EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 47269/18
Claudia GAROFALO against Italy
and 3 other applications
(see list appended)

The European Court of Human Rights (First Section), sitting on 21 January 2025 as a Chamber composed of:

Ivana Jelić*, President*,
Erik Wennerström,
Alena Poláčková,
Georgios A. Serghides,
Gilberto Felici,
Raffaele Sabato,
Frédéric Krenc*, judges*,

and Ilse Freiwirth, *Section Registrar*,

Having regard to the above applications lodged on the various dates indicated in the appended table,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having regard to the comments submitted by the association *Unione delle Camere Penali Italiane*, which had been invited by the President of the Section to intervene,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix.

2. The Italian Government ("the Government") were represented by their Agent, Mr L. D'Ascia, *Avvocato dello Stato*.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The first set of proceedings concerning a preventive measure

4. On 21 December 2007 the public prosecutor attached to the Latina District Court requested the application of a preventive measure in respect of Maurizio De Bellis (the second applicant), namely, that he be placed under special police supervision (*sorveglianza speciale di pubblica sicurezza*) and that a compulsory residence order (*obbligo di soggiorno*) to stay in the municipality of his residence for a duration of five years be imposed on him. The public prosecutor argued that the second applicant fell within the category of persons of "ordinary dangerousness" (*pericolosità generica*) provided for by section 1(1) and (2) of Law no. 1423 of 27 December 1956 (see paragraph 16 below; "Law no. 1423/1956").

5. In a decision of 19 December 2008, the Latina District Court dismissed the request. It observed that the person in question (*proposto*, that is, the person directly concerned by a request to apply a preventive measure) could not be considered a danger to society at that time and, accordingly, considered that the requested preventive measures could not be applied (see paragraph 28 below). In particular, although the second applicant had been the subject of several criminal proceedings in respect of the crimes of theft, injury, attempted murder and drug offences, the last criminal offence dated back to 2005.

B. The second set of proceedings concerning a preventive measure and the confiscation order

1. The first-instance proceedings

6. In 2013, following the second applicant's arrest for involvement in drug offences, the public prosecutor requested the Latina District Court to place him under special police supervision and impose a compulsory residence order on him for a duration of five years, and to seize and confiscate, as a preventive measure, certain assets directly or indirectly at the second applicant's disposal, in particular those owned directly by him or by third parties on his behalf (see paragraph 27 below).

7. On 14 January 2014 the Latina District Court ordered the seizure of assets both owned by the second applicant and at his disposal, that is, those formally owned by third parties, such as his wife, Claudia Garofalo (the first applicant), his mother, Antonia Rito (the third applicant), and his daughter, Martina De Bellis (the fourth applicant).

8. At the hearing of 20 October 2016, in a decision deposited in the registry on 28 November 2016, the Latina District Court granted the public prosecutor's request and imposed the requested preventive measure applied in respect of individuals (see paragraph 13 below) on the second applicant and the preventive measure of the confiscation of the seized assets. The court dismissed the second applicant's argument that the imposition of preventive

measures was precluded by the *ne bis in idem* principle, on account of the existence of a previous set of proceedings concerning a preventive measure, as there had been new facts justifying the imposed measures. It further observed that the second applicant could be considered a danger to society on the basis of the evidence produced by the public prosecutor and the pending criminal proceedings. Lastly, as regards the assets, the court observed that the confiscated assets, although formally owned by third parties, were actually at the second applicant's disposal.

2. The appeal proceedings

9. The applicants appealed against the decision to the Rome Court of Appeal complaining, *inter alia*, of an alleged breach of the *ne bis in idem* principle and of the absence of the subjective and objective conditions required by law for the imposition of preventive measures.

10. In a decision of 5 October 2017, deposited in the registry on 24 October 2017, the Rome Court of Appeal quashed the lower court's decision as regards the preventive measures applied in respect of individuals (that is, the special police supervision and the compulsory residence order), observing that the second applicant had not presented a danger to society at the time of the imposition of the measures (see paragraph 28 below). Conversely, it dismissed the part of the applicants' appeal concerning the preventive measure of the confiscation, finding that it was not necessary to ascertain that the "dangerousness" existed at the time of the imposition of the measure; moreover it considered that the assets acquired were disproportionate to the applicant's lawful income and they had failed to prove their lawful origin.

3. The proceedings in the Court of Cassation

11. The applicants lodged appeals on points of law with the Court of Cassation, complaining of an alleged breach of the *ne bis in idem* principle and of the lack of the requirements provided for by law for the imposition of the preventive confiscation measure.

12. In judgment no. 14347 of 13 March 2018, deposited in the Registry on 28 March 2018, the Court of Cassation dismissed the applicants' appeals on points of law.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Relevant domestic law

13. The domestic legal framework distinguishes between preventive measures applied in respect of individuals (*misure di prevenzione personali*)

and preventive measures applied in respect of property (*misure di prevenzione patrimoniali*).

1. The evolution of the legislation concerning preventive measures in respect of individuals

14. Preventive measures applied independently of proof of the commission of an offence date back to the nineteenth century in Italy. They were already in existence prior to the unification of Italy in 1861 and were subsequently reincorporated into the legislation of the Kingdom of Italy by the Pica Act (no. 1409/1863), and later by the 1865 Consolidated Public Safety Act (*Testo Unico di Pubblica Sicurezza*).

15. In 1948 the Italian Constitution came into force, placing emphasis on the protection of fundamental freedoms, in particular personal liberty (Article 13) and freedom of movement (Article 16), as well as the principle of legality in relation to criminal offences and security measures (Article 25 §§ 2 and 3).

16. Law no. 1423/1956 on preventive measures in respect of individuals presenting a danger for security and public morality (*Misure di prevenzione nei confronti delle persone pericolose per la sicurezza e per la pubblica moralità*) provided for the imposition of preventive measures in respect of "persons presenting a danger for security and public morality". Section 1 of the Law, as amended by Law no. 327 of 3 August 1988, provided that preventive measures applied to:

> "(1) individuals who, on the basis of factual evidence, may be regarded as habitual offenders;
>
> (2) individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime; and
>
> (3) individuals who, on the basis of factual evidence, may be regarded as having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public order."

17. Law no. 575 of 31 May 1965 on provisions against the mafia ("Law no. 575/1965") extended the applicability of preventive measures in respect of individuals to persons suspected of belonging (*appartenenza*) of a mafia-type organisation.

18. Over the years, preventive measures have been adapted to comply with the fundamental criteria referred to in judgments of the Constitutional Court, requiring judicial intervention and observance of the principle of legality in their application.

2. The evolution of the legislation concerning confiscation as a preventive measure

19. Confiscation as a preventive measure was introduced in the Italian legal system through section 14 of Law no. 646 of 13 September 1982, which introduced sections 2-*bis* and 2-*ter* into Law no. 575/1965. As originally formulated, the application of a preventive confiscation measure was conditional on a preventive measure being applied to an individual (see paragraph 13 above) and, accordingly, on the "current danger" to society posed by the individual to whom the measures applied having been ascertained (see paragraph 28 below).

20. In 2008 the legislature made preventive measures in respect of individuals and the preventive measure of confiscation autonomous. In particular, section 10(1)(c)(2) of Law-Decree no. 92 of 23 May 2008 (as amended when converted into Law no. 125 of 24 July 2008) added subsection 6-*bis* to section 2-*bis* of Law no. 575/1965, stipulating that "[p]reventive measures concerning individuals and property can be requested and applied separately".

21. The latter provision was further amended by section 2(22) of Law no. 94 of 15 July 2009, which added to the text, after the word "separately", the following sentence: "regardless of the danger to society posed by the person in question (*proposto*) at the time of the request for the preventive measure."

3. Legislative Decree no. 159 of 6 September 2011

22. This Decree (the *Codice delle leggi antimafia e delle misure di prevenzione* – Code of Anti-Mafia Laws and Preventive Measures) was adopted on the basis of Law no. 136 of 13 August 2010, by which the Parliament entrusted the Government with reorganising the provisions concerning preventive measures. This instrument was significantly amended on the basis of Law no. 161 of 17 October 2017 ("Law no. 161/2017").

23. Chapter II of Part I, entitled "Preventive measures in respect of property" regulates the preventive confiscation measure.

24. In accordance with the interplay between Articles 1, 4 and 16 of Decree no. 159/2011, the preventive confiscation measure may be applied to, *inter alia*, individuals who are suspected of belonging to a mafia-type organisation and "individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime".

25. Article 18 enshrines the principle of the autonomy between preventive measures concerning individuals and property, as well as the principle of the applicability of the latter irrespective of the death of the person in question. It reads as follows:

"1. Preventive measures concerning individuals and property can be requested and applied separately and, as regards preventive measures concerning property, independently of the danger to society posed by the person in question at the time of the request therefor.

2. Preventive measures concerning property can be imposed also in the event of the death of the person in question. In this case, the proceedings shall continue against the heirs or, in any case, the successors in title.

3. Proceedings in respect of preventive measures concerning property can be initiated also in the event of the death of the person against whom the confiscation has been ordered; in this case, the request for the application of the preventive measure can be made in respect of all or particular heirs within five years from the death [of the person in question].

4. Proceedings in respect of preventive measures concerning property may be commenced or continued also in the event the person to whom the measure could be applied cannot be found [*in caso di assenza*] or resides or is domiciled abroad, on the proposal of the competent persons referred to in Article 17 in the last known place of abode of the person concerned, with regard to the goods and property which there is reason to believe are the proceeds of illegal activities or constitute the reinvestment of such goods and property.

5. For the same purposes, proceedings may be commenced or continued when the person is subject to a custodial security measure or probation."

26. Article 23 § 1 provides that proceedings to impose the preventive confiscation measure are regulated by the provisions enshrined in Chapter I, Heading II, Sub-Heading I of the same Decree.

