and do not protect against arbitrariness. Therefore, the precision and predictability of the applicable law to the impugned interference are incompatible with Article 7 of the Convention.

339. The confiscation proceedings against the applicants fell precisely within the period when the Court of Cassation case-law on the notion of membership of a Mafia-type association was at the peak of its vagueness, between 1999 and 2015, before the intervention of the Plenary of the Court of Cassation by judgment no. 111/2017.

340. In any event, the domestic courts did not make a serious effort to narrow down the definition of membership of a Mafia-type association in the Cavallotti case, as was demonstrated with my analysis of the motivation of the domestic courts judgments (see

Part IV-C-2-d). These conclusions are also valid to assess the lawfulness requirement under Article 1 of Protocol No. 1.

341. There are additional reasons to find that the domestic courts failed to comply with the lawfulness requirement. Domestic law does not define the concept of illegal activities relevant for the demonstration of the illicit origin of the confiscated assets, but case-law admits very broadly that not only criminally illegal activities are relevant, but any illegal activities, is sufficient to confiscate (Cass., II, judgment no. 14346/2018, VI, judgment no. 6570/2012, and VI, judgment no. 36762/2003).

342. The 2011 confiscation decree referred to the applicants' assets as the fruit or reuse of illegal activity, without explaining what should be understood by illegal activity, let alone explaining what branches of the legal system it was referring to. It was simply noted that illegality had an indefinite character: "with regard to the confiscability of the asset as the fruit or reuse from illegal activities, it must first be emphasised the indefinite nature of illegality, reiterated on several occasions by the jurisprudence of legitimacy"; "certain facts, although criminally irrelevant, may be illegitimate in other branches of the legal system". If the 1999 seizure decree had considered that the business activities of the applicants had been "financed through proceeds deemed illicit as a result of crimes against public administration", which were connected to the crimes with which the applicants were still charged, namely bid-rigging and Mafia-type association, at the time of the confiscation decree Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito Cavallotti had already been definitively acquitted. To circumvent the acquittal, the 2011 confiscation decree changed the grounds of illegality of the origin of the proceeds from crimes against public administration to an indecipherable illegality "in other branches of the legal system" (for a similar situation, *Dimitrovi v. Bulgaria*, no. 12655/09, § 42, 3 March 2015). When looking elsewhere for an explanation by the domestic court of this enigmatic reference to "other branches of the legal system", the court clarifies what is already obvious, namely that illegality is a bogus word that is empty of any legal meaning: "in reference to the confiscability of the asset as the fruit or reuse of illicit activities, the indefinite nature of illegality must first be emphasised […]".

343. Furthermore, the 2011 confiscation decree correlated the concepts of illegal activity and "Mafia enterprise": illegal activity "finds its maximum extension and most significant application in relation to the figure of the Mafia enterprise", i.e., "that

commercial enterprise in whose corporate assets, as abnormal components of foundation, the intimidatory strength from the associative bond and the resulting code of silence are included."

344. "Mafia enterprise" is a non-legal concept which domestic case-law developed for the purposes of preventive confiscation law. In the present case, the domestic courts made ample use of this concept to justify a collective judgment of the Cavallotti brothers, without identifying specific conduct subjectively attributable to each of them. The language of the courts varied without any precise definition of the concept.

345. In the 2011 confiscation decree, one reads: "Therefore, it can be conclusively affirmed the social dangerousness qualified by the membership of the Cosa Nostra Mafia association of today's proposed persons [...], in the sense expressed above of prolonged, active and advantageous insertion in the context of **collusive-Mafia entrepreneurship**"; "The **Cavallotti companies were part of the system of illicit-Mafia** division of contracts". Within the Mafia enterprise, the court did not distinguish the roles of the applicants: "Since it is necessary to evaluate here **the overall conduct of the defendants** and not also their criminal and personal responsibility for a specific criminal act, it is impossible not to take into account the circumstance that each of these persons, as owner of individual businesses, subsequently closed, and/or partner and/or sole director pro tempore of one of the individual companies here under seizure, contributed to the creation and subsequent affirmation on the market of a cohesive family group of businesses subject to a unitary management and making use of the intimidating force of the Mafia association bond, in the terms outlined above." (my bold)

346. The 2014 Court of Appeal decree repeatedly referred to the "Mafia nature of the Cavallotti businesses": "With regard to, specifically, the **Mafia nature of the Cavallotti business activity**, […]"; "Therefore, it must be considered established […] that the entrepreneurial activity carried out by the CAVALLOTTIs in the period from the mid-1980s until the seizure of the assets was characterised as a **Mafia enterprise**."; "[…] the second of the main instruments through which the defendants exercised **Mafia entrepreneurial activity**"; "proceeds from the operation of a **Mafia business**". This provided the context in which the court of appeal affirmed that, "given as proven that the CAVALLOTTI companies have proliferated in the exercise of their activities thanks to the facilitations that have been provided to them by the heads of the Mafia organisation,

it appears consequent that, unlike what may be relevant for the purely criminal purpose regarding the configuration of the relative liability, the ascertainment of the individual top positions within the CAVALLOTTI companies assumes a highly indicative character with regard to the judgment of Mafia membership, according to the criteria outlined above." (my bold)

347. In other words, since the Cavallotti companies were colluded, their collective social dangerousness has been transferred to the people who have held social positions in those companies.

348. Having read and re-read the passage, one thing is not clear at all to me and the other is truly clear. Firstly, it is very clear to me that, from the collective dangerousness of the companies, the Court of Appeal moved on to individual dangerousness in an incorrect reasoning that starts from a premise (the companies are Mafia-run) that should be the conclusion and reaches a conclusion (Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito were subjectively dangerous) that should be the premise. Reverse reasoning obviously served the purpose of prejudging the personal liability of each individual Cavallotti brother.

349. Secondly, it is still not clear at all to me why only Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito were considered socially dangerous, given that the other brothers (Giovanni Cavallotti, Salvatore Cavallotti) and their brother-in-law Mazzola Salvatore also held top social positions. The Court of Appeal omitted any justification for the different treatment given on the one hand to Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito, and on the other to Giovanni Cavallotti, Salvatore Cavallotti and Mazzola Salvatore, although they all held social positions in the supposedly colluded Cavallotti companies.

350. The 2015 Court of Cassation judgment also omitted this explanation. The Court of Cassation did not miss to qualify the Cavallotti businesses as a Mafia enterprise: "The motivational structure of the contested decree assigns, in a reasoned manner, to the Cavallotti group the nature of **a Mafia company** or one in collusion with the Mafia." (my bold) But in replying to a defence appeal ground, the judges refrained from assessing the merits of the alleged violation of the principle of personal dangerousness:

> "it is undeniable that the inspiring principle of «personal responsibility» must apply, *mutatis mutandis*, also in the prevention stage, corresponding to a dictate

of legal civilisation. However, even this defensive observation has found an adequate response in the text of the motivation under examination (page 69), on the reflection that the three proposed persons were, in various capacities, officiated with social roles at the various companies of the group precisely in the period in which the same were profitably involved in the system of illicit division, hence the probable awareness, on their part, of the dynamics that facilitated the assignment of the profitable contracts. This is clearly a motivation that is anything but a mere appearance, the real, significant content of which obviously cannot be deliberated here, for the reasons stated above."

351. It is important to note that both the 2014 Court of Appeal decree and the 2015 Court of Cassation judgment used the criminal enterprise concept in the exact same way of the 2002 court of appeal judgment delivered in the criminal proceedings, which had stated: "the position of each [of the Cavallotti brothers] is not distinguishable, since the companies IMET and COMEST s.r.l., of which they were and are partners, are part of the same family group, appearing rather as an external articulation of the same company [the underlining is original]."

352. Yet the 2004 Court of Cassation judgment delivered in the criminal proceedings strongly reproached this reasoning in the following way:

"The contested sentence [has determined] logical and legal gaps in terms of motivation regarding the nature of the respective conduct (also and above all in terms of objectivity and subjectivity of these relevant for the existence of the crime of association), gaps that do not allow [...] a proven, reassuring and convincing demonstration, for each – please note – of the appellants of appreciably relevant, effective and conscious conducts that are worth supporting an equally proven and sufficient inclusion of these individuals, considered individually, in the Mafia association community. […] "Recourse to the issue of alleged enjoyment of the so-called "province agreement" (or Siino method) of distribution of contracts in Sicily does not allow […], except in a merely and gratuitously presumptive manner, to grasp proven, convincing and verified real and therefore appreciably concrete sharing of the aims of the Mafia by each of the appellants.[…] [the conviction does not offer] "a precise and individualizing explanation: a) of what consciously active and appreciably efficient role the appellants had in relation to

the existence and consistency of the Mafia association and how, when and why they actually made use of the force of intimidation and the bond of silence that typifies this criminally associative form; b) of what and in what period should be placed the possible episodes from which it is possible to reasonably deduce the said elements characterizing the contested associative crime, which is intuitively and logically necessary for a correct reading and framing of the entire affair under examination concerning the Cavallotti brothers."

353. In short, the motivation of the 2011 and 2014 confiscation decrees in terms of the personality of social dangerousness is completely superimposable to the motivation of the 2002 conviction in terms of the personality of criminal liability. Paradoxically, the Court of Cassation, in the criminal proceedings, considered that motivation of the 2002 conviction to be seriously illogical and annulled the conviction with referral. The Court of Cassation, in the prevention proceedings, was unable to examine the logic ("the real significant content") of the motivation of the 2014 court of appeal decree since, in the matter of preventive measures, the appeal to the Court of Cassation is limited to the violation of the law only, a defect that does not include the logic or congruence of the motivation. This means that to issue a preventive confiscation in Italy it is sufficient that there is a motivation. If that motivation is illogical, it does not matter.

354. Thus, my opinion is that the contested confiscation did not comply with the minimum requirement of lawfulness of the interference.

b) Legitimate aim

355. In *Raimondo v. Italy*, no. 12954/87, § 30, 22 February 1994, the Court observed that the confiscation provided for in section 2-*ter* of Law 575/1965 pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community. This is no longer the proclaimed purpose of the contested measure.

