Abstract

This work relates to pecuniary preventive measures, which constitute a peculiar institute of Italian legal system.

The survey starts with a general overview of the historical and juridical evolution of the matter: born as police control instruments for people considered dangerous for political and legal system, these preventive measures became, over the years, a fully "jurisdictional" instrument which permit, among the others, seizure of illicitly accumulated capitals belonging to mafia suspects or to people living of the income of every crime of any nature (also white-collar crimes).

In fact, in recent years, the recession and the economic crisis have fueled the increasingly heated debate about crime and economic development, costs and effects of the first on the second and the impact of criminal organization on business structure and territorial, social and cultural context.

Respect for the law is above all an ethical and moral value, an essential pillar of all civil society, but also a fundamental economic value, a necessary condition to protect the freedom of traders, the regular course of business dynamics, market transparency, free and fair competition.

The proper functioning