27. The preventive confiscation measure is regulated by Article 24 § 1 of the Decree, which, as originally formulated, read as follows:

"The court shall order the confiscation of the seized assets of which the person against whom the proceedings have been instituted (*proposto*) cannot justify the legitimate origin and of which, also through the intervention of a third party (*anche per interposta persona fisica o giuridica*), he or she is the owner or has at his or her disposal, in any capacity, in a value disproportionate to his or her income, as declared for income tax purposes, or to his or her economic activity, as well as of the assets which are the proceeds of unlawful activities or constitute the reuse thereof."

The relevant parts of the provision, as amended by Law no. 161/2017, reads as follows:

"The court shall order the confiscation of the seized assets of which the person against whom the proceedings have been instituted [*proposto*] cannot justify the legitimate origin and of which, also through a third party [*anche per interposta persona fisica o giuridica*], he or she is the owner or has at his or her disposal, in any capacity, in a value disproportionate to his or her income, as declared for income tax purposes, or to his or her economic activity, as well as of the assets which are the proceeds of unlawful activities or constitute the reuse thereof. In any event, the person in question cannot justify the legitimate origin of the assets by alleging that the money used to purchase them is the proceeds or reuse of tax evasion. ..."

B. Relevant domestic practice

1. The conditions for imposing preventive measures

28. In judgment no. 32 of 19 March 1969, the Constitutional Court clarified that, in order to impose a preventive measure in respect of an individual, it was not sufficient that he or she fell within one of the categories of "dangerousness" enshrined in section 1 of Law no. 1423 of 1956 (see paragraph 16 above), it was also necessary to ascertain that the "dangerousness" existed at the time of the imposition of the measure (*attualità della pericolosità*) and was not merely potential.

29. The precondition for the imposition of a preventive confiscation measure is the "reasonable presumption that the asset has been purchased with the proceeds of unlawful activities" (see Court of Cassation, Combined Divisions (*Sezioni Unite*), judgment no. 4880 of 2 February 2015).

30. The domestic case-law clarified that, in order to be characterised as falling within the category set out in Article 1 § 1 (b) of Decree no. 159/2011 – an individual who, on account of his or her behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime – it is necessary for there to have been at least one judicial ascertainment of the commission of a crime in criminal proceedings, which can derive from a conviction or from an acquittal containing a substantial ascertainment of the fact and its commission by the individual concerned (see Court of Cassation, judgments nos. 31209 of 24 March 2015, 53003 of 21 September 2017, and 11846 of 15 May 2018). The Constitutional Court considered that the cited provision could be considered sufficiently precise and foreseeable on account of, *inter alia*, that clarification made in the case-law (see Constitutional Court, judgment no. 24 of 27 February 2019).

2. The nature and purpose of the preventive confiscation measure

31. The domestic legal order distinguishes between penalties and security measures. In principle, penalties are aimed at sanctioning the offence committed whereas security measures are aimed at preventing the commission of further offences. As to preventive measures, traditionally viewed as security measures, there has been discussion among legal scholars as to whether they – in particular confiscation – should still, in particular after the reforms in 2008-09, be classified as security measures or rather as penalties. As regards the case-law, there have been the following developments.

(a) Court of Cassation

(i) Case-law prior to the 2008-09 reform

32. In judgment no. 18 of 17 July 1996, the Combined Divisions of the Court of Cassation observed that preventive confiscation measures were applied in specific proceedings concerning preventive measures and in accordance with specific rules, and required the ascertainment of the "current danger" to society posed by the individual concerned (see paragraph 19 above). However, in contrast to preventive measures in respect of individuals (*misure di prevenzione personali*), which were temporary in nature, their aim was to permanently remove goods and property from the use of the person suspected of belonging to a mafia-type organisation in order to prevent the possibility of increasing the individual's wealth through the commission of further crimes. According to the Court of Cassation, therefore, although the measure was not criminal in nature, it was not comparable to a proper preventive measure; it was rather a third species (*tertium genus*), that is an "administrative sanction" which could be equated, in its content and effects, to a security measure (see also, among others, Court of Cassation, Combined Divisions, judgment no. 57 of 8 January 2007).

(ii) Case-law following the 2008-09 reform

33. Following the legislative reform making preventive measures in respect of individuals and the preventive measure of confiscation autonomous (see paragraph 20 above), and allowing the imposition of confiscation as a preventive measure irrespective of the "current danger" posed by the individual in question (see paragraph 21 above), the Court of Cassation was called upon to examine the issue whether the measure had changed in nature and become a "penalty".

34. In judgment no. 14044 of 24 March 2013, the Fifth Criminal Division of the Court of Cassation observed that the case-law that had equated confiscation as a preventive measure to security measures (see paragraph 32 above) had been based on the common requirement of the subjective danger to society. Given that the 2008-09 reform had eliminated the requirement according to which, in order to impose a preventive confiscation measure, the "current danger" posed by the individual had to be ascertained, the measure had acquired the "objective nature of a sanction" (*natura oggettivamente sanzionatoria*).

35. By contrast, in judgment no. 39204 of 23 September 2013, the First Criminal Division of the Court of Cassation confirmed that the measure remained an "administrative sanction", since its purpose was that of "removing from economic circulation assets obtained from activities which ... are considered to be connected to the person in question being a member of a mafia-type organisation". In its view, the fact that the measure could be imposed irrespective of the "current danger" to society posed by the

individual at the material time had not changed this purpose and, accordingly, the nature of the measure, but had merely made more effective the possibility of achieving that aim. The Court of Cassation therefore held that the measure had a "preventive" and not a "punitive" nature. In particular, it held as follows:

> "... the public interest in the removal from economic circulation of assets of suspected illegitimate provenance, owing to their owner belonging to a mafia-type organisation, subsists for the sole fact that those assets have increased the wealth of the individual in question, irrespective of whether the latter continues to pose a danger, because the purpose of a preventive confiscation measure resides precisely in preventing the legal economic system from being altered by anomalous accumulation of wealth, whatever the current status of the person who later uses it. The preventive, and not punitive, nature of confiscation must therefore be reaffirmed, even after the 2008 and 2009 amendments ..."

36. Other judgments of the First Criminal Division followed the same approach (see, in particular, Court of Cassation, First Criminal Division, judgments nos. 44327 of 18 July 2013, and 16729 of 17 January 2014).

(iii) The intervention of the Combined Divisions of the Court of Cassation

37. As a result of the existence of conflicting interpretation, the issue was submitted to the Combined Divisions of the Court of Cassation, which addressed it in judgment no. 4880 of 2 February 2015.

38. The Court of Cassation observed that, as the Constitutional Court had already clearly stated, confiscation measures could have different natures. While their end result was always the deprivation of economic goods and property, they could be imposed for different reasons and for various purposes, so that, sometimes, they took on the nature and function of a penalty, security measure or a civil or administrative measure. What was to be considered was not the abstract and generic notion of confiscation, but the concrete confiscation resulting from a given law, with particular reference to its underlying purpose.

39. The Court of Cassation admitted that the 2008-09 reform had apparently done away with the main reason for equating a preventive confiscation measure to security measures, that is, the common reference to the danger to society posed by the individual concerned. However, it observed that, even under the new legal regime, the danger to society posed by the individual to whom the measure applied remained a precondition for its imposition, although it was not required that it existed at the time of the adoption of the measure.

40. As regards the purpose of the measure, the court held:

> "[T]he main purpose of the preventive measure of confiscation is, therefore, to remove illegally accumulated assets from the use of certain individuals who are unable to prove their legitimate origin."

41. Observing that the imposition of the measure required in any case the ascertainment of the danger to society posed by the individual at the time when the assets to be confiscated were acquired, the court ruled out the possibility that a preventive confiscation measure could be considered a direct *actio in rem*. As a result of its connection with the danger to society posed by the individual, in the Court of Cassation's view the measure retained a preventive function. In this regard, the court held as follows:

> "9. ... [On the one hand,] with respect to imposing preventive measures on individuals, the requirement that the individual pose a 'current danger' continues to have a *raison d'être*, given that, that danger being capable of coming to an end or greatly diminishing with the passage of time, it would be aberrant – as objectively useless, if not for surreptitious or spurious purposes – to apply a preventive measure to an individual who was no longer a danger to society; on the other hand, with respect to preventive measures in respect of property [confiscation], the notion of dangerousness is inherent to the *res*, owing to its illegitimate acquisition, and is 'genetically' inherent to it, in a permanent and, basically, indissoluble way.
>
> This means that the inescapable condition for the application of preventive measures in respect of property is the dangerousness of the individual, that is, his [or her] classification within one of the subjective categories provided for by the relevant legislation for the purposes of the application of the preventive measure. ...
>
> This is undoubtedly true, with the necessary clarification, however, that what is important is not so much the danger posed to society by the individual concerned, considered in itself, but rather the fact that he [or she] posed such a danger at the time of the acquisition of the asset.
>
> If this is so, and if this relationship is indefeasible, in the sense that, in so far as the person who purchased it was, at the time of the purchase, a dangerous individual, the preventive function of the confiscation is enhanced, inasmuch as it is intended to prevent the commission of further crimes, given the deterrent effect of the confiscation itself."

42. The Court of Cassation therefore drew a distinction between preventive measures in respect of individuals (*misure di prevenzione personali*) – applied to those who posed a "current danger" and, accordingly, aimed at preventing the commission of crimes – and preventive measures in respect of property (*misure di prevenzione patrimoniali*) – applied to "dangerous assets":

> "9. ... The observation made in the literature according to which, in applying preventive measures in respect of individuals, the attention of the legal system is focused on the character of the person as such, is therefore not unfounded: namely, in so far as he [or she] is considered, on the basis of certain parameters, to be a danger to society, that is, capable of committing crimes, according to a reasonable prognostic assessment. Therefore, a preventive measure in respect of an individual, aimed at averting the danger of the future commission of crimes, can only be justified by the persistent, current nature of the dangerousness of the individual in question.
>
> Whereas, as regards preventive measures in respect of property, that attention shifts to the *res*, which is considered 'dangerous'."