356. In this regard, the Court must be attentive to the on-going domestic debate on the so-called macroeconomic purpose of the contested measure, namely, to protect the market

and free competition. The constitutional legitimacy of preventive seizure and confiscation is at the epicentre of the discussion on preventive measures ever since they were introduced in domestic law, and both the Constitutional Court and the Court of Cassation have expressed different views on the issue, and the debate is certainly not limited to the confrontation between the *Occhipinti* and the *Spinelli* judgments.

357. I have already dealt with this issue under the heading of Article 7, and I concluded that the "macroeconomic" argument envisaging the protection of the correct functioning of the market and free competition as the constitutional basis for preventive patrimonial measures is grounded on illogical legal fiction, and therefore only provides a rhetorical tool to escape the crude reality that the Italian Constitution does not envisage any basis for these measures. The Italian Constitution knows two types of sanctions: penalties and security measures, which attain clearly distinct legitimate constitutional purposes. There is no such constitutional basis for preventive measures. In any event, the so-called macroeconomic purpose has the same general and vague character of the purpose of "guaranteeing just conditions for economic activity" which the Court reproached in *Dimitrovi v. Bulgari* (cited above, § 52).

358. Therefore, considering the conclusions reached above (see Part IV-C-2-b), I am not convinced that the contested confiscation pursued a legitimate aim under the Constitution of Italy and consequently also not under Article 1 of Protocol No. 1.

c) Proportionality of the interference

i. Whether, in light of the acquittal of the first group of applicants of the charge of participation in a Mafia-type criminal organisation, the finding of special dangerousness and the subsequent confiscation of assets were justified

359. The object of this question is the principle of autonomy between criminal proceedings and preventive confiscation proceedings, which was consecrated by the Plenary of the Court of Cassation in the *Simonelli* judgment (Cass., Plenary, judgment no. 18/1996, and, for a recent example, Cass., I, judgment no. 36878/2023). Article 29 of the Anti-Mafia Code enshrines the principle of autonomy between criminal action and

prevention action, which is one aspect of the broader principle of autonomy between criminal and preventive proceedings.

360. According to the Constitutional Court, the justification for this principle lies in the different functions of preventive measures vis-à-vis criminal penalties (Constitutional Court, judgment no. 419/1994, ordinance no. 124/2004 and judgment no. 291/2013), as well as the different methodology of preventive and criminal proceedings, the former being focused on the assessment of conduct that is not necessarily criminal (Constitutional Court, ordinance no. 275/1996).

361. Recent legislative and jurisprudential developments have reduced the impact of the principle of autonomy, either by referring the hypothesis of qualified dangerousness to specific criminal offences [Article 4, paragraph 1, letters a), b), d), i-*bis*, i-*ter* of the Anti-Mafia Code], by narrowing down the scope of general dangerousness in the hypothesis of Article 1, paragraph 1, letter b) of the Anti-Mafia Code to the commission of profit-making offences during a certain period of time (Constitutional Court judgment no. 24/2019, and Cass., V, judgment no. 19227/2022), and by admitting the judge's recusal in criminal proceedings when he has already decided upon the same facts in preventive proceedings (Constitutional Court judgment no. 283/2000), and vice-versa (Cass., Plenary, judgment no. 25951/2022).

362. Yet important effects remain of this principle in domestic law and the case-law.

363. As a result of the principle of autonomy, the proposal for preventive measures is discretionary, contrary to criminal action. Such discretionary power belongs not only to the Public Prosecution but also to administrative authorities, which do not have the same guarantees of independence and impartiality of the Public Prosecutor.

364. The critique to this discretionary power comes from within the Italian judiciary governing body itself:

> "[…] however, it is necessary to reflect on the discretionary nature of the preventive action (personal and patrimonial) as it is deduced from articles 5 and 17 of the anti-Mafia code which are expressed in fact in terms of the possibility of promoting the request. The survey carried out has, in fact, confirmed this data and highlighted the need to verify in what terms the discretion is guided by organisational criteria, by choices of priority, and by the methods with which it is intended to regulate, in the prosecuting offices, the relationships between the

exercise of the preventive action and the exercise of the criminal action for the same facts and/or for events connected from the point of view of the evidentiary sources.[…] It would also be useful, moreover, if these Authorities - we are obviously referring to the police commissioner and the director of the DIA - also addressed the problem of clarifying and sharing the reference criteria for the exercise of the discretionary power of proposal." (Consiglio Superiore della Magistratura, *Risoluzione in materia di attività degli uffici giudiziari nel settore delle misure di prevenzione antiMafia e dell'aggressione ai patrimoni illeciti*, Deliberation of 13 September 2017).

365. Other than being hardly compatible with the principle of equality and the principle of obligation to prosecute, respectively enshrined in Articles 3 and 112 of the Italian Constitution, the discretionary exercise by administrative authorities of the power to present a proposal for preventive confiscation is incompatible with the requirement of predictability of the interference in view of Article 1 of Protocol no. 1.

366. The principle of autonomy is also problematic because it leaves room to the formation of *res judicata* of ontologically incompatible judgments in criminal and preventive proceedings. To avoid such contradiction, and safeguard legal certainty and uniformity in the legal system, the Supreme Court acknowledged certain limits to the autonomy principle, establishing that "the evidence, since it is aimed at demonstrating the historicity of certain facts, cannot be appreciated differently by the judge of criminal cognition and by the judge of prevention", and "the historical facts whose existence has been positively ascertained or negatively excluded in the criminal trial cannot fail to be considered, by the judge of prevention, as data of facts now established and not as elements susceptible to further verifications" (Cass., judgment n. 891/2001). But this case-law did not avoid the persistence of contradictory judgments in criminal and preventive proceedings regarding the same criminal facts.

367. The High Judicial Council itself acknowledges that the practice regarding the relationship between preventive seizure (and confiscation) proposal and request for seizure in criminal proceedings is arbitrary, suggesting that the cumulation of preventive and criminal proceedings is the best way forward:

"The answers to the questionnaire and the outcome of the meeting between the Public Prosecutors have highlighted hugely different realities with regard to the

choice between preventive seizure proposal and/or request for criminal seizure functional to extended confiscation, in particular in the presence of concomitant preventive and criminal proceedings. In some cases, priority is given to the preventive seizure (and confiscation) proposal advanced together with the request for the application of a personal precautionary measure (i.e. immediately after its issuance); in other cases, priority is given to the request for seizure aimed at extended confiscation, reserving the possible preventive seizure (and confiscation) proposal for a later stage; finally, there are cases in which only the seizure aimed at extended confiscation is requested. [...] It has clearly emerged that the choice of the double initiative (proposal for preventive seizure and request for seizure aimed at extended confiscation) is the one that presents the greatest possibility of a positive final outcome, even if the use of multiple resources in the different venues - preventive and criminal - inevitably increases the commitment of the judicial offices, including the Court (consulted both by the GIP office and the preventive court).” (Consiglio Superiore della Magistratura, *Risoluzione in materia di attività degli uffici giudiziari nel settore delle misure di prevenzione antiMafia e dell’aggressione ai patrimoni illeciti*, 13 September 2017, p. 20-21)

368. Although the High Judicial Council’s concern with the additional workload for the judicial offices derived from the cumulation of the preventive and criminal proceedings is understandable, there are two other major concerns which the High Judicial Council did not ponder, namely the confrontation of the suspect person with the obligation to defend himself in two different proceedings and the increase of contradictory outcomes of both proceedings. It is evident that these two major concerns, that the Council omitted to consider, cannot be ignored when it comes to the assessment of the proportionality principle under Article 1 of Protocol No. 1.

369. In cases of general dangerousness, the case-law is divided on the point whether the acquittal of the defendant in criminal proceedings bars prevention proceedings, in view of the principle of non-contradiction of the legal order (in favour of the barring effect, Cass., VI, judgment no. 45280/2024, II, judgment no. 4191/2022, I, judgment no. 36080/2020, I, no. 43826/2018, and I, judgment no. 31209/2015, but against it, Cass., II, judgment no. 31549/2019, II, judgment no. 33533/2021, II, judgment no. 4191/2022, and II, judgment no. 15704/2023).

370. This legal framework is symptomatic of the inadmissible lack of predictability of the case-law in the domain of the principle of autonomy. But there is an even more serious concern, which relates to the unequal treatment of citizens targeted by preventive confiscation based on suspicion of Mafia-type membership. The acquittal of the person accused of committing the crime set out in Article 416-*bis* of the Criminal Code does not prevent the evaluation of his alleged illicit activities in parallel prevention proceedings (Cass., I, judgment no. 36878/2023, and II, judgment no. 23813/2020). As a matter of law, Article 23-*bis*, paragraph 1, of Law no. 646/1982, which remains in force, according to Article 115 of the Anti-Mafia Code, provides for a mandatory exercise of preventive action in case of suspicion of crimes set out in Article 416-*bis* of the Criminal Code. Likewise, the newly introduced Article 578-*ter* of the Criminal Procedure Code provides that, in cases where confiscation is not applicable due to the dismissal of the criminal action, the presiding judge forwards the documents to the District Public Prosecutor for the initiation of the preventive asset confiscation action.

371. Contradictory *res judicata* outcomes may still be avoided through the institute of revocation. Article 7, paragraph 2, of Law no. 1423/1956 provided for the possibility of revocation or modification of personal preventive measures, upon request of the interested party and after hearing the public party that proposed it, when the cause that determined it had ceased or changed, namely when a sentence in criminal proceedings established facts irreconcilable with those established in the preventive proceedings (Cass, I, judgment no. 21639/2008). It took more than three decades for the case-law to extend this provision analogously to preventive confiscation (Cass., I, judgment no. 1071/1992).

372. Article 28, paragraph 1, letter b), of the Anti-Mafia Code provides for the very limited possibility of revocation of preventive confiscation when the facts ascertained by definitive criminal sentences, which have occurred or become known at a time subsequent to the conclusion of the prevention proceedings, "absolutely exclude" the existence of the conditions for the application of confiscation. The enigmatic expression "absolutely excludes" aims at excluding some grounds of revocation: revocation cannot be based on an acquittal according to Article 530, paragraph 2, of the Criminal Procedure Code (Cass, II, judgment no. 4191/2022, II, judgment no. 33533/2021, and II, judgment no.

31549/2019), nor on an order of dismissal of the case according to Articles 409 and 411 of the Criminal Procedure Code (Cass, VI, judgment no. 49750/2019).

373. According to the above-mentioned case-law, the justification for the different, harsher treatment of the specific case of qualified dangerousness based on membership of a Mafia-type association lies in the fact that the legislative concept of membership has been designed in a significantly different way compared to the corresponding criminal law provision, namely Article 416-*bis* of the Criminal Code. This argument is not convincing.

374. Firstly, the argument is historically wrong, since nowhere in the preparatory works of the Rognoni-La Torre law is the choice of the Legislator to distinguish participation from membership to be found, the only difference at that time being of a probative nature: proof beyond any reasonable doubt in the case of participation; sufficient evidence in the case of membership. The substantive degradation of the category of qualified social dangerousness is due to the subsequent initiative of the courts, for example, with the notable judgment of the Naples Court, of 30 January 1986 (Pres. Guglielmucci, Est. Pagano, Del Giudice), which argued that the person suspected of belonging to a mafia-type association would encompass "he who, persevering in a conduct of life, is likely to end up completely conforming to the associate, becoming such himself". The essential core of membership was thus moved into the realm of the elusive concept of "contiguity to the association" with the declared purpose of targeting, in prevention proceedings, the entrepreneurs who had paid extorsion money on the assumption that their "willingness [to pay the extorsion money] expresses an alarming propensity towards organised crime".

375. Secondly, the argument is logically circular, implying that membership can only be determined in autonomous preventive proceedings which are autonomous precisely because they determine membership. The fact that the concept of membership of a Mafia-type association was introduced in domestic law only in 1965 and the principle of autonomy only definitively consecrated by the Supreme Court in 1996 and by the legislator in 2011 shows that there is no necessary logical implication between them.

376. Thirdly, the argument is criminologically wrong, because the legal types of qualified social dangerousness refer to conduct sanctioned by the Criminal Code and, therefore, the connection with the criminal offence is evident. Indeed, the criminological categories of social dangerousness have the same "value" that the corresponding criminal

law provisions gives them (Cass, I, judgment no. 54119/2017). The fact that qualified dangerousness refers to specific criminal provisions aims precisely at facilitating a better cognitive evaluation of the factual basis of the proposed person's social dangerousness, but the more the legislator brings the prevention case closer to the substantive provisions of the Criminal Code, the more difficult it becomes to justify, under the guise of autonomy of preventive proceedings, the persistent differences in terms of procedural guarantees between them.

377. In sum, the principle of autonomy has been implemented in an unpredictable and unequal way, both with regard to the discretionary exercise of the power to present a proposal for preventive and the formation of *res judicata* of ontologically incompatible judgments in criminal and preventive proceedings, especially in the case of people suspected of membership of Mafia-type association who have been acquitted of the crime participation in in a Mafia-type criminal organisation under Article 416-*bis* of the Criminal Code. Such unpredictability and inequality have produced disproportionate results, such as those of the present case.

378. Having said that, the Court seemed to have admitted the most important effect of the autonomy principle, namely the applicability of preventive measures to an acquitted person, in § 195 of *Labita v. Italy*, cited above: "Furthermore, an acquittal does not necessarily deprive such measures of all foundation, as concrete evidence gathered at trial, though insufficient to secure a conviction, may nonetheless justify reasonable fears that the person concerned may in the future commit criminal offences." Although formulated in abstract terms, the sentence must be contextualised.

379. In *Labita*, the Court was addressing the proportionality of the restriction to the applicant's freedom of movement under Article 2 of Protocol No. 4, with regard to the decision to place the applicant under special supervision taken on 10 May 1993 at a time when there effectively existed some evidence that he was a member of the Mafia, i.e., before the delivery of the acquittal judgment of 12 November 1994. The domestic preventive court ordered the severance of the preventive proceedings relating to the attachment of the applicant's holding in a company and some of his immovable property, and the fate of these severed confiscation proceedings was not known to the Court.

380. Thus, the present case calls for a different assessment, which is warranted both in terms of facts because *Labita* is not a case of preventive confiscation, and in terms of law,

because *Labita* could not anticipate the change of paradigm in preventive confiscation law produced by the legislative reform of 2008-2009. Correctly, in *Garofalo and Others v. Italy*, cited above, the Court did not even mention the outdated § 195 of *Labita v. Italy*.

381. The disproportionate consequences of the principle of autonomy, demonstrated above in general terms, are evident in the concrete circumstances of this case too. To show that the present case is an eloquent example of disproportionate judicial practice, I will refer again to the language used by the domestic courts.

382. When addressing the principle of autonomy, the 2014 confiscation decree simply referred to the "consolidated jurisprudence" and stated that "circumstantial elements can be deduced - as occurred in the case in question - from a sentence of acquittal, since it is the duty of the prevention judge to evaluate, with an independent judgment, the elements forming the basis of the sentence issued in criminal proceedings (in this sense, see Cass. Pen., Sez. 1, sentence no. 6521 of 20/1/1997 - Rv.209528).[…] The indications of affiliation to a Mafia clan, therefore, can also be deduced from the same historical facts in relation to which the configurability of criminal unlawfulness has been excluded or from other, acquired or independently deduced in the prevention trial."

383. Consequently, the 2014 confiscation decree considered two sources: from pages 46 to 51, it referred to the pre-trial detention order and from pages 51 to 60 to the testimonies of the four informants (Vara Ciro, Giuffrè Antonino, Campanella Francesco and Greco Giacomo) who had been questioned during the second trial of the Court of Appeal in the criminal proceedings. About these new statements, the Court considered that "[t]hese are statements with characteristics of highly circumstantial evidence that, in the context of the preventive trial, for the purposes of recognizing the subjective condition of Mafia membership, do not require corroboration of any kind." Despite the fact these were hearsay statements, and sometimes even double hearsay statements, i.e., hearsay statements that contain another hearsay statement itself, the Court of Appeal judges for preventive measures did not find it necessary to approach this evidence with caution, relying on the case-law which did not apply Article 192 of the Criminal Procedure Code to preventive proceedings, but ignoring the lesson of §§ 157 and 158 of *Labita v. Italy*. On this untenable basis the Court of Appeal judges for preventive measures decided that the evidence produced before the criminal courts was sufficient to find that the Cavallotti were active part of the system of distribution of the tenders and not a victim of the Mafia

and therefore that the opposite thesis of the defence was "a distortion of the evidence acquired during the long penal proceedings".

384. The Cavallotti's acquittal did not hinder the finding of dangerousness, according to the 2014 confiscation decree, because the 2010 Court of Appeal judgment found "the acquittal of the defendants CAVALLOTTI was based on a lack of evidence regarding the realisation of a bilateral pact between the CAVALLOTTI and the top mafiosi.[…] "from the same conclusion reached by the criminal judge to deny the existence of the guilt of the CAVALLOTTI defendants, one can extrapolate the concept that underlies Mafia membership […], that is, the existence for a certainly considerable time of a close relationship of contiguity, also from an economic perspective […] that has linked all the members of the CAVALLOTTI family to the Mafia leaders" (p. 64-65)

385. On the contrary, the simple reading of the 2010 Court of Appeal judgment shows that the judges not only excluded the naturalistic dimension of the fact as attributable to the accused persons, because the evidence had "no individualizing value of the conduct", but they neutralised all the evidence items brought by the Public Prosecutor against the accused persons, considering them as "intrinsically weak and generic" (see for a similar reasoning, Cass., I, no. 21369/2008, which shows that there was jurisprudence that already at the time of the 2011 confiscation decree pointed to the prevalence of the 2010 acquittal judgment over the discretion of the preventive judges). In view of the conduct of the Court of Appeal judges for the prevention measures, who turned the evidence assessment of the 2010 Court of Appeal judgment upside down, the critique of distortion of the evidence could be returned to them.

386. Nevertheless, the 2015 Court of Cassation judgment shared the Court of Appeal's application of the principle of autonomy, considering that the acquittal did not impact on the "unchanged underground reality […], that is, the proximity of the Cavallotti, dating back to the years '80, to the top of Cosa Nostra."

387. I have already argued that this Court of Appeal's line of argumentation is unacceptable under the perspective of the principle of presumption of innocence and the perspective of the legality of the concept of membership of a Mafia-type association. In addition to that, it leads to a disproportionate application of preventive confiscation, since it produces unnecessary punishment of the proposed persons based on the exact same evidence that led to their acquittal.

388. To compound the violation, the preventive confiscation applied in the present case could not be revoked under Article 28, paragraph 1, letter b), of the Anti-Mafia Code, because of its transitional norm. It could only be revoked under Article 7, paragraph 2, of Law no. 1423/1956. In fact, the applicants tried this legal avenue but were unsuccessful once again. The decree of 3 May 2019, which rejected the revocation of the confiscation, among other arguments, found the informant Brusca's important exculpatory clarification regarding the methane gasification works as irrelevant precisely because, in the domestic court's view, the famous incriminating notes read in conjunction with the related testimonies were prior to the awarding of the tender, thus ignoring the 2004 Court of Cassation judgment prohibiting the use of the said testimonies. Having appealed this decree, the Court of Appeal rejected the request for revocation considering the case-law on new evidence that had been developed on the provision of Article 28 of the Anti-Mafia Code. This case-law (Cass, Plenary, judgment no. 43668/2022) does not consider new evidence "that which can be deduced and not deduced within the scope of the […] [prevention] procedure". Yet since the request had been formulated pursuant to Article 7 of the 1956 law, and in view of the explicit transitional provision of the Anti-Mafia Code, the Court of Appeal should have followed the most favourable case-law, namely the *Adduino* judgment, which considered as new, for the purposes of revoking the confiscation, any evidence not assessed, not even implicitly, in the prevention proceedings, even that not submitted due to the lawyer's fault. Hence, the request for revocation was rejected due to a more unfavourable jurisprudence consolidated on a rule (Article 28 of the Anti-Mafia Code) that, by express legislative provision, could not find application in prevention proceedings initiated before the entry into force of the anti-mafia code.