43. As regards the qualification of an asset as "objectively dangerous" in relation to the danger to society posed by the individual who purchased it, entailing the need to remove it from circulation irrespective of whether it was currently owned by that same individual, the Court of Cassation held as follows:

> "9. ... Thus, in the case of unlawfully acquired assets, the character of dangerousness is linked not so much to the way in which they were acquired or to their particular structural characteristics, but rather to the subjective character of the individual who acquired them. This means that the purchaser's dangerousness itself reverberates on the purchased assets, but once again not in a static way, that is to say, by the very fact of their subjective character, but rather in a dynamic projection, based on the principle of the objective dangerousness of keeping illegally acquired assets in the possession of those who are considered to belong – or have belonged – to one of the subjective categories envisaged by the legislature.
>
> The aforesaid reverberation ends up, then, by 'objectifying itself', translating itself into an objective attribute or special 'character' of the asset, capable of affecting its legal status. This is evident in the event of the death of the owner, already categorised as dangerous, or of formal transfer or fictitious registration (*intestazione fittizia*), given that the asset can, even in the possession of the successor in title, whether universal or particular, be subject to judicial attachment. In fact, it is evident that, in such circumstances, the confiscation to the detriment of heirs or apparent owners can no longer be justified by the relationship of pertinence between the *res* and the person in question (*proposto*), but only by reason of the objective 'character' of that asset, since it was, at the material time, acquired by an individual who posed a danger to society and, as such, was presumably the proceeds of a method of illegal acquisition. And, precisely because it has become 'objectively dangerous' (in the above-mentioned sense), by the same token it must be removed from the system of legal circulation.
>
> Even though, in such circumstances, the direct relationship between the asset and the dangerous individual has ceased to exist, the framing of the legal situation in the paradigm of prevention nevertheless remains unaffected."

44. Relying on the case-law of the Constitutional Court (see paragraph 51 below), the Court of Cassation further held that the measure was not merely preventive in the strict sense:

> "9. ... In this regard, this Court shares the reasoning of the Constitutional Court, according to which the rationale of the confiscation in question, on the one hand, 'includes, but exceeds, the aim of prevention, in so far as it aims to permanently remove the asset from illegal economic circulation, in order to insert it into another one, free from the criminal features that characterised the former', and, on the other hand, 'in contrast to preventive measures in the proper sense, goes well beyond the need of prevention in respect of specific individuals who pose a danger to society and therefore justifies the measure even in the event of their death.
>
> Therefore, also according to the theoretical approach of the Constitutional Court, to the essential core of prevention is added the specific purpose of removing the asset from illegal economic circulation, recovering it also from the universal heirs, in the event of the death of the dangerous individual.
>
> This extension of efficacy of the measure of confiscation cannot be considered either arbitrary or illegitimate, precisely because the asset, as the proceeds of an illegal obtainment, carries within itself a negative connotation, which requires its compulsory

removal, even after the death of the dangerous individual, other than the already noted distorting effects – from a macroeconomic perspective – of the illegal accumulation of wealth and income disproportionate to the person's situation.

But if this is the case, it is evident that such notion of dangerousness remains imprinted on the *res*, regardless of any legal event concerning its ownership (universal or particular succession) ..."

45. In subsequent passages, however, the Court of Cassation further stressed the preventive (in the strict sense) purpose of the measure:

"9.2. In conclusion, in the light of the principle of autonomy between preventive measures concerning individuals and property and, above all, of the principle which stipulates the possibility of confiscating assets to the detriment of the heirs of the dangerous individual, the dimension – and the same conceptual value – of 'dangerousness' of the assets and property that can constitute the object of the measure of confiscation, assumes a very particular meaning. With this expression, in fact, the character of the asset must be understood as being the proceeds of habitual dedication to crime or of Mafia activity and, therefore, the expression, in both cases, of a method of illegal acquisition. As such, it must be removed – by virtue of a *praeter delictum* measure – from the legal economy because of the deemed need to prevent the dangerous individual from continuing to be able to use it, and also as a deterrent against the commission of further illegal activities: and this is valid – as has been said – whether one is dealing with ordinary dangerousness or in the event of qualified dangerousness."

46. In the light of the above, the Court of Cassation ruled out the possibility that, even after the 2008 and 2009 legislative amendments, the measure could be considered punitive in nature. In this regard, the court added the following observations:

"9.3. In the light of these considerations, therefore, it appears justified to conclude that the legislative amendments, which removed the requirement of the "current danger" posed by the person in question, have not affected the legal nature of the preventive confiscation measure.

Accordingly, this Combined Divisions of the Court of Cassation maintain that the said confiscation must continue to be recognised as having a purely preventive purpose (*finalità prettamente preventiva*), beyond any possible 'para-punitive' reverberations, such as to not obscure its principal essence, that is, that of being an instrument intended, principally, to dissuade the individual from committing further offences and from having a lifestyle that conflicts with the rules of civil society.

The previously noted possibility to impose the measure of confiscation to the detriment of heirs and successors in title constitutes the most eloquent confirmation of the persistent preventive connotation of the measure, ruling out its punitive nature."

47. In the Court of Cassation's view, this conclusion was further confirmed by the fact that only assets acquired during the period when the individual concerned posed a danger to society could be confiscated:

"9.3. ... As is obvious, this conclusion is directly consequential to the very premise of the preventive measure, that is, the danger to society posed by the individual in question. The dangerousness marks, in fact, the 'temporal parameter' (*misura temporale*) of the confiscation ... It could not, moreover, be otherwise, since it is precisely the dangerousness that constitutes the justifying reason for the compulsory

seizure and confiscation of assets acquired during the period in question and as a result of the particular nature of the dangerousness."

48. Accordingly, the Court of Cassation stipulated that, in the light of its purpose, a preventive confiscation measure was applicable only in respect of assets acquired during the period when the individual concerned posed a danger to society:

"10. It is necessary, at this point, to deal with the correlated question of the necessity or otherwise of a chronological delimitation, that is whether there must be a temporal correlation between the acquisition of the assets and the manifestation of the danger to society [posed by the individual concerned].

In this regard, with reference to ordinary dangerousness, it is necessary to lay down the legal principle according to which only assets that have been acquired during the period of time during which the individual's danger to society was manifested are capable of being confiscated, irrespective of whether the dangerousness persists at the moment when the proposal for application of the confiscation measure is lodged.

Such a conclusion derives from the assessment of the same reason justifying the preventive confiscation measure, that is the reasonable presumption that the assets were acquired with the proceeds of unlawful activities (remaining, in this way, affected by a sort of genetic unlawfulness or, as it has been argued in the literature, by an 'ontological pathology') and is, accordingly, fully consistent with the reiterated preventive nature of the measure in question.

By contrast, if it was possible to confiscate, indiscriminately, the assets of the individual in question, irrespective of the existence of any 'relation of pertinence' or temporal correlation with the danger to society posed by the individual, the measure would inevitably end up assuming the connotations of a real and proper penalty. Such a measure would therefore hardly be compatible with the constitutional parameters concerning the protection of economic initiative and private property, enshrined in Articles 41 and 42 of the Italian Constitution, as well as with the relevant Convention principles (in particular, with the principles in Article 1 of Protocol No. 1 to the Convention). In the light of these principles, the confiscation of assets, deemed to be of unlawful origin, can be considered legitimate, as an expression of the proper exercise of the legislature's discretionary power, only when it responds to the general interest of removing unlawfully acquired assets from economic circulation. On the other hand, it is obvious that the social function of private property can be fulfilled only on the immutable condition that its acquisition is in conformity with the rules of the legal system.

Therefore, the *contra legem* acquisition of assets cannot be considered compatible with that function, so that an unlawful acquisition can never be relied on as an argument against the State ...

Moreover, there is no doubt that the identification of a precise chronological context within which the power of confiscation may be exercised renders the exercise of the right of defence much easier, in addition to fulfilling an essential general safeguard. ..."

49. The Court of Cassation also underlined the compatibility of such a measure with the Convention and EU law:

"8.6. ... For its part, the Strasbourg Court, in relation to the identifying criteria of the penalty and the *matière pénale* – as determined in a well-established line of interpretation, developed in the wake of the judgments *Engel v. Netherlands*,

8 June 1976; *Welch v. United Kingdom*, 9 January 1995; and *Sud Fondi and Others v. Italy*, 30 August 2007, in the light of Articles 6 and 7 ECHR, namely: the nature of the offence under domestic law; the nature of the sanction and the concrete seriousness of that sanction – ruled that it was not justifiable to place [preventive confiscation] in the category of sanctions. With reference to preventive confiscation in Italy in particular, several rulings of the ECHR have ruled out the applicability of the principles of non-retroactivity and *ne bis in idem* prescribed in criminal matters by Article 7 of the Convention, while in other rulings (*Capitani and Campanella v. Italy*, 17 May 2011; *Leone v. Italy*, 2 February 2010; *Bongiorno v. Italy*, 5 January 2010; *Perre v. Italy*, 8 July 2008; and *Bocellari and Rizza v. Italy*, 13 November 2007), in finding that the Italian preventive measures' procedure was not in conformity with the rule on public hearings, it was pointed out that the provisions of the Convention which had been violated, for example, Article 6 ECHR, pertained to that part of the 'fair trial' guarantee that was not reserved to the sphere of 'criminal matters'. The European Court of Human Rights judgment of 22 February 1994 in *Raimondo v. Italy* noted that preventive confiscation was 'designed to block these movements of suspect capital, [and was] an effective and necessary weapon in the combat against this cancer'. The decision of 15 June 1999 in *Prisco v. Italy* affirmed that preventive confiscation 'affected assets which had been deemed by the courts to have been unlawfully acquired and was intended to prevent the ... applicant ... from using them to make a profit for himself or herself or for the criminal organisation to which he or she was suspected of belonging'.