389. One could argue that the lack of proportionality could nevertheless be avoided in cases where the prevention judge had evaluated elements other than those examined in the criminal proceedings, with an argument drawn from the Constitutional Court judgment no. 23/1964, according to which an acquittal on grounds of insufficient evidence could never in itself justify a finding that a person posed a danger to society, since other factual indications of dangerousness had to be present.

390. Regardless of the strength of the argument in theory, the fact remains that this was not the present case. The first group of applicants were subjected to prevention

proceedings and the ensuing preventive confiscation measure based on the same evidence which had led the criminal courts to acquit them.

391. Hence, in the circumstances of the present case, it is undeniable that the finding of qualified dangerousness and the ensuing preventive confiscation measures after the acquittal of the first group of applicants was manifestly disproportionate.

ii. Whether the domestic authorities showed that the assets formally owned by the second group of applicants actually belonged to the first group of applicants in a reasoned manner, on the basis of an objective assessment of the factual evidence, and without relying on a mere suspicion

392. According to Article 2-*bis*, paragraph 3, of Law no. 575/1965 and its amendments, a presumption of fictitious ownership operated regarding the ascendant, descendant, spouse, and cohabiting partner, and the availability could be presumed without specific investigations, based on the simple disproportion between the value of the assets and the declared income or economic activity carried out.

393. Giovanni Cavallotti, Salvatore Mazzola, and Salvatore Cavallotti did not fall under the category provided for by Article 2-*bis*, paragraph 3, of Law no. 575/1965 and its amendments, because they were not spouses, ascendants, descendants, and did not even cohabit permanently with the first group of applicants. Hence, no such presumption of fictitious ownership of assets applied to them.

394. To avoid this legal constraint, the domestic courts resorted to an ingenious instrument, the concept of "Mafia enterprise", which implied the collective accountability of all those who had held social positions for the conduct of the Cavallotti enterprises. Making ample use of this jurisprudential construct, which has never entered hard law, the domestic courts did not show that the assets formally owned by the second group of applicants belonged to the first group of applicants in a reasoned manner, based on an objective assessment of the factual evidence, and without relying on a mere suspicion.

395. The 2014 confiscation decree denounced the "close relationship of contiguity, also under an economic perspective […] which has linked all the components of the Cavallotti family to the top mafiosi", paying no attention to the 2010 Court of Appeal findings that the evidence did not allow for any identification of the role of each individual member of

the Cavallotti family in spite of the fact that they all were involved in the management of the companies and held social positions (p. XLIV). The exact same evidence that had led the later court to conclude that the evidence had "no individualizing value of the conduct" was estimated by the former as assuming a "highly indicative character" of the membership to a Mafia-type association.

396. Once again, the 2015 Court of Cassation judgment shared the approach of the Court of Appeal, finding that it had given an "adequate reply" to the applicants' complaint of lack of individual responsibility, but also adding that any control of that issue was beyond the scope of its jurisdiction.

397. In the prevention proceedings, the Cavallotti brothers were always mentioned in the plural: "the Cavallotti companies", "the Cavallotti brothers", "the Cavallottis". The domestic courts never explained how, when, and why Salvatore Vito, Vincenzo and Gaetano, considered individually, made use of the intimidating force typical of the associative bond in the exercise of their economic activity. It is a well-known principle that social dangerousness must be personal. In this case, however, there is a reversal of the paradigm of the form for ascertaining subjective dangerousness. In other words, a sort of "collective" dangerousness was configured: given that the companies (always in the plural) were allegedly favoured by Mafia, the people who held social positions were socially dangerous. In the domestic courts' reasoning, social dangerousness originates from companies, is always declined in the plural, and from the companies it passes to the people.

398. I have demonstrated above that the concept of Mafia enterprise is not compatible with the principle of legality and the domestic courts do not provide a lawful assessment of the liability of proposed persons. *A fortiori*, this critique is even more powerful when it comes to the assessment of liability of third persons who allegedly function as strawmen of the proposed persons. The domestic courts did not provide for any justification for the different treatment given on the one hand to Gaetano Cavallotti, Vincenzo Cavallotti and Salvatore Vito, and on the other to Giovanni Cavallotti, Salvatore Cavallotti and Mazzola Salvatore, although they all held social positions in the supposedly colluded Cavallotti companies. One does not understand why some members of the Cavallotti family are proposed persons and other members of the same family are third parties since the domestic courts themselves did not draw a discernible line between them.

399. Furthermore, the domestic courts pointed to the discrepancy, as established by them, between the applicants' income and expenditure, without giving any further reasons whatsoever, and dismissed the applicant's objections in that regard. In addition, they failed to indicate whether the value of the assets to be forfeited equalled the established discrepancy between each applicant's income and expenditure (for an analogous situation, *Todorov and Others v. Bulgaria*, nos. 50705/11 and 6 Others, § 221, 13 July 2021).

400. In other words, the all-encompassing concept of Mafia enterprise was applied in a discretionary way, targeting the members of the family or clan in the old-fashioned way of retributive kin responsibility.

401. Having said that, even if it were compatible with the principle of legality, which is not, the concept of Mafia enterprise would raise a serious issue in terms of its compatibility with the principle of proportionality, because its *Sippenhaft* nature dissolves the principle of personal responsibility, leaving room to unnecessary punishment of the circle of people surrounding the proposed persons.

402. Thus, the domestic authorities did not show that the assets formally owned by the second group of applicants belonged to the first group of applicants in a reasoned manner, relying on a mere collective suspicion, contrary to the objective assessment of the factual evidence made by the 2010 Court of Appeal judgment.

iii. Whether the domestic authorities showed that the confiscated assets could have been of wrongful origin in a reasoned manner, on the basis of an objective assessment of the factual evidence, and without relying on a mere suspicion, also in light of the date of their acquisition

403. This question raises the issue of the so-called temporal correlation rule. According to the *Spinelli* judgment, it is necessary to define the period during which the proposed person was socially dangerous and only the assets that entered into the patrimony of the proposed person during that period can be subject to patrimonial preventive measures. By logical implication of this rule, the dangerousness of the person is transferred to the asset acquired during the period in which the person was dangerous, becoming the asset itself immanently dangerous, which would allow for its confiscation even when the person was

no longer dangerous, or no longer alive at all. Confiscation would neutralise the "genetic" dangerousness generated by the acquisition of the illicit asset.

404. Although the purpose of the temporal correlation rule was to limit the previously *omnibus* preventive confiscation, it did not prove useful to limit the discretion of the judges. My argument is based on five premises.

405. First, the temporal connection rule is unapplicable to the preventive confiscation per equivalent, since the confiscated assets have no temporal correlation with the period of illicit enrichment (Cass., V, judgment no. 41016/2023). Furthermore, preventive confiscation per equivalent may be manifestly excessive, with the possible double confiscation of both the countervalue of the transmitted asset which entered the patrimony of the proposed person, and the equivalent of the transmitted asset transferred to assets legitimately owned.

406. Second, the temporal connection rule is hardly compatible with the hypothesis of common dangerousness which targets not a single action but a segment of life and the indication of illicit origin of the assets is represented by the analysis of the overall disproportion rather than by the identification of the profit of the single crime, as it occurs with confiscation per equivalent.

407. Third, the temporal parametrisation of dangerousness in cases of qualified dangerousness would potentially lead to an evaluation of the entire life of the proposed person. To avoid this difficulty, the Court of Cassation used until recently a non-legal presumption of stability of the bond between the suspect person and the Mafia-type association (*semel mafiosus, semper mafiosus*), unless there were signs of repent or change of life (Cass, Plenary, judgment no. 111/2017). This reversed the burden of proof, attributing to the defence the burden to prove repentance or change of life and disobliging the State from proving the *dies ad quem* of the period of qualified dangerousness.

408. Fourth, the case-law interpreted loosely the requirement of temporal correlation, admitting the confiscation of assets acquired after the final moment of dangerousness, with the justification that these assets could have been purchased with proceeds accumulated illegally during the period of dangerousness (Cass., VI, judgment no. 31634/2017, and II, judgment no. 14165/2018).

409. Fifth, domestic courts have been divergent in the extent of the consequences to be drawn in the case of a business of legitimate origin which has been subsequently

conducted with Mafia methods, and in the case of a business started with Mafia capital and methods which has been subsequently "cleaned". According to a maximalist trend in the Court of Cassation case-law, the preventive confiscation of a business complex cannot be ordered only with reference to the ideal share attributable to the use of illicit resources, since it is not possible to distinguish, due to the unitary nature of the asset, the contribution of lawful components attributable to entrepreneurial capacity and initiative from that attributable to illicit means, especially when the consolidation and expansion of the economic activity have been facilitated by the criminal organisation (Cass., VI, judgment no. 7072/2021, V, judgment no. 16311/2014, and along the same line, II, judgment no. 9774/2015, I, judgment no. 29667/2014, II, judgment no. 20993/2012, and V, judgment no. 17988/2009). According to a minimalist trend, confiscation of all the assets that make up the business complex should only be ordered in the case of absolute or, in any case, very clear, value preponderance of resources of an illicit nature, with the obligation therefore for the judge to compare the legal resources with the illicit resources, without arriving at general, automatic confiscations (Cass., V, no. 10983/2020, VI, judgment no. 43447/2017, VI, judgment no. 31634/2017, and V, judgment no. 17739/2012). The Court of Cassation has been unable to settle the significant differences of opinion until now, leaving room for a random and therefore unpredictable applicability of the temporal correlation rule. It is telling that the Anti-Mafia Code did not codify the temporal correlation rule. Since the courts had failed to provide the legal certainty that is expected from them, the legislator could and should have undertaken the responsibility to provide for such legal certainty, but he did not.

410. The application of the temporal connection rule in the Cavallotti case testifies to my argument: both the 1999 seizure decree and the 2011 and 2014 confiscation decrees were delivered before the *Spinelli* judgment and paid no attention to any temporal correlation between the period of dangerousness and the moment of acquisition of the illicit asset and the 2015 Court of Cassation only paid lip service to the new jurisprudential rule.

411. In 1999, the seizure was ordered without any consideration of the temporal correlation between the period of the hypothesised social danger and the moment of the illicit capital increase. Furthermore, no verification of the disproportion between the value

of the assets and the income declared by the proposed persons or their activities was conducted.