It should, moreover, be noted that the supranational legal system allows for interventions by the authorities that interfere with the 'right to respect for property' when this is deemed to be in the public interest, as enshrined in Article 1 of Protocol No. 1, ECHR, which recognises the discretionary power of the member States to enact the laws they deem necessary to regulate the use of property 'in accordance with the general interest'. And it is also useful to refer to the EU Framework Decision 2005/212/JHA, adopted under Title VI of the Treaty on European Union, and, most recently, Directive 2014/42/EU, approved by the European Parliament on 25 February 2014, which, in recital 21, states: 'Extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.'

8.7. Under the legislation in force, the principal objective of the preventive confiscation is, therefore, that of removing the unlawfully acquired assets from the disposal of certain persons, who cannot demonstrate their lawful origin. This purpose is, therefore, in full harmony with the *ratio decidendi* of the above-mentioned rulings of the European Court of Human Rights and with the guiding principles of the Convention."

50. The relevant "principle of law", within the meaning of Article 173 § 3 of the Implementation Rules of the Code of Criminal Procedure, as established by the Court of Cassation, was the following:

> "13. ... The modifications to section 2-*bis* of Law no. 575 of 1965 introduced by Decree-Law no. 92 of 2008 (converted into law by Law no. 125 of 2008) and Law no. 94 of 2009 have not altered the preventive nature of the confiscation ordered within the scope of preventive proceedings, so that its classification as a security measure and, therefore, the applicability, in the event of successive laws, of Article 200 of the Criminal Code, still remains valid."

(b) Constitutional Court

(i) Judgment no. 335 of 8 October 1996

51. In this judgment, the Constitutional Court held that while preventive measures in the strict sense were temporary, the rationale underlying preventive confiscation measures went beyond the mere aim of prevention, since they aimed to permanently remove specific assets from economic circulation (see also Constitutional Court, judgment no. 21 of 9 February 2012).

(ii) Judgment no. 24 of 27 February 2019

52. In this judgment, the Constitutional Court ruled on the clarity and foreseeability of the subjective categories of "ordinary dangerousness", in the light of the Court's judgment in the case of *De Tommaso v. Italy* ([GC], no. 43395/09, 23 February 2017), and clarified the nature of confiscation as a preventive measure. It observed that the measure had to be based on a reasonable presumption that the asset had been purchased with the proceeds of unlawful activities (see paragraph 29 above). However, it ruled out the possibility that this led to the conclusion that the measure was criminal in nature.

53. It also held that a preventive confiscation measure constituted an instrument aimed at fighting crime which produces wealth (*criminalità lucrogenetica*) which is widely recognised nowadays at the international level.

54. The Constitutional Court, which focused on the unlawful origin of the confiscated assets, held that the measure had a "merely restorative nature" (*carattere meramente ripristinatorio*):

> "10.4.1. ... the confiscation of the assets does not constitute a penalty, but rather the natural consequence of their unlawful acquisition, which determines ... a genetic deficit in the constitution of the right of ownership of the person who has acquired the asset, it being 'obvious that the social function of private property can be fulfilled only on the immutable condition that its acquisition is in conformity with the rules of the legal system. ... [T]he *contra legem* acquisition of property cannot [therefore] be considered compatible with that function, so that an unlawful acquisition can never be relied on as an argument against the State' ...

> In short, where there is a reasonable presumption that the asset, of which the person is the owner or which he or she has at his or her disposal, has been acquired through unlawful conduct ... or where there is direct evidence of this unlawful origin, the seizure and confiscation of the asset do not have the aim of punishing the individual for his conduct; rather, more simply, the measure aims to break the *de facto* relationship between the individual and the asset, given that that relationship was formed in a manner not in accordance with the legal system, or in any case to ensure (possibly through confiscation by equivalent means (*confisca per equivalente*)) the neutralisation of enrichment which, in the absence of the alleged criminal activity, he or she would not enjoy.
>
> In the absence of further afflictive connotations, the confiscation of property has, in such circumstances, a merely restorative nature, its purpose being to restore the situation that would have existed if the asset had not been unlawfully acquired. Therefore, the latter is to be removed from illegal economic circulation, and instead be redirected ... to purposes of public interest ..."

55. The Constitutional Court declared the provision enshrined in Article 1 § 1 (a) of Decree no. 159/2011 – namely, the subjective category of "individuals who, on the basis of factual evidence, may be regarded as habitual offenders" – unconstitutional, in so far as it lacked clarity and foreseeability.

56. As regards the subjective category enshrined in Article 1 § 1 (b) of Decree no. 159/2011 – concerning "individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime" – the Constitutional Court considered that the scope and meaning of the provision had been sufficiently clarified and was, accordingly, foreseeable, on the basis of the relevant case-law of the Court of Cassation. In this regard, the Constitutional Court held as follows:

> "The 'categories of offence' that can serve as prerequisites for the measure are in effect likely to be established specifically within the present case under examination by the court in the light of the triple prerequisite – which must be proven on the basis of precise 'factual findings' that the court must substantiate precisely in its reasoning (Article 13 § 2 of the Constitution) – that the case must involve: (a) offences committed habitually (and thus over a significant period of time) by the individual, that (b) effectively gave rise to a profit for himself/herself or another person, which (c) in turn represent – or represented at a particular moment in time – the individual's only income, or at least a significant part of that income."

57. The Constitutional Court further held that the measure of confiscation had to be limited to the assets acquired during the period in which the individual was considered a danger to society and to the profit realised through the crimes presumably committed during that period:

> "As far as the preventive measures of seizure and confiscation of property are concerned, the above-mentioned requirements must ... be ascertained in relation to the period of time in which the illegal acquisition of property that the confiscation intends to neutralise occurred in the past. Since, according to what has been authoritatively affirmed by the Combined Divisions of the Court of Cassation the necessity of the temporal correlation in question 'derives from the appreciation of the same reason

justifying the preventive measure of confiscation, that is the reasonable presumption that the assets were acquired with the proceeds of illegal activities' ... the confiscation of the assets will be justified if, and only within the limits in which, the criminal conduct carried out in the past by the person in question transpires to have actually been a source of illegal profits, in an amount reasonably congruent with the value of the assets to be confiscated, and whose lawful origin he or she is unable to justify."

(iii) Judgment no. 112 of 10 May 2019

58. In this judgment, concerning another type of confiscation, namely direct and equivalent confiscation in the area of insider trading, the Constitutional Court held that the measure at issue was not punitive because it was limited to the profits generated by the crimes committed by the individual concerned and, accordingly, had a merely restorative purpose, aimed at avoiding unjust economic advantage obtained from the offence. The court held as follows:

"8.3.4. It follows from the foregoing that, in the matter of market abuse, while the confiscation of the 'profit' [of the crime] has a mere restorative function of the previous pecuniary situation of the offender, the confiscation of the 'product' – identified as the entire amount of the instruments acquired by the offender, or the entire sum obtained from their disposal – and the confiscation of the 'goods used' to commit the offence – identified as the sums of money invested in the transaction, or in the financial instruments disposed of by the offender – have an aggravating effect with respect to the pecuniary situation of the offender.

These forms of confiscation therefore take on a 'punitive' connotation, inflicting on the offender a limitation of the right to property of greater (and, as a rule, much greater) scope than that which would derive from the mere removal of the unjust economic advantage obtained from the offence.

Starting from this perspective, moreover, the United States Supreme Court recently affirmed the 'punitive'– and not merely restorative – nature of the measure, functionally analogous to the one here under consideration, of 'disgorgement' applied by the Security Exchange Commission (SEC) in matters of market abuse; this was precisely because this measure – extending to the entire result of the illegal transaction – exceeds, as a rule, the value of the economic advantage that the perpetrator has derived from the transaction itself ...

...

8.3.6. In the opinion of this Court, the combination of a pecuniary sanction of exceptional severity, but which can be adapted according to the concrete gravity of the offence and the economic situation of the offender, and a further sanction also of a 'punitive' nature such as that represented by the confiscation of the product and of the goods used to commit the offence, which, moreover, does not allow the administrative authority and subsequently the courts any possibility of modifying its amount, necessarily leads, in practice, to manifestly disproportionate sanctioning results."

C. Relevant international instruments

1. Council of Europe instruments

(a) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

59. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141) was opened for signature on 8 November 1990. It was ratified by Italy on 20 January 1994 and came into force in its respect on 1 May 1994.

60. Its Preamble proclaimed that one of the "modern and effective methods" in the "fight against serious crime ... consists in depriving criminals of the proceeds from crime".

61. The 1990 Convention called upon its signatories to "adopt such legislative and other measures as may be necessary to enable [them] to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds" (see Article 2 § 1). It defined the term "confiscation" as "a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property" (see Article 1 (d)).

62. The Explanatory Report to the 1990 Convention further clarified the relevant legal terms as follows:

> "15. ... The experts were also able to identify considerable differences in respect of the procedural organisation of the taking of decisions to confiscate (decisions taken by criminal courts, administrative courts, separate judicial authorities, in civil or criminal proceedings totally separate from those in which the guilt of the offender is determined (these proceedings are referred to in the text of the Convention as 'proceedings for the purpose of confiscation' and in the explanatory report sometimes as '*in rem* proceedings'), etc.). It was also possible to distinguish differences in respect of the procedural framework of such decisions (presumptions of licitly/illicitly acquired property, time-limits, etc.).
>
> ...
>
> 23. The committee discussed whether it was necessary to define 'confiscation' or 'confiscation order' under the Convention. ...
>
> The definition of 'confiscation' was drafted in order to make it clear that, on the one hand, the Convention only deals with criminal activities or acts connected therewith, such as acts related to civil *in rem* actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the Convention. For instance, the fact that confiscation in some States is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge. The term 'court' has the same meaning as in Article 6 of the European Convention on Human Rights. The experts agreed that purely administrative confiscation was not included in the scope of application of the Convention.
>
> ..."

(b) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

63. On 16 May 2005 the Council of Europe opened for signature in Warsaw another, more comprehensive, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198). It was ratified by Italy on 2 February 2017 and came into force in its respect on 1 June 2017.

64. The relevant parts of Articles 3 and 5 of the 2005 Convention state as follows:

Article 3 § 4 – Confiscation measures

"Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national 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."