412. The 2011 confiscation decree explicitly stated that it was not necessary to establish any temporal correlation between the period of social danger and the moment of the illicit enrichment ("to order confiscation, disproportion does not necessarily have to be accompanied by the acquisition of the asset in a contemporaneous or subsequent period to the manifestation of the proposed person's membership in the Mafia-type association or the manifestation of general dangerousness"). The preventive judges even criticised the case-law that, before the *Spinelli* judgment, considered temporal correlation as a prerequisite and limit for confiscation, for the following reason:

> "part of the jurisprudence believed that [...] it is necessary a temporal correlation between social dangerousness and the acquisition of assets, being it necessary to verify whether the latter entered the availability of the proposed person, not previously, but subsequently or at least concurrently with his involvement in the Mafia-type association [...]. In the presence of [only] disproportion between declared income and the value of the asset, there is no need for the [derivation of the asset from criminal activity] connection".

413. In reality, in 2014, the Court of Appeal prevention judges identified a much broader period of social dangerousness than that in which the alleged criminal offences objects of the criminal proceedings occurred, since the social dangerousness of the first group of applicants was arbitrarily backdated to the mid-1980s while in the 2002 conviction judgment issued by the Palermo Court of Appeal, the historical events for which the Cavallotti were accused were placed between 1994 and 1998. In any event, the 2014 Court of Appeal confiscation decree used the concept of Mafia enterprise to confiscate assets acquired before the identified period of dangerousness due to the alleged impossibility of separating the lawful components from illicit ones within a corporate complex (see, reproaching the lack of temporal connection between the acquisition of the asset and the period of dangerousness, *Todorov and Others v. Bulgaria*, cited above, § 247).

414. The 2015 Court of Cassation judgment was delivered after the *Spinelli* judgment and made a short reference to it but ultimately validated the appealed court's ample confiscation decree based on the jurisprudential construct of the Mafia enterprise and the

mantra of *semel mafiosus, semper mafiosus* ("the appellate judges correctly applied the undisputed jurisprudential teaching of legitimacy, anchored to experiential and sociological data, according to which, if the 'membership' of the proposed person to a Mafia-type association is ascertained, the stability and actuality of the bond can reasonably be presumed, which, given its nature, is tendentially enduring, subject to proof of withdrawal or disintegration of the criminal structure, so that no particular motivation is necessary in this regard.")

415. Summing up, while setting the *dies a quo* of the Mafia contamination of the Cavallotti enterprises in the mid-eighties, the preventive courts went even further than the charges in the criminal proceedings of which the applicants had been acquitted. To leave open the determination of the *dies ad quem* of that contamination, the preventive courts made use of the presumption *semel mafiosus, semper mafiosus*, which would be later disavowed in the *Gattuso* judgment. By finally ignoring the temporal correlation rule in the present case, and using the all-encompassing concept of Mafia enterprise, the preventive courts not even complied with the domestic proportionality standards, imposing an indiscriminate and omnivorous confiscation of the entire property of the applicants, without distinguishing assets of lawful and unlawful origin.

416. Therefore, the preventive courts did not show that the confiscated assets could have been of wrongful origin in a reasoned manner, based on an objective assessment of the factual evidence, and without relying on a mere suspicion, also in light of the date of their acquisition.

iv. Whether the reversal of the burden of proof as to the lawful origin of assets acquired many years earlier imposed an excessive burden on the applicants

417. Article 2-*ter* of Law No. 575/1965 and its amendments established, in the presence of "sufficient evidence", a presumption that the assets of a person suspected of belonging to a criminal association constitute the profit from illicit activities or its reinvestment. Following the different wording introduced by Legislative Decree no. 92/2008, referring to "appear to be the fruit", it has been discussed whether the intensity of the standard of evidence required from the prosecution in relation to the illicit origin of the assets has changed in any way.

418. The *Spinelli* judgment interpreted the presumption of the illicit origin of assets in a unclear, convoluted way, considering one the one hand that the intensity of the standard of evidence had not changed, but admitting on the other that it must be based on grave, precise and concordant evidentiary elements, standard that corresponds in substance to that of Article 192, paragraph 2, of the Criminal Procedure Code. This is the sinuous wording of the judgment:

> "No innovation has been introduced even in terms of the intensity of the evidentiary contribution, depending on the expression "they appear to be the result", in place of the previous formulation which required the existence of "sufficient evidence" of illicit origin (originally, expressly provided only for seizure). And in fact, the assumption of the illicit origin of the assets must always be the result of a demonstrative process, which also makes use of presumptions, entrusted to circumstantial elements if they are characterised by the necessary coefficients of gravity, precision, and concordance."

419. Furthermore, the Court of Cassation added that the disproportion between the acquired illicit assets and the revenue of the suspected person does not represent an autonomous requirement of preventive confiscation, but an alternative evidentiary simplification criterion, which could replace the requirement of illicit origin of the assets of a member of a Mafia-type association.

420. On the contrary, the Council of State expressed a straightforward view on the need for grave, precise and concordant evidentiary elements to prove both the illicit origin of assets and their availability to the proposed person (Council of State, III, judgment no. 1499/2019).

421. It is important to note that the legal presumption related to the illicit origin of the assets was not the only one applied in the Cavallotti case. The 2015 Court of Cassation judgment made use or validated the use of the following presumptions: firstly, the presumption of stability of the bond between the suspect person and the Mafia-type association, unless there were signs of repent or change of life; secondly, the presumption that those who officiated with social roles at the various companies of the Cavallotti group had "the probable awareness" of the Mafia-methods that facilitated the assignment of the profitable contracts; and thirdly, the presumption of illicit origin of the assets acquired by the Cavallotti companies, unless proof that the presumed fact did not exist was presented.

There is another presumption that the Court of Cassation found outside of its control, namely the presumption of availability of assets to the proposed persons through third persons who acted as figureheads of the proposed persons, upon which the 2014 confiscation decree had been based (for example, "it is highly probable that the capital contributions [of the third parties] were made with the illegal proceeds deriving from the entrepreneurial activity of the proposed CAVALLOTTI").

422. The Government considered that the applied rules governing the burden of proof in preventive confiscation proceedings are reasonable by virtue of the jurisprudential principle of the "proximity of the evidence" (on this principle, also affirmed in criminal procedure law, see Cass., II, judgment no. 3883/2019, and I, judgment 30520/2023). The domestic courts did not refer to this principle during the preventive proceedings.

423. The Court has repeatedly expressed the view that the Article 2-*ter* presumption is not *per se* inadmissible (for example, *Cacucci and Sabatelli v. Italy*, no. 29797/09, § 43, 17 June 2014, *Leone v. Italy*, no. 30506/07, § 37, 2 February 2010, *Bongiorno v. Italy* (dec.), no. 4514/07, § 47, 5 January 2010, *Morabito and Others v. Italy* (dec.), no. 58572/00, 5 June 2005, *Bocellari and Rizza v. Ita*ly (dec.), no. 399/02, 28 October 2004, and *Licata v. Italy* (dec.), no. 32221/02, 27 May 2004, always referring to the expression "*indices suffisants*").

424. The main argument supporting the Court's findings was that the presumption based on Article 2-*ter* of Law no. 575/1965 and its amendments was not absolute, since the defence could rebut the presumption by presenting evidence that demonstrated that the presumed fact did not exist. But the Court did not consider the legal uncertainty resulting from the convoluted language of the Court of Cassation in the *Spinelli* judgment regarding the correct interpretation of the presumption of the illicit origin of assets. In addition, it is not clear what was the applicable burden of proof regarding the other presumptions used or validated by the Court of Cassation in the present case, whether it was necessary for the defence to prove that the presumed fact did not exist or a lesser standard should apply, the defence having only to create doubt in regard to the presumed fact. All this legal uncertainty left the applicants in an inadmissibly vulnerable procedural position.

425. Furthermore, in *Labita v. Italy*, cited above, the Court censured the burden put on the proposed person to demonstrate repent and to change life, but the domestic courts,

including the Court of Cassation, simply ignored this jurisprudence of Strasbourg in the Cavallotti case.

426. The cumulative effect of the interplay of the four presumptions above-mentioned constituted an excessive burden on the applicants. In *Todorov and Others v. Bulgaria*, cited above, § 246, the Court advised domestic courts to be cautious with presumptions regarding confiscation of the proceeds of crime when the applicants had not provided proof of sufficient lawful income. In the present case, the domestic courts burdened the applicants with a complex web of interrelated presumptions that left little room for the applicants to contest a fair case.

427. The untenable situation of the applicants was further aggravated by the fact that, in 1999, they were required to provide proof of their income and expenses over a period of 27 years, in spite of the fact that, according to Article 2220 of the Civil Code, mandatory accounting records (journal and inventory book), active and passive invoices, telegrams and letters sent or received must be kept for only ten years from the date of the last registration (for a similar situation, *Dimitrovi v. Bulgaria*, cited above, § 46, and *Todorov and Others v. Bulgaria*, cited above, § 202). The public prosecutor required from the applicants the *probatio diabolica* of demonstrating the legitimacy of their entire patrimony.

428. Moreover, preventive courts should be prevented from making findings based on the presumption of illicit origin when the relevant evidence is unjustifiably inaccessible to the proposed person, as the Venice Commission recommended (see Part III-B-2-a-iii). Between the seizure and the first confiscation decree the domestic proceedings lasted 12 years, without the applicants being able to advance their case and having no access to their seized enterprises and the respective accounting documents, which made the exonerating evidence inaccessible and the defence practically impossible, gainsaying the principle of proximity of the evidence. Indeed, the applicants were banned from accessing their enterprises. During their detention, Gaetano, Vincenzo, and Salvatore Vito Cavallotti obviously could not go to enterprises while Giovanni and Salvatore Cavallotti, as well as Mazzola Salvatore, had been removed from company management and were expressly forbidden to approach the enterprises' headquarters. Furthermore, Salvatore Cavallotti's sons, Vincenzo Cavallotti and Salvatore Mazzola, who worked in the family businesses, were also removed. Later one, during the proceedings to revoke the

confiscation, the applicants asked the president of the section for preventive measures of the court of Palermo to authorize their access to the documents of the companies subject to confiscation, for the purpose of preparing their defence. Although the president granted the authorisation, the Cavallotti never had access to the enterprises' documents because, according to the judicial administrator, they had been lost during the judicial administration.