Article 5 – Freezing, seizure and confiscation

"Each Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass:

(a) the property into which the proceeds have been transformed or converted;

(b) property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

(c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds."

65. The relevant parts of the Explanatory Report to the 2005 Convention reaffirmed that:

"39. The definition of 'confiscation' was drafted in order to make it clear that, on the one hand, the 1990 Convention only deals with criminal activities or acts connected therewith, such as acts related to civil *in rem* actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the 1990 Convention and this Convention. For instance, the fact that confiscation in some states is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge. ...

71. Paragraph 4 of Article 3 requires Parties to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. ...

76. This provision underlines in particular the need to apply such measures also to proceeds which have been intermingled with property acquired from legitimate sources or which has been otherwise transformed or converted."

66. Article 23 § 5, which enshrines an obligation to cooperate in the execution of non-conviction-based confiscation, reads as follows:

"The Parties shall 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."

2. Other international instruments

Convention Against Corruption

67. The United Nations Convention against Corruption was adopted by the General Assembly by Resolution 58/4 of 31 October 2003.

68. Article 54 § 1 (c) invites Member States to consider the possibility of non-conviction-based confiscation. It reads as follows:

Article 54: Mechanisms for recovery of property through international cooperation in confiscation

"1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

...

(c) 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."

3. Non-binding texts

69. Additionally, some international organisations have produced good practice guides and recommendations on non-conviction-based confiscation, such as the G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets (2004), the World Bank's publication "Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture" (2009) and the OECD's Financial Action Task Force Recommendations entitled "International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation" (adopted in 2012 and last updated in 2023).

D. Relevant European Union instruments

70. The European Union has adopted a number of instruments for progressive harmonisation and cooperation in the field of the confiscation of the proceeds of crime.

1. Previous instruments

71. In a Joint Action of 3 December 1998 (98/699/JHA) on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, the Member States undertook not to derogate from the Strasbourg Convention in respect of offences which were punishable by deprivation of liberty for a maximum of more than one year. Substantially similar provisions were subsequently included in the Council Framework Decision of 26 June 2001 (2001/500/JHA) on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

72. Council Framework Decision of 24 February 2005 (2005/2012/JHA) on the confiscation of crime-related proceeds, instrumentalities and property, reiterated these obligations (Article 2) and introduced a form of extended confiscation, applicable to persons convicted of a number of serious crimes, when the domestic courts were fully convinced that the assets derived from criminal activities (Article 3).

73. The Directive on the freezing and confiscation of the proceeds of crime in the European Union of 3 April 2014 (2014/42/EU) provided for the obligation to enable confiscation of instrumentalities and proceeds of crime, or property of equivalent value, subject to a final conviction for a criminal offence (Article 4 § 1). The Directive provided for a form of non-conviction-based confiscation, applicable when criminal proceedings had been initiated and could have led to a criminal conviction for an offence which was liable to give rise to economic benefit, but the conviction had not been possible owing to illness or absconding of the accused (Article 4 § 2). The Directive also provided for a form of extended confiscation of property belonging to a person convicted of a criminal offence which was liable to give rise to economic benefit, where the domestic courts were convinced that the property derived from criminal conduct (Article 5).

2. Directive on asset recovery and confiscation

74. The above-mentioned European Union instruments have been replaced by the recent Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation. This Directive aims to reinforce the capacity of the competent authorities to deprive criminals of the proceeds of criminal activities.

75. Recital 36 provides that the tracing and identification of property to be frozen and confiscated should be possible even after a final conviction for a criminal offence, or following proceedings involving non-conviction-based confiscation, but that that does not prevent Member States from establishing reasonable time-limits after a final conviction or final decision in proceedings involving non-conviction-based confiscation, following expiration of which tracing and identification would no longer be possible.

76. Its relevant provisions read as follows:

Article 3: Definitions

"For the purpose of this Directive, the following definitions apply:

...

(6) 'confiscation' means a final deprivation of property ordered by a court in relation to a criminal offence;

..."

Article 12: Confiscation

"1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of instrumentalities and proceeds stemming from a criminal offence subject to a final conviction, which may also result from proceedings in absentia.

2. Member States shall take the necessary measures to enable the confiscation of property the value of which corresponds to instrumentalities or proceeds stemming from a criminal offence subject to a final conviction, which may also result from proceedings in absentia. Such confiscation may be subsidiary or alternative to confiscation pursuant to paragraph 1."

Article 13: Confiscation from a third party

"1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person.

The confiscation of proceeds or other property as referred to in the first subparagraph shall be possible where a national court has established, based on the concrete facts and circumstances of a case, that the relevant third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation. Such facts and circumstances include:

(a) the transfer or acquisition was carried out free of charge or in exchange for an amount which is clearly disproportionate to the market value of the property; or

(b) the property was transferred to closely related parties while remaining under the effective control of the suspected or accused person.

(2) Paragraph 1 shall not prejudice the rights of bona fide third parties."

Article 15: Non-conviction-based confiscation

"1. Member States shall take the necessary measures to enable, under the conditions set out in paragraph 2 of this Article, the confiscation of instrumentalities, proceeds or property as referred to in Article 12, or proceeds or property transferred to third parties as referred to in Article 13, where criminal proceedings have been initiated but could not be continued because of one or more of the following circumstances:

(a) illness of the suspected or accused person;

(b) absconding of the suspected or accused person;

(c) death of the suspected or accused person;

(d) the limitation period for the relevant criminal offence prescribed by national law is below 15 years and had expired after the initiation of criminal proceedings.

2. Confiscation without a prior conviction under this Article shall be limited to cases where, in the absence of the circumstances set out in paragraph 1, it would have been possible for the relevant criminal proceedings to lead to a criminal conviction for, at least, offences liable to give rise, directly or indirectly, to substantial economic benefit, and where 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."

Article 16: Confiscation of unexplained wealth linked to criminal conduct

"1. Member States shall take the necessary measures to enable, where, in accordance with national law, the confiscation measures of Articles 12 to 15 may not be applied, the confiscation of property identified in the context of an investigation in relation to a criminal offence, provided that a national court is satisfied that the identified property is derived from criminal conduct committed within the framework of a criminal organisation and that conduct is liable to give rise, directly or indirectly, to substantial economic benefit.

2. When determining whether the property referred to in paragraph 1 should be confiscated, account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which may include:

(a) that the value of the property is substantially disproportionate to the lawful income of the affected person;

(b) that there is no plausible licit source of the property:

(c) that the affected person is connected to people linked to a criminal organisation.

3. Paragraph 1 shall not prejudice the rights of bona fide third parties.

4. For the purposes of this Article, the notion of 'criminal offence' shall include offences referred to in Article 2(1) to (3), where such offences are punishable by deprivation of liberty of a maximum of at least four years.

5. Member States may provide that the confiscation of unexplained wealth in accordance with this Article shall be pursued only where the property to be confiscated has been previously frozen in the context of an investigation in relation to a criminal offence committed within the framework of a criminal organisation."

COMPLAINTS

77. The first, third and fourth applicant complained under Article 7 § 1 of the Convention that a "penalty" had been imposed on them in the absence of a conviction for any criminal offence. They further complained of an alleged violation of the presumption of innocence guaranteed by Article 6 § 2 of the Convention, submitting that they had been compelled to assume liability for crimes allegedly committed by the second applicant, and not by them.

78. The second applicant complained under Article 4 of Protocol No. 7 to the Convention of an alleged violation of the *ne bis in idem* principle, as in previous proceedings in respect of a preventive measure against him, the relevant court had found that he was not a danger to society. Since new proceedings had been instituted in 2013, he argued that he had been tried twice on the basis of the same facts.

THE LAW

A. Joinder of the applications

79. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single decision.

B. Preliminary remarks

80. The Court notes from the outset that, in a series of previous cases, the Convention institutions have held that the preventive measures prescribed by the Italian Acts of 1956, 1965 and 1982, which did not involve a finding of guilt, but were designed to prevent the commission of offences, were not comparable to a criminal "sanction" (see, among others, *M. v. Italy*, no. 12386/86, Commission decision of 15 April 1991, Decisions and Reports 70, p. 59, at p. 98; *Raimondo v. Italy*, 22 February 1994, § 30, Series A no. 281-A; *Prisco v. Italy* (dec.), no. 38662/97, §§ 2 and 4, 15 June 1999; *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001; and *Capitani and Campanella v. Italy*, no. 24920/07, § 37, 17 May 2011, with further references).

81. In the present cases, the applicants argued that the preventive confiscation measure provided for by the Italian legal system was criminal in nature, on account of some amendments that had been made to the domestic legislation – in particular the making of preventive measures in respect of individuals and of confiscation autonomous and the lifting of the requirement that the individual pose a "current danger" to society in order to apply the preventive confiscation measure (see paragraphs 20-21 above) – and of some subsequent developments in the case-law of the Court of Cassation which recognised the criminal nature of the preventive confiscation measure

(see paragraph 34 above). This argument was disputed by the Government, which, relying on the domestic case-law (see paragraphs 47 and 54 above), reiterated that the measure had no punitive but rather a preventive and restorative purpose and, accordingly, could not be considered a penalty.

82. The Court observes that, since the cases in which it had previously ruled on the issue, there have been significant developments in the domestic legislation and case-law, and considers that that circumstance calls for a fresh and in-depth assessment of the nature and function of the preventive measure of confiscation.

C. Complaint under Article 7 § 1 of the Convention

83. The first, third and fourth applicant complained that the confiscation of their assets had breached Article 7 § 1 of the Convention, as the measure was criminal in nature and had been imposed on them notwithstanding that they had not committed any criminal offence.

84. Article 7 § 1 reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

1. The parties' submissions

(a) The Government

85. The Government argued that, on the basis of the criteria established in the Court's case-law, the preventive confiscation measure provided for in the Italian legal system could not be considered a "penalty" within the meaning of Article 7 of the Convention and that, accordingly, those complaints should be declared incompatible *ratione materiae* with the provisions of the Convention.

86. They observed that the measure had not been imposed following a finding of guilt for a criminal offence, but rather following the ascertainment of the danger to society posed by the individual concerned at the time of the acquisition of the assets, the possibility of direct or indirect use of the assets by the dangerous individual, the discrepancy between these assets and the lawful income declared to the tax authorities and the failure to demonstrate their lawful origin.

87. Relying on the case-law of the Court of Cassation and the Constitutional Court, the Government submitted that the aim of the measure was not punitive in nature but rather restorative and preventive, as it aimed to remove assets of unlawful origin from economic circulation and to deter the person concerned from committing further crimes.

88. As regards the procedure for the imposition of the measure, the Government stressed that proceedings in respect of preventive measures were

fully autonomous from criminal proceedings, both in time and content, since the preventive confiscation measure was imposed in specific proceedings before specialised divisions of courts.

(b) The applicants

89. Relying on the Court of Cassation's judgment no. 14044 of 24 March 2013 (see paragraph 34 above), the first, third and fourth applicants argued that following the 2008-09 legislative reform the preventive confiscation measure had changed in nature and had come to have an "objectively punitive nature" and, accordingly, had become a "penalty" for the purposes of Article 7 of the Convention.

90. In the applicants' view, that conclusion was confirmed by the Court's ruling in the case of *Welch v. the United Kingdom* (no. 17440/90, 9 February 1995, Series A no. 307-A), in which it had held that even a confiscation order adopted irrespective of a criminal conviction could be considered criminal in nature.

(c) The third-party intervener

91. The association *Unione delle Camere Penali Italiane* argued that the measure at issue could be considered a "penalty" within the meaning of Article 7 of the Convention. In their view, by stating that the measure had an "afflictive" dimension, in judgment no. 24 of 27 February 2019 (see paragraphs 52-57 above) the Constitutional Court had implicitly recognised its punitive aim.

92. In the association's view, the measure pursued multiple aims, namely punitive, preventive, and restorative. However, this circumstance in itself could not suffice to rule out its nature as a "penalty". The decisive element would undoubtedly be the afflictive effects and the severity of the measure. Moreover, the association stressed that the measure had lost its original preventive purpose, given that its application was no longer subjected to an assessment of the risk of future commission of crimes.

2. The Court's assessment

(a) General principles

93. For the purposes of the Convention there can be no "conviction" unless it has been established in accordance with the law that there has been an offence – a criminal or, if appropriate, a disciplinary offence. Similarly, there can be no penalty unless personal liability has been established (see *Ulemek v. Serbia* (dec.), no. 41680/13, § 46, 2 February 2021, with further references).

94. The concept of "punishment" or "penalty" as set out in Article 7 § 1 of the Convention has an autonomous scope. To render the protection offered by this provision effective, the Court must remain free to go behind

appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A; *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013; and *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 210, 28 June 2018). The wording of the second sentence of Article 7 § 1 indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch*, cited above, § 28; *Del Río Prada*, cited above, § 82; and *G.I.E.M. S.r.l. and Others*, cited above, § 211). The severity of the measure is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Del Río Prada*, cited above, § 82, and the references therein, and *Rola v. Slovenia,* nos. 12096/14 and 39335/16, § 66, 4 June 2019).

95. The Court observes that it has generally considered that the existence of a conviction for a criminal offence was but one of the criteria to be taken into consideration (see *Saliba v. Malta* (dec.), no. 4251/02, 23 November 2004, and *Berland v. France*, no. 42875/10, § 42, 3 September 2015), and that it could not be deemed decisive for establishing the nature of the measure (see *Valico S.r.l v. Italy* (dec.), no. 70074/01, ECHR 2006-III, and *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, § 60, 8 October 2019). The Court has seldom considered this factor as decisive in declaring Article 7 inapplicable (see *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV, and *Bowler International Unit v. France*, no. 1946/06, § 67, 23 July 2009). In the Court's view, if the criminal nature of a measure were to be established, for the purposes of the Convention, purely on the basis that the individual concerned had committed an act characterised as an offence in domestic law and had been found guilty of that offence by a criminal court, this would be inconsistent with the autonomous meaning of "penalty" (see *G.I.E.M. S.r.l. and Others*, cited above, § 216). Without an autonomous concept of penalty, States would be free to impose penalties without classifying them as such, and the individuals concerned would then be deprived of the safeguards under Article 7 § 1. That provision would thus be devoid of any practical effect. It is of crucial importance that the Convention be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory, and this principle thus applies to Article 7 (ibid., § 216, and *Del Río Prada*, cited above, § 88). Consequently, while conviction by the domestic criminal courts may constitute one criterion, among others, for determining whether or not a measure constitutes a "penalty" within the meaning of Article 7, the absence

of a conviction does not suffice to rule out the applicability of that provision (see *G.I.E.M. S.r.l. and Others*, cited above, § 217, and *Balsamo*, cited above, § 60).

96. The specific conditions of execution of the measure in question may be relevant in particular for the nature and purpose, and also for the severity of that measure and thus for the assessment of whether or not the measure is to be classified as a penalty for the purposes of Article 7 § 1. These conditions of execution may change during a period of time covered by the same judicial order (see *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 204, 4 December 2018). In some cases, a substantial change, in particular in the conditions of execution of the measure, can withdraw the initial qualification of the measure as a penalty within the meaning of Article 7 of the Convention, even if that measure is implemented on the basis of the same order (ibid., § 206). The Court considers that it is only in a position to fully assess whether a measure amounts in substance to a penalty in the light of the criteria developed in its case-law if it takes into account changes in the actual execution of a measure on the basis of the same order. It notes that some of these criteria can be described as "static" or not susceptible to change after the point in time when the measure was ordered, particularly the criterion whether the measure in question was imposed following conviction for a "criminal offence" or that of the procedures involved in its making. In contrast, other criteria, including those of the nature and purpose of the measure and of its severity, can be described as "dynamic" or susceptible to change over time. In order to assess the compliance of a measure with Article 7 § 1 during a given period, the actual manner in which the measure was executed throughout that period must therefore be considered relevant and must be taken into consideration by the Court (ibid., § 208).

97. The Court reiterates that confiscation is not a measure confined to the sphere of criminal law, but that it is encountered widely in the sphere of administrative law where objects liable to confiscation include, for example, unlawfully imported (see *AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108) or exported (see *The J. Paul Getty Trust and Others v. Italy*, no. 35271/19, § 314, 2 May 2024) goods. Moreover, non-criminal confiscations may concern, for example, items considered dangerous in themselves (such as weapons, explosives or infected cattle) and property connected, even if only indirectly, with a criminal activity (see *M. v. Italy*, cited above, p. 59; *Bowler International Unit*, cited above, § 67; and *Gogitidze and Others v. Georgia*, no. 36862/05, § 126, 12 May 2015). The Court has held that various types of confiscation, whether or not meted out by courts of criminal jurisdiction, being restorative in nature, fall outside the scope of Article 7 of the Convention (see, in particular, *Ulemek*, cited above, §§ 55-58).

98. In this regard, the Court reiterates that each confiscation must be seen in its context (see *Balsamo*, § 64, and *The J. Paul Getty Trust and Others*, § 308, both cited above).

(b) Application of the above principles to the present cases

99. In the present cases, the Court must ascertain whether the confiscation at issue constitutes a "penalty" within the meaning of Article 7 of the Convention. To do so it will apply the criteria which stem from the general principles reiterated above.

(i) Whether the confiscation was imposed following a conviction for criminal offences

100. As regards the connection between the confiscation order in respect of the first, third and fourth applicants' assets and a particular criminal offence, the Court notes that the imposition of a preventive confiscation measure in the Italian legal system does not involve a finding of guilt, but is rather premised on the finding that the "person in question" (*proposto*, that is, the person directly concerned by a request to apply a preventive measure) falls within one of the subjective categories of individuals who are suspected of having committed crimes, as set out in Articles 1 and 4 of Decree no. 150/2011 (see paragraph 24 above). In the domestic practice, the finding that an individual falls within one of those subjective categories leads to his or her qualification as an individual who poses a "danger to society", even in the absence of any assessment of a specific risk of the commission of further offences. Such qualification entails the reasonable presumption that the assets acquired during the period in which the individual fell within one of those subjective categories, which are disproportionate to his or her lawful income and for which there is no evidence demonstrating their lawful origin, are the proceeds of unlawful activities or were purchased with them (see paragraphs 29 and 46 above).

101. However, the absence of a conviction does not suffice to rule out the applicability of Article 7 (see, among others, *Balsamo*, cited above, § 60, with further references). As reiterated above, if the criminal nature of a measure were to be established, for the purposes of the Convention, purely on the basis that the individual concerned had committed an act characterised as an offence in domestic law and had been found guilty of that offence by a criminal court, this would be inconsistent with the autonomous meaning of "penalty" (see *G.I.E.M. S.r.l. and Others*, cited above, § 216). It follows that this criterion is only one among others to be taken into consideration, without it being regarded as decisive when it comes to establishing the nature of the measure (see *Balsamo*, § 60; *Ulemek*, §§ 48 and 58; and *G.I.E.M. S.r.l. and Others*, § 217, all cited above).

102. In the present case, therefore, in which the measure was not imposed following a conviction for a criminal offence, the Court must examine whether the confiscation amounted to a penalty in the light of the other factors established in its case-law.

(ii) The classification of confiscation in domestic law

103. As regards the classification of confiscation in domestic law, the Court observes that the domestic provision regulating that measure, Article 24 § 1 of Decree no. 159/2011 (the *Codice delle leggi antimafia e delle misure di prevenzione* – Code of Anti-Mafia Laws and Preventive Measures), is included in Chapter II of Part I, which is entitled "Preventive measures in respect of property" (*misure di prevenzione patrimoniali*; see paragraph 23 above). Accordingly, the Court cannot infer from the formal qualification of the measure that it was criminal in nature.