429. In the Cavallotti case, the dangerousness requirement ceased, in fact, to serve as a temporal enclosure for confiscation because, in the presence of acquisitions distant in time, the only verification carried out was on the alleged global inadequacy of income and financial capacity of the proposed persons, from which the illicit origin of an innumerable mass of assets was presumed.

430. To say that in these circumstances the burden of proof remains with the public party is totally illusory, because prosecution can simply sit in the sofa and play the game of presumptions, shifting the burden of proof again and again, forcing the counterpart to justify the disproportion between assets and income capacity and deriving from their allegedly unsatisfactory reply the unlawful origin of the assets, so that the doubt ultimately benefits the prosecution and the judgment only validates a predefined accusatory hypothesis. That is exactly what happened in the Cavallotti proceedings.

431. Therefore, in the concrete circumstances of this case, it is patent that the reversal of the burden of proof as to the lawful origin of assets acquired many years earlier was disproportionate.

v. Whether the applicants were afforded a reasonable opportunity of putting their arguments before the domestic courts and whether the latter duly examined the evidence submitted by the applicants

432. As already demonstrated above (see Part IV-C-2-c), the guarantees of the preventive proceedings are not in keeping with the substantive criminal nature of preventive confiscation, although it is imposed by criminal courts and following a judgment that mirrors the criminal process. Historically, domestic case-law has equated preventive confiscation to criminal confiscation, extended confiscation, and even confiscation by equivalent, without ever applying fully the principles of criminal

procedure law. Some have been, some have not. This variable geometry of criminal procedure guarantees, which is characteristic of preventive proceedings, is characteristic of a contradictory, and therefore arbitrary, construct that does not fit into the constitutional framework of penalties and security measures.

433. But even assuming, for the sake of argument, the non-criminal nature of preventive confiscation, the domestic courts did not provide in the present case a reasonable opportunity for the defence to put their arguments before them and whether the latter duly examined the evidence submitted by the applicants. Next, I will examine the most important grounds of this critique.

α. Unappealable seizure and selling decrees

434. The preventive judges seized the assets of the applicants and *ex officio* seized other assets considered attributable to them based on the report of the judicial administrator and sought evidence to confiscate the seized assets. Right from the start, they took an initiative-taking role that went much further than that of the public prosecutor.

435. As I noted above, the seizure decree considered neither the necessary temporal correlation between the period of the hypothesised social danger and the moment of the capital increase, nor the disproportion between the value of the assets and the income declared by the proposed persons or their activities, but the targeted persons could not appeal to the Review Court, because no such appeal was allowed by law.

436. Even before issuing the confiscation decree, and prior to hearing the defence's arguments in trial, the domestic court authorised the administrator to sell off part of seized assets, as if it had already decided to confiscate. This decision was unappealable too.

β. Distortion of testimonial evidence

437. The 2011 confiscation decree distorted the testimonies of the witnesses, in a flagrant denial of justice. The file shows that the informants' statements made to the Public Prosecutor during the preliminary investigations of the parallel criminal

proceedings were used in the decree, but their responses to the questions posed by the defence during cross-examination in the prevention procedure were omitted in the decree.

438. According to the 2011 confiscation decree, "[t]he accomplice Mazzola Giovanni also referred more generally to the inclusion of the proposed members in the context of Mafia entrepreneurship, at the instigation of the heads of the Belmonte Mezzagno family, on which both Siino and Brusca essentially offered convergent indications."

439. This statement represents a blatant distortion of the testimonial evidence. The file shows that, contrary to what was claimed in the confiscation decree, Brusca and Siino expressly denied that the Cavallotti were mafiosi. Brusca did not know any of the Cavallotti and had declared that he was only interested in collecting the extorsion money for the methane gas work conducted in Monreale (a town in the province of Palermo). Siino, on the other hand, had only seen Salvatore Vito Cavallotti once, who allegedly told him that he was subjected to pressing extortion requests ("being squeezed like a lemon"). Siino, during the prevention proceedings, at the express request of the president of the judging panel (Judge Silvana Saguto), had excluded that Salvatore Vito had economic relations with a member of the Belmonte Mezzagno Mafia family (Ciccio Pastoia). The only existing relationship consisted in the fact, as Siino explained, that Salvatore Vito had to pay the extorsion money.

440. For the domestic court, it was not even required that a specific factual imputation be directed at a particular person. In the words of the court, "when 'the indications derive from a co-accused, it is not necessary that it possesses the requirements indicated by Article 192 of the Criminal Procedure Code, as, if not *icto oculi* unreliable or contradicted by contrary elements, it constitutes, in itself, an element that, although incapable of providing proof of the criminal responsibility of the co-accused, is still suitable to demonstrate, in terms of probability, the fact attributed to him in preventive proceedings' and it is not required that the co-accused is necessarily accompanied by those individualizing external corroboration necessary for its use for the purpose of forming the evidence". By doing so, the preventive judges directly contradicted the assessment of the evidence made by the criminal judges who had established the total lack of corroboration for the informants' statements, based on the exact same evidence.

γ. Discretionary expert decisions

441. The applicants disputed the conclusions of the court-appointed experts. The Palermo Court limited itself to observing that the experts' reports were not "adequately contradicted by the observations of the opposing applicant's experts" without explaining on what basis the third parties' and the proposed persons' counterarguments did not amount to adequate contradiction to the expert's conclusions. The applicants had requested the Court of Appeal to order a new expert opinion to provide the necessary clarifications, but no new expertise was conducted during the appeal, despite the fact that the experts themselves had suggested that, "in the opinion of the undersigned, an investigation is necessary that goes beyond the skills of the experts as it should concern the direct acquisition of information from current and former employees, in order to refute the recourse to undeclared payments" (see experts' report).

442. In subsequent Preventive Proceedings no. 248/2011 R.M.P., two experts, Giovanni Giammarva and Attilio Masnata, applied different criteria to evaluate family consumption, real estate values, and the impact of labour costs, and consequently, no disproportion between revenue and expenses was hypothesised. There are no apparent reasons why the same experts applied in two preventive proceedings targeting the Cavallotti family hugely different criteria, which shows the degree of arbitrariness of the experts' reports.

δ. False and arbitrary facts

443. The 2011 confiscation decree referred to alleged facts that had been mentioned in the 1998 pre-trial order, such as this one: "The fugitive […] invites his interlocutor to deal with a theft (obviously not reported by the victim in compliance with the strictest rules of "Cosa Nostra")". This statement is objectively false. In fact, the theft in question was reported at the Carabinieri Barracks in Pedara. However, in this way, the false failure to report became evidence of the Cavallotti' adherence to "the strictest rules of Cosa Nostra".

444. Other than using false facts, the factual reasoning of the confiscation order is utterly arbitrary when it referred to "these lists often include some companies of the Cavallotti group together with numerous other companies that have already been found

to be colluding with the Mafia in other personal and financial prevention proceedings before this Court (among others, Vadalà Nello […], Schimmenti Gaetano […], Schimmenti Gaetano, Schimmenti Santo, Siino Giuseppe, Siino Angelo, Lunetto Gaetano, Cataldo Farinella)". The Cavallottis participated in tenders, without winning any, in which other subjects listed in the confiscation order in brackets also participated. These were all convicted of Mafia association or collusion with the Mafia. The judicial syllogism underlying this statement clearly reflected the opinion according to which the Cavallotti were guilty of criminal offences:

major premise – The Cavallotti participated in some tenders.

minor premise – Mafia and colluding individuals participated in the same tenders.

conclusion – The Cavallotti are also Mafia or colluding individuals.

ε. Use of prohibited evidence

445. There cannot be a more serious example of an unduly assessment of the evidence than the statement of facts as proven based on evidence acquired *contra legem*.

446. In fact, the declaration by the 2004 Court of Cassation judgment of inadmissibility of the informant Ilardo's statements and of the respective summary made by Col. Riccio invalidated the reasoning repeatedly carried out by the domestic judges regarding Provenzano's interest in favour of the Cavallotti brothers, in the phase preceding the awarding of the contracts. The star evidence, namely the anteriority of the Agira and Centuripe notes from which the domestic preventive courts deduced the Cavallotti brothers' inclusion in the system of illicit division of contracts and the Mafia nature of their businesses, was found legally unusable by the 2004 Court of Cassation judgment. From that moment on, affirming the anteriority of the Agira and Centuripe notes with respect to the awarding of the tender meant using evidence acquired *contra legem*.

447. That is precisely what the judges did during the prevention proceedings, ignoring the principle that "evidence declared unusable because acquired in violation of the prohibitions established by law is not susceptible to use for any type of judgment,

including that relating to the application of preventive measures" (Cass., Plenary, no. 13426/2010).

448. Referring to the notes from Agira and Centuripe, the court for prevention measures pretended, in the 2011 confiscation decree, that the notes were "equipped with an autonomous and precise circumstantial value, without the need to connect its usability to the indications at the time in this regard offered by Ilardo Luigi to Colonel Riccio and declared unusable in the criminal trial", but then added that the date was derived from Ilardo's statements: "Considering that according to the reconstruction provided by Ilardo himself, the letter in question dates back to October 1994, the aforementioned emergencies unequivocally lead to supporting that the awarding of the aforementioned tender was decided in places other than the institutional ones and even well before the official deadlines". (my bold)

449. The 2014 Court of Appeal judgment took it for granted that the tender for the gasification of the municipalities of Agira and Centuripe had been manipulated, precisely based on the statement that the notes were prior to the awarding of the tender: "the collaboration of the Cavallotti company with the Mafia family found confirmation in the notes on the public procurement contracts in Agira and Centuripe [...], and in the priority of all such annotations compared to the execution of the works". (my bold)

ζ. Unappealable vices of the confiscation decree

450. The total lack of a reasonable opportunity of discussing the defence's arguments results also from the fact that the confiscation order recalled the 2002 conviction and the annulment sentence of the 2004 conviction but ignored the acquittal judgment of 2001 and contradicted the 2010 acquittal judgment, making a flagrantly one-sided assessment of the criminal proceedings and the evidence produced therein. It is important to note that the 2001 judgment held that the fact imputed to the accused persons did not exist, with a specific acquittal formula of Article 530, paragraph 1, of the Criminal Procedure Code, and that the 2010 judgment confirmed the acquittal of the first instance court. Yet the Court of Appeal preventive judges sustained, in the 2014 confiscation decree, that the

2010 judgment left room for doubt regarding the applicants' criminal responsibility, which could itself ground a social dangerousness finding.