104. The Court notes that there have been developments in the domestic case-law concerning the classification of the measure in issue and a clarification of its nature and purpose. However, with one notable exception (see paragraph 34 above), both the Court of Cassation and the Constitutional Court have always agreed that the preventive confiscation measure had no punitive aim. In order to reach such a conclusion, those courts relied, to varying degrees, on its preventive and restorative purposes.

105. When confiscation as a preventive measure could be applied only in conjunction with preventive measures applied in respect of individuals and on the basis of the assessment of the "current danger" to society posed by the individual (namely, of a risk that further offences would be committed; see paragraph 19 above), it was considered an "administrative sanction" aimed at removing goods and property from the use of the person suspected of being a member of a mafia-type organisation. According to the relevant domestic case-law (see paragraph 32 above), the measure was comparable, in its content and effects, to a "security measure", aimed at preventing the commission of further criminal offences (see paragraph 31 above). In this particular context, the aim of the measure was to prevent the commission of specific offences: on the basis of the "current danger" to society posed by the individual concerned, he or she could have committed further offences through the disposition and use of assets which had been unlawfully acquired.

106. Following the above-mentioned legislative amendments, which introduced the possibility of imposing the preventive confiscation measure autonomously from preventive measures applied in respect of individuals and irrespective of the existence of a "current danger" to society posed by the individual concerned (see paragraph 81 above), the issue of the nature and purpose of the measure in issue gave rise to conflicting interpretation by the Court of Cassation.

107. According to the majority of the domestic case-law, the measure had not changed in nature and remained an "administrative sanction", having a

general preventive purpose, namely the general aim of preventing the commission of criminal offences, which, however, was justified by the "public interest in the removal from economic circulation of assets of suspected illegitimate provenance" (see paragraph 35 above). The measure was therefore considered primarily preventive, but also justified by its restorative purpose.

108. One judgment of the Court of Cassation, however, concluded that the measure had acquired an "objectively punitive nature" (*natura oggettivamente sanzionatoria*), since it could be imposed irrespective of the "current danger" to society posed by the individual concerned at the moment when the measure was imposed and, therefore, in the absence of a specific risk that the measure sought to prevent (see paragraph 34 above).

109. As a result of the existence of conflicting case-law, the issue was submitted to the Combined Divisions of the Court of Cassation (see paragraph 37 above). The latter held that the measure in issue was not criminal in nature and had no punitive purpose.

110. Clear indications were subsequently provided by the Constitutional Court, which also held that the measure was not criminal in nature. It observed that confiscation as a preventive measure aimed to permanently remove specific assets from economic circulation (see paragraph 51 above). Therefore, while the measure had to be considered an instrument aimed at fighting criminality (see paragraph 54 above), it had a "merely restorative nature" (*carattere meramente ripristinatorio*), since it aimed to restore the situation that would have existed if the asset had not been unlawfully acquired (ibid.). The Constitutional Court stressed the non-punitive nature of the measure, as demonstrated by the fact that it had to be limited to assets acquired during the period in which the individual concerned had presumably committed crimes entailing unjust enrichment, and had to be limited to the profits potentially originating from those crimes (see paragraph 57 above).

111. It follows that the type of confiscation measures at issue are currently qualified under domestic law as mainly restorative in nature. In the Court's view, therefore, the classification under domestic law does not indicate that the confiscation in the present cases was indeed a penalty (see *Balsamo*, cited above, § 61; contrast *G.I.E.M S.r.l. and Others*, cited above, § 221).

(iii) The nature and purpose of confiscation

112. As to the nature of the confiscation at issue, the Court notes that there are several elements demonstrating that the measure is not punitive and presents characteristics that distinguish it from criminal penalties.

113. First of all, the Court notes that the degree of culpability of the offender is irrelevant for fixing the amount of the assets to be confiscated, unlike in the case of criminal-law fines (see *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007, and *Ulemek*, cited above, § 53; contrast *Welch*, cited above, § 33). In this respect, the Court also points

out that the confiscation is independent from the imposition of criminal sanctions.

114. Secondly, the measure is specifically directed at the profits of the crimes presumably committed by the individual who is considered to fall into one of the subjective categories provided for by law (see paragraph 57 above), even though there is no conclusive evidence of those crimes, and it can never be converted into a measure entailing a deprivation of liberty, which is another important characteristic of criminal-law fines (see, *mutatis mutandis*, *Dassa Foundation and Others*, cited above, and *Ulemek*, cited above, § 53; contrast *Welch*, cited above, § 33).

115. Additionally, the measure appears to be the expression of an increasing international consensus on the use of confiscation or similar measures in order to remove assets of unlawful origin from economic circulation, with or without a previous finding of criminal liability (see paragraphs 59-76 above).

116. As regards the purpose of confiscation, the Court notes that it underwent significant changes as part of the 2008-09 legislative amendments.

(α) Preventive purpose

117. In this connection, the Court observes that, as originally formulated, the measure aimed to prevent the unlawful and dangerous use of assets whose lawful origin could not be established. This is confirmed by the fact that it could be imposed only in conjunction with an preventive measure applied in respect of individuals and subject to the ascertainment of the "current danger" to society posed by the individual concerned (see paragraph 28 above), which entailed a presumption that the individual could have committed further criminal offences. Against this legal background, the preventive confiscation measure could indeed be equated to a "security measure", in the sense that it aimed to prevent the commission of further criminal offences (see paragraph 32 above).

118. These characteristics of the measure in issue were stressed in the early case-law of the Convention institutions. For example, in concluding that the preventive confiscation measure did not constitute a penalty within the meaning of Article 7 of the Convention, the Commission observed, *inter alia*, that it was conditional upon a prior declaration of dangerousness to society, based on suspicion of belonging to a mafia-type organisation, and was subsidiary to the adoption of a preventive measure restrictive of personal liberty (see *M. v. Italy*, cited above, at p. 97). The Commission considered that this legal background confirmed the preventive character of confiscation and showed that it was designed to prevent the unlawful use of the property which was the subject of the order (ibid., at p. 98). Furthermore, in assessing the purpose of such a measure under Article 1 of Protocol No. 1, the Court has observed that it sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin had not been established

(see, among others, *Raimondo*, cited above, § 30; *Arcuri and Others*, cited above; and *Riela and Others v. Italy*, no. 52439/99, 4 September 2001).

119. In the Court's view, those characteristics showed the truly "preventive" nature, in the strict sense, of the measure at stake. And, indeed, in its case-law the Court has often stressed, albeit in different contexts, that the main feature of preventive measures is that they have to be based on concrete elements which are truly indicative of the continued existence of the risk that such measures seek to forestall (see, *mutatis mutandis*, *Labita v. Italy* [GC], no. 26772/95, § 193, ECHR 2000-IV; *Vlasov and Benyash v. Russia*, nos. 51279/09 and 32098/13, § 34, 20 September 2016; and *Pagerie v. France*, no. 24203/16, § 194, 19 January 2023, all relating to restrictions of freedom of movement). The Court has further stressed that preventive measures applied in respect of individuals must be adopted having regard to the behaviour or actions of the person concerned, following an individual and detailed assessment of the risk in question (see *Domenjoud v. France*, nos. 34749/16 and 79607/17, § 104, 16 May 2024; see also *Advisory opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to or belonging to a religious movement* [GC], request no. P16-2023-001, Belgian *Conseil d'État*, §§ 97-98 and 100-01, 14 December 2023).

120. However, it appears to the Court 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. This means that, in its current formulation, the imposition of the preventive confiscation measure does not require the ascertainment of the "current danger" to society posed by the individual concerned and, therefore, of the risk that further criminal offences will be committed, which the measure in issue would aim to prevent.

121. Therefore, and irrespective of its formal characterisation in the domestic legal system – "preventive measure in respect of property" (*misura di prevenzione patrimoniale*) – the Court considers that the measure no longer has a preventive function in the strict sense, given that it can be applied in the absence of any assessment of the existence of a specific risk which it seeks to forestall. It therefore appears to the Court 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. No further "dangerousness" or "risk" assessment, aimed at determining whether the individual concerned will commit further offences in the future, is currently required under the applicable domestic provisions, as interpreted and applied in the domestic case-law.

122. Having said that, the Court observes that, even after the 2008-09 legislative amendments, the Court of Cassation (see paragraph 47 above) and the Constitutional Court (see paragraph 53 above) stressed that the preventive confiscation measure retained a preventive purpose in the general sense: that is, in guaranteeing that crime does not pay, by recovering unlawfully acquired assets, the measure aimed to prevent the commission of further criminal offences and, accordingly, retained a deterrent effect.

123. In this regard, the Court observes that it has already held that ensuring that criminals will not profit from illegal activities is a key issue for the prevention of criminality (see *Ulemek*, cited above, § 54). Similarly, in the context of Article 1 of Protocol No. 1, the Court has held that the rationale behind the confiscation of wrongfully acquired property and unexplained wealth owned by persons accused of serious offences and their family members and close relatives was twofold, having both a compensatory and preventive aim (see *Gogitidze and Others*, cited above, § 101). In that way, the Court identified the preventive element in the aim to prevent unjust enrichment through the commission of crimes (in that case, corruption), by sending a clear signal to public officials already involved in corruption or considering so doing that their wrongful acts, even if they went unpunished by the criminal justice system, would nevertheless not procure pecuniary advantage either for them or for their families (ibid., § 102; see also *Silickienė v. Lithuania*, no. 20496/02, § 65, 10 April 2012, and *Telbis and Viziteu v. Romania*, no. 47911/15, § 74, 26 June 2018). Similarly, the Court has held that the making of a confiscation order in respect of criminally acquired property operates in the general interest as a deterrent to those considering engaging in criminal activities and also guarantees that crime does not pay (see *Denisova and Moiseyeva v. Russia*, no. 16903/03, § 58, 1 April 2010, with further references). As regards confiscation as a preventive measure in Italy, the Court has already observed that it was an effective and necessary weapon in the combat against the Mafia (see, in particular, *Raimondo*, cited above, § 30).

124. The Court does not, however, consider it necessary to rule definitively on whether the measure retained, even in the light of its specific features resulting from the 2008-09 reform, a preventive function in the general sense.

125. In this regard, the Court reiterates that it has already observed 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 (see, in particular, *Welch*, cited above, § 30). Accordingly, even assuming that a similar function might be attributed to the confiscation measure in issue notwithstanding the 2008-09 legislative amendments, this element alone cannot lead to the conclusion that the measure had no punitive aim and was not criminal in nature.

(β) Restorative purpose

126. Having said that, the Court observes that the measure in question, as resulting from the 2008-09 legislative amendments and the clarifications provided in the subsequent domestic case-law, presents several elements that make it more comparable to restitution of unjustified enrichment rather than to a fine under criminal law.

127. Firstly, the Court notes that, although the Court of Cassation distinguished the confiscation in issue from a proper *actio in rem* (see paragraph 41 above), it held that the focus of the measure was in any case to remove "dangerous assets" from economic circulation (see paragraph 42 above), identified as such on the basis of the fact that they had been acquired by an individual who, at the time when they were acquired, fell within one of the subjective categories, provided for by law, of individuals suspected of having committed criminal offences (see paragraph 43 above). The focus of the measure in respect of the property, and not the individual, is evident from the fact that the confiscation can be ordered even *vis-à-vis* property belonging to a third person who inherited or purchased it, if such property was acquired by one of the individuals referred to above, and the third person has no valid legal claim to it (see paragraphs 42 and 46 above).

128. The Court therefore considers 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 an individual (see, for example, *Ulemek*, cited above, § 53).

129. Secondly, the Court attaches particular importance to the fact 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.

130. In this connection, the Court notes that, in the light of the clarifications provided by the Constitutional Court in judgment no. 24 of 27 February 2019, the scope of the measure in question had to be limited by its purpose of preventing unjust enrichment: in particular, the Constitutional Court held that the measure could be justified only in so far as the criminal offences presumably committed by the individual concerned were a source of

illegal profits, in an amount reasonably congruent with the value of the assets to be confiscated (see paragraph 57 above).

131. Another relevant feature is the principle, established by the Court of Cassation (see paragraph 48 above) and confirmed by the Constitutional Court (see paragraph 57 above), 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 on the basis of the commission of criminal offences.

132. In the Court's view, limiting confiscation to the unlawful profits derived from the crimes presumably committed by the individual concerned is a relevant feature ruling out its punitive nature (see, by contrast, *G.I.E.M. S.r.l. and Others*, cited above, § 227, in which the Court considered that the fact that the measure could be applied indiscriminately and irrespective of the plot of land on which the offence of unlawful site development had been committed, was a factor militating in favour of its punitive aim). This is confirmed by the fact that the Constitutional Court itself, albeit in respect of a different type of confiscation, observed that by limiting it to unlawful profit the measure was not punitive in nature, but that it would by contrast have become punitive if it also extended to the product of the crime, given that this would have produced detrimental effects on the personal sphere of the individual concerned which would have gone further than the mere deprivation of the unjust enrichment derived from the crime (see paragraph 58 above).

133. The Court therefore considers that the primary purpose of the measure was to avoid unjust enrichment derived from criminal offences, by depriving the persons concerned of unlawful profits, and notes that in its prevailing case-law measures which pursued that objective have generally been considered to have a restorative rather than punitive aim (see *Dassa Foundation and Others*, cited above; *Balsamo*, cited above, § 65; *Ulemek*, cited above, § 57; and *Todorov and Others v. Bulgaria*, nos. 50705/11 and 6 others, § 304, 13 July 2021). By contrast, the Court has considered to be punitive measures that were more extensively directed against the proceeds of unlawful activities, including their product, without being limited to actual enrichment or profit (see *Welch*, cited above, § 33).

(γ) Conclusions as to the nature and purpose of the confiscation

134. Thus, as currently formulated, the confiscation order was intended to ensure that crime does not pay and to prevent unjust enrichment, by depriving the individual concerned and third parties not having a valid claim over the property to be confiscated of the profits of criminal activities, and was, accordingly, essentially of a restorative and not punitive nature (see, for example, *Ulemek*, cited above, § 50).

(iv) The severity of the measure

135. As regards the severity of the measure, the Court observes that the confiscation of the first, third and fourth applicants' assets undeniably seriously interfered with their property rights, and could thus be considered a measure of relative severity. A confiscation order can be used to confiscate assets of a considerable value, and there is no upper limit on that value.

136. However, this circumstance alone is insufficient, in the light of the additional considerations above, to justify the conclusion that the authorities imposed on the applicants a "penalty" within the meaning of Article 7 of the Convention (see *Todorov and Others*, cited above § 306), since many non-criminal measures of a preventive nature may have a substantial impact on the person concerned (see *Balsamo*, § 64; *Del Río Prada*, § 82; and *Ilnseher*, § 203, all cited above).

137. Moreover, the Court notes 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 (see paragraph 57 above).

(v) Procedures for the adoption and enforcement of a confiscation measure

138. As regards the procedures for the adoption and enforcement of a confiscation measure, the Court notes that it is imposed by special divisions of courts of criminal jurisdiction. However, this cannot in itself be decisive. Indeed, it is a common feature of several jurisdictions for criminal courts to take decisions of a non-punitive nature such as, for example, the possibility for criminal courts to order civil reparation measures for the victim of a criminal act (see *Balsamo*, cited above, § 63).

139. Moreover, the Court notes that the confiscation order in the present 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 (compare *Ulemek*, cited above, § 55). The proceedings were conducted in accordance with the legislation specifically designed for the regulation of proceedings in respect of preventive measures.

(c) Conclusions

140. It follows from the above considerations that the measure at issue was not a "penalty" in its autonomous meaning under the Convention, and therefore Article 7 is not applicable in the present cases.

141. These complaints must therefore be rejected as incompatible *ratione materiae* with the provisions of the Convention in accordance with Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

D. Complaint under Article 6 § 2 of the Convention

142. The first, third and fourth applicants complained of an alleged violation of the presumption of innocence guaranteed by Article 6 § 2 of the Convention, submitting that they had been compelled to assume liability for crimes allegedly committed by the second applicant, and not by them. Article 6 § 2 reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

143. The Court reiterates that there are two ways in which the presumption of innocence can be viewed. In the context of a criminal trial, it acts as a procedural guarantee, imposing requirements in respect of, *inter alia*, the burden of proof, legal presumptions of fact and law, the privilege against self-incrimination, pre-trial publicity, and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013, and *Nealon and Hallam v. the United Kingdom* [GC], nos. 32483/19 and 35049/19, § 101, 11 June 2024). However, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the Court has, over time, developed a "second aspect" to the presumption of innocence, which comes into play after the criminal proceedings have concluded, either with an acquittal or a discontinuance (see *Nealon and Hallam*, cited above, § 102). Regardless of the nature of the case, the Court has maintained that the principal aim of the presumption of innocence in its second aspect is to protect individuals who have been acquitted of a criminal charge or in respect of whom criminal proceedings have been discontinued from being treated by public officials and authorities as though they are in fact guilty of the offence charged (ibid., § 108).

144. As regards the question whether the first aspect of the presumption of innocence is applicable to the facts of the present case, the Court reiterates that it is a well-established principle that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, for example, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 54, ECHR 2012; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 136, ECHR 2012 (extracts); *Marguš v. Croatia* [GC], no. 4455/10, § 128, ECHR 2014 (extracts); and *Merabishvili v. Georgia* [GC], no. 72508/13, § 293, 28 November 2017). Furthermore, in many cases, the Court has emphasised the link between Article 6 and Article 7 in criminal cases, in particular with regard to the notion of a "criminal charge" (see *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, § 112, 22 December 2020).

145. Given that the Court has already concluded that the confiscation cannot be considered a penalty within the meaning of Article 7, for reasons

of consistency in the interpretation of the Convention taken as a whole, it finds that the proceedings in question did not involve the determination of a "criminal charge" within the meaning of Article 6 of the Convention.

146. Therefore, the confiscation order at issue cannot give rise to the application of Article 6 § 2 (see *Gogitidze and Others*, cited above, § 126) and, therefore, to the application of the first aspect of the presumption of innocence.

147. The Court notes, furthermore, that the first, third and fourth applicants have not raised any complaint concerning the second aspect of the presumption of innocence.

148. It follows that these complaints are incompatible *ratione materiae* with Article 6 § 2 of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

E. Complaint under Article 4 of Protocol No. 7 to the Convention

149. The second applicant complained under Article 4 of Protocol No. 7 to the Convention of an alleged violation of the *ne bis in idem* principle, as in previous proceedings concerning a preventive measure in respect of him, the relevant court had found that he was not a socially dangerous individual. The relevant part of this provision reads as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

150. The above considerations concerning the measure at issue (see paragraphs 140-141 and 146-148) are also valid as regards the complaint under Article 4 of Protocol No. 7. Therefore, the Court does not consider that the second applicant was "tried or punished again in criminal proceedings" within the meaning of that provision (see *Todorov and Others*, cited above, § 307).

151. In view of the foregoing, the Court concludes that the complaint under Article 4 of Protocol No. 7 is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 13 February 2025.

Ilse Freiwirth Section Registrar	Ivana Jelić President

APPENDIX

List of cases

No.	Application no.	Case name	Lodged on	Applicant Year of birth Place of residence Nationality	Represented by
1.	47269/18	Garofalo v. Italy	27/09/2018	**Claudia GAROFALO** 1969 Latina Italian	Carla BERTINI
2.	47426/18	De Bellis v. Italy	27/09/2018	**Maurizio DE BELLIS** 1967 Latina Italian	Carla BERTINI
3.	47793/18	Rito v. Italy	27/09/2018	**Antonia RITO** 1940 Latina Italian	Carla BERTINI
4.	47996/18	De Bellis v. Italy	27/09/2018	**Martina DE BELLIS** 1996 Latina Italian	Carla BERTINI