451. Faced with this contradictory and illogical reasoning of the 2014 confiscation decree, the proposed persons had no possibility to argue this and other vices before the Court of Cassation, due to the non-appealability of the illogicity of the motivation (Cass., II, judgment no. 5807/2017), as well as the non-acceptance of decisive evidence or the undervaluation of defence arguments (Cass., Plenary, judgment no. 33451/2014).

3. Preliminary conclusion

452. As obvious from the above, the Government's statement that "the preventive proceedings took place with adversarial procedure in full compliance with the principle of equality of arms" (§ 178 of their Observations) is unacceptable. The deficiencies of the strictly inquisitorial confiscation proceedings under Law no. 575/1965 and its amendments impacted the fairness of the preventive proceedings lodged against the applicants to such a degree that the interference with their rights was disproportionate to the legitimate aims pursued and therefore the domestic courts deprived them of a fair opportunity to put forward their defence and of a duly examination of the submitted evidence.

453. Hence, in my opinion, there has been a violation of both the substantive and the procedural limbs of Article 1 of Protocol No. 1.

E. Final Conclusion

454. This independent legal opinion is finalised exactly 33 years after the tragic killing of Judge Giovanni Falcone by the Corleonesi Mafia on the A29 motorway near the town of Capaci. The judicial saga of the Cavallotti family reminded me of his powerful words on preventive measures when he, in his straightforward manner, said that "*le misure di prevenzione sono un mezzo antidemocratico e che il vero luogo della punizione del responsabile è il processo penale*". For Judge Giovanni Falcone, using preventive measures without ascertaining guilt "*è una strategia già perdente che non serve a nulla.*

Serve soltanto a creare ancora una volta dei martiri dello Stato, delle persone che affermano di aver subito delle profonde ingiustizie e, in buona parte, è anche vero".

455. In addition to circumventing basic standards of criminal and criminal procedural law and blurring the criminal-civil divide, this losing strategy, *strategia già perdente*, is even more worrying because the Legislator ignores the real dimension of its impact in Italian society and economy. The official report based on Article 49 of the Anti-Mafia Code does not provide information regarding the presumed criminal offence triggering preventive confiscation (for example, how many confiscation decrees were issued on the suspicion of membership of a Mafia-type association), the final decision delivered in the respective criminal proceedings (for example, how many confiscation decrees were issued after an acquittal), the state of the assets when returned to society (whether they were still in an operational state or not) and the losses in terms of employment, revenue and taxation caused by the issuing of preventive confiscation decrees.

456. Worse still, the available figures leave an uncomfortable lingering suspicion that it is not by chance that the martyrs of the State are always the same and come always from the same regions of Italy. Confirming the unambiguous statement made in Parliament on 25 May 1965 regarding whom the legislator envisaged to target with the new preventive confiscation law, the response provided to the inquiry made by Deputy Giachetti on 10 February 2025 acknowledged that 7182 enterprises had been submitted to preventive confiscation between 2019 and 2023, with a "particular concentration in Sicily, Campania and Calabria".

457. It is high time for the Italian Legislator and Magistrates to rethink whether the current system of preventive confiscation is still an instrument compatible with the human rights friendly Italian Constitution and its international obligations. It is logically and deontologically inadmissible that the Government defend a position in Rome and in Brussels, to justify mutual recognition of preventive confiscation orders within the European Union, and the opposite position in Strasbourg, to deprive the addresses of these orders of the guarantees of Articles 6 §§ 2 and 3 and 7 and Article 4 of Protocol No. 7.

458. This much-needed reflection can only be launched if Legislator and Magistrates truly acknowledge what is obvious, that preventive confiscation under Law no. 575/1965 and its amendments and the Anti-Mafia Code have led to the stripping of the entire wealth of innocent people, placing them in a much worse economic and social position than they

held prior to engaging in presumed criminal conduct. If this highly repressive system of non-conviction-based confiscation was introduced under the populist rhetoric that it was intended to target a particularly dangerous phenomenon of organised crime in the south of Italy, what is already a questionable criminal policy choice, its subsequent indiscriminate expansion to cover profit-making offences in the field of common criminal law puts at stake the very constitutional foundations of the Italian State. What is the purpose of having a liberal, human-rights-friendly criminal law and procedure to deal with common criminality, as Italy has, if you have side-by-side a Middle-Age-like, human-rights-unfriendly preventive measures law, and whenever the former fails to punish the suspect person the Italian State turns to the latter to finish the job?

459. I respectfully submit, as an independent legal expert, that this reflection is also warranted by Italy's international obligations under Articles 6 § 2, and 7 of the European Convention on Human Rights and Article 1 of Protocol No. 1, which have been violated in the case of the Cavallotti brothers and their families, true *martiri dello Stato*.

Paulo Pinto de Albuquerque
Lisbon, 23 May 2025

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Annex I. The Author

Paulo Pinto de Albuquerque is a former judge of the European Court of Human Rights. His term of office lasted from April 2011 to March 2020. In that capacity Judge Pinto de Albuquerque ruled as a single judge on 3,507 applications, as a member of a committee on 3,343 applications, as a member of a chamber on 3,585 applications and as a member of a Grand Chamber on fifty-six applications. In total Judge Pinto de Albuquerque ruled on 10491 applications. As a Strasbourg Judge Pinto de Albuquerque delivered 162 separate opinions.

Judge Albuquerque delivered separate opinions in *Varvara v. Italy*, *De Tommaso v. Italy* (GC), *GIEM and Others v. Italy* (GC), among other leading Italian cases.

He was the President of the most important committee of the European Court of Human Rights, the Committee on the Rules of the Court, from October 2018 to March 2020. He was the Member of the Grand Chamber panel which selects the cases that are reviewed by the Grand Chamber, from June to December 2012 and again from June to December 2016. He was the founder and president of the Criminal Law Group of the European Court of Human Rights, from January 2014 to March 2020.

Judge Pinto de Albuquerque functioned as an expert for GRECO (Group of States against Corruption) of the Council of Europe, tasked with the supervision of implementation of the Council of Europe Criminal Law Convention against Corruption. In this capacity he performed the third round of evaluation of GRECO in Belgium (2009) and Bulgaria (2010). His reports and recommendations to improve the law and practice against corruption in Belgium and Bulgaria were approved by the General Assembly of the GRECO.

Before joining the ECtHR, Judge Pinto de Albuquerque had a judicial career at national level, from September 1990 to September 2004. Professor Pinto de Albuquerque was called (admitted) to the Portuguese Lawyers' Bar in 2009 and is today a practicing lawyer and jurisconsult. As an independent legal expert, he has delivered legal opinions in cases pending before the following jurisdictions: Italy, Norway, Portugal, Spain, and Ukraine.

He is also a full Professor of Law (*Professor Catedrático*), at the Faculty of Law of the Catholic University of Lisbon, where he has taught since 2003. He currently teaches

criminal law and European human rights law. He has taught, among others, at the Illinois College of Law (USA), the Yaroslav Mudryi National Law University, in Kharkiv (Ukraine), the Law Faculty of the University of Paris II-Assas (France) and the Law Faculty of the University of Florence (Italy).

He was awarded twice the degree of Doctor of Law Honoris Causa by Edge Hill University, in Omskirk (United Kingdom) and by Yaroslav Mudryi National Law University, in Kharkiv (Ukraine); the Medal of the University of Toulouse and the seal of the Faculty of Law of the same University, in Toulouse (France); a commendation by the Japanese Government for promoting the cooperation agreement between the Supreme Court of Japan and the European Court of Human Rights; and the Medal of Honour of the Portuguese Lawyers' Bar for the defence of human rights and constitutional freedoms during a 30-year long professional career as judge, lawyer and law professor.

He has published thirty-six books and ninety-two journal articles and book chapters in the fields of criminal law and procedure, administrative offences law, disciplinary offences law, human rights law, constitutional law, and international law. His books were published in Belgium, Brazil, France, Germany, Italy, the Netherlands, Portugal, the Russian Federation, Spain, Türkiye, Ukraine, and the United Kingdom.

Annex II. Table of Italian Proceedings

1. Sentenza del Tribunale di Palermo of 21.3.2001 (cognizione)
2. Sentenza della Corte di Appello di Palermo of 14.1.2002 (cognizione, *Pavone*)
3. Sentenza della Corte d'Appello di Palermo of 14.3.2002 (cognizione)
4. Note alla perizia tecnica d'ufficio redatte dai consulenti di parte Prof. Rag. Michele Ciacciofera e Prof. Avv. Alberto Stagno d'Alcontres of 8.10.2004 (129 pages)
5. Note ed osservazioni sulle questioni tecniche della C.T.U. di Ing. Giuseppe Mannino, of May 2004 (49 pages)
6. Note tecniche della difesa sulla "Risposta" dei Periti dell'11 maggio 2005 nell'interesse dei Signori Cavallotti, di Ing. Giuseppe Mannino, of June 2005 (26 pages)

7. Brevi note e riflessioni su "Risposta dei CT.U.alle osservazioni della CT.P." di parte Prof. Rag. Michele Ciacciofera e Prof. Avv. Alberto Stagno d'Alcontres, of July 2005 (4 pages)
8. Sentenza della Corte di Cassazione di annullamento of 17.12.2004 (cognizione)
9. Sentenza della Corte d'Appello di Palermo of 6.12.2010 (cognizione)
10. Decreto del Tribunale di Palermo of 31.5.1999 (prevenzione)
11. Decreto di sequestro della Siciliana SERVIZI of 23.7.1999 (prevenzione)
12. Decreto di confisca del Tribunale di Palermo of 14.102011 (prevenzione)
13. Decreto di confisca della Corte d'Appello di Palermo of 14.2.2014 (prevenzione)
14. Sentenza della Corte di Cassazione of 12.11.2015 (prevenzione)

Annex III. Table of Italian Legislation

Royal Decree no. 1848 of 6 November 1926

Royal Decree no. 773 of 18 June 1931

Legislative Decree of the Lieutenant of the Realm no. 159 of 27 July 1944

Legislative Decree of the Lieutenant of the Realm no. 134 of 26 March 1946

Law no. 1423 of 27 December 1956

Law no. 575 of 31 May 1965

Decree of the President of the Republic no. 223 of 20 March 1967

Law no. 152 of 22 May 1975

Law no. 646 of 13 September 1982

Law no. 327 of 3 August 1988

Law no. 256 of 24 July 1993

Decree of the President of the Republic no. 252 of 3 June 1998

Legislative-Decree no. 92 of 23 May 2008 (converted into Law no. 125 of 24 July 2008)

Law no. 94 of 15 July 2009

Law no. 136 of 13 August 2010

Legislative Decree no. 159 of 6 September 2011

Annex IV. Table of Italian Case-law

Italian Constitutional Court

Judgment no. 2/1956 of 23 June 1956

Judgment no. 27/1959 of 20 April 1959

Judgment no. 29/1961 of 25 May 1961

Judgment no. 23/1964 of 4 March 1964

Judgment no. 46/1964 of 4 June 1964

Judgment no. 32/1969 of 27 February 1969

Judgment no. 177/1980 of 16 December 1980

Ordinance no. 177/1988

Judgment no. 419/1994 of 24 November 1994

Ordinance no. 275/1996 of 11 July 1996

Judgment no. 335/1996 of 30 September 1996

Ordinance no. 124/2004 of 7 April 2004

Judgment no. 93/2010 of 8 March 2010

Judgment no. 21/2012 of 9 February 2012

Judgment no. 216/2012 of 18 July 2012

Judgment no. 291/2013 of 2 December 2013

Judgment no. 24/2019 of 24 February 2019

Italian Council of State

Judgment of Section III, no. 1499/2019

Italian Court of Cassation

Judgment no. 1149/1990 of 27 February 1990 (C. pen. 91, 1461)

Judgment of Section I, no. 1071/1992 of 31 March 1992

Judgment of Section I, no. 2019/1995 of 30 May 1995

Judgment of Section I, no. 2654/1995 of 15 July 1995

Judgment of the Plenary, no. 18/1996 of 3 July 1996

Judgment of Section I, no. 6521/1997 of 28 January 1997

Judgment of Section I, no. 6515/1997 of 20 November 1997

Judgment of Section I, no. 5649/2002 of 16 January 2002

Judgment of Section I, no. 15684/2002 of 7 February 2002

Judgment of Section V, no. 23041/2002 of 14 June 2002

Judgment of Section VI, no. 36762/2003 of 25 September 2003

Judgment of Section I, no. 43046/2003 of 11 November 2003

Judgment of the Plenary, no. 33748/2005 of 20 September 2005

Judgment of Section II, no. 44326/2005 of 5 December 2005

Judgment of Section VI, no. 12174/2005 of 29 March 2005

Judgment of the Plenary, no. 57/2007 of 19 December 2006

Judgment of Section I, no. 21369/2008 of 28 May 2008

Judgment of Section V, no. 37659/2008 of 28 May 2008

Judgment of Section V, no. 17988/2009 of 30 April 2009

Judgment of Section V, no. 49479/2009 of 25 September 2009

Judgment of the Plenary, no. 13426/2010 of 24 March 2010

Judgment of Section VI, no. 6570/2012 of 17 February 2012

Judgment of Section I, no. 11768/2012 of 29 March 2012

Judgment of Section V, no. 17739/2012 of 10 May 2012

Judgment of Section II, no. 20993/2012 of 31 May 2012

Judgment of Section V, no. 14044/2013 of 24 March 2013

Judgment of Section VI, no. 39204/2013 of 17 May 2013

Judgment of Section V, no. 16311/2014 of 23 January 2014

Judgment of Section I, no. 23641/2014 of 11 February 2014

Judgment of the Plenary, no. 33451/2014 of 29 May 2014

Judgment of the Plenary, no. 4880/2014 of 26 June 2014

Judgment of Section I, no. 29667/2014 of 8 July 2014

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Judgment of Section VI, no. 10931/2017 of 1 February 2017

Judgment of the Plenary, no. 12621/2017 of 16 March 2017

Judgment of Section VI, no. 31634/2017 of 17 May 2017

Judgment of Section I, no. 54119/2017 of 14 June 2017

Judgment of the Plenary, no. 111/2017 of 30 November 2017

Judgment of Section VI, no. 43447/2017 of 6 July 2017

Judgment of Section II, no. 14165/2018 of 20 October 2017

Judgment of Section I, no. 54119/2017 of 30 November 2017

Judgment of Section II, no. 14346/2018 of 28 March 2018

Judgment of Section I, no. 43826/2018 of 19 April 2018

Judgment of Section V, no. 17947/2018 of 20 April 2018

Judgment of Section II, no. 27855/2019 of 22 March 2019

Judgment of Section II, no. 31549/2019 of 6 June 2019

Judgment of Section II, no. 3883/2019 of 19 November 2019

Judgment of Section VI, no. 49750/2019 of 7 December 2019

Judgment of Section II, no. 23813/2020 of 17 July 2020

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Judgment of Section II, no. 7072/2021 of 14 September 2021

Judgment of Section II, no. 4191/2022 of 11 January 2022

Judgment of Section V, no. 19227/2022 of 16 May 2022

Judgment of the Plenary, no. 43668/2022 of 26 May 2022

Judgment of the Plenary, no. 25951/2022 of 6 July 2022

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Judgment of Section II, no. 14265/2023 of 13 January 2023

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Annex V. Table of International Legislation

Council of Europe

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CTS no. 141, 1990) and the respective Explanatory Report

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Fighting organised crime by facilitating the confiscation of illegal assets. Analysis of Irish, Italian, Dutch, British systems, Parliamentary Assembly of the Council of Europe Committee on Legal Affairs and Human Rights, Report, Doc. 14516, 26 March 2018

The use of non-conviction-based seizure and confiscation, 2020

European Union

Framework Decision 2001/500/JHA of 26 June 2001

Framework Decision 2003/577/JHA of 22 July 2003

Framework Decision 2005/212/JHA of 24 February 2005

Framework Decision 2006/783/JHA of 6 October 2006

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

Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018

Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation

United Nations

Convention against corruption (2004)

Challenges, good practices and lessons learned, and procedures allowing the confiscation of proceeds of corruption without a criminal conviction from States parties that have implemented such measures in accordance with Article 54, paragraph 1 (c), of the Convention Note by the Secretariat, CAC/COSP/2021/15, 6 October 2021

Other International Soft Law Materials

AIRE Centre (Advice on Individual Rights in Europe) and RAI (Regional Anti-Corruption Initiative), Tools and Best Practices for International Asset Recovery Cooperation Handbook (2019)

CARIN (Camden Asset Recovery Inter-Agency Network) Recommendations (2023)

FATF (Financial Action Task Force) Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery (2012)

FATF International standards on combating money laundering and the financing of terrorism & proliferation. The FATF Recommendations (2025)

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EUROJUST Note on the Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders A new legal framework for judicial cooperation in the field of asset recovery (2020)

OECD (Organisation for Economic Co-operation and Development) Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019)

SWISS FEDERAL GOVERNMENT, BASEL INSTITUTE ON GOVERNANCE, WORLD BANK and UNODC (United Nations Office on Drugs and Crime) Guidelines for the efficient recovery of stolen assets (2020)

UNICRI (European Commission and the United Nations Interregional Crime and Justice Research Institute) Good Practices in accelerating the capture of illicitly-acquired assets (2024)

UNODC Model Law on Extinción de dominio. Legal Assistance Program for Latin America and Caribbean (2011)

UNODC Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime (2012)

Annex VI. Table of International Case-law

Court of Justice of the European Union

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Judgment of 28 October 2021, *Komisia za protivodeystvie na koruptsiata i otnemane na nezakonno pridobito imushtestvo*, C-319/19, ECLI:EU:C:2021:883

Judgment of 9 March 2023, *Otdel "Mitnichesko razsledvane i razuznavane"*, C-752/21, ECLI:EU:C:2023:179

Judgment of 4 October 2024, *1Dream and Others*, C-767/22, ECLI:EU:C:2024:823

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European Court of Human Rights

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Arcuri and Others v. Italy (dec.), no. 52024/99, 5 July 2001

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Cacucci and Sabatelli v. Italy, no. no 29797/09, 17 June 2014

Capitani and Campanella v. Italy, no. 24920/07, 17 May 2011

Cleve v. Germany, no. 48144/09, 15 January 2015

De Tommaso v. Italy [GC], no. 43395/09, 23 February 2017

Del Río Prada v. Spain [GC], no. 42750/09, 21 October 2013

Dimitrovi v. Bulgaria, no. 12655/09, 3 March 2015

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Episcopo and Bassani v. Italy, no. 47284/16 and 84604/17, 19 December 2024

Garofalo and Others v. Italy (dec.), no. 47269/18, 21 January 2025

Geerings v. the Netherlands, no. 30810/03, 1 March 2007

GIEM SRL and Others v. Italy [GC], no. 1028/06 and Others, 28 June 2018

Gogitidze and Others v. Georgia, no. 36862/05, 12 May 2015

Grande Stevens and Others v. Italy, no. 18640/10 and others, 4 March 2014

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N. v. Italy (dec.), no. 12386/86, 15 April 1991

Nicoleta Gheorghe v. Romania, no. 23470/05, 3 April 2012

Öztürk v. Germany [Plenary], no. 8544/79, 21 February 1984

Perre and Others v. Italy (dec.), no. 1905/05, 12 April 2007

Perre and Others v. Italy, no. 1905/05, 8 July 2008

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Prisco v. Italy, no. 38662/97, 15 June 1999

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Riela and Others v. Italy (dec.), *no.* 52439/99, 4 September 2001

Telbis and Viziteu v. Romania, no. 47911/15, 26 June 2018.

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Ziliberberg v. Moldova, no. 61821/00, 1 February 2005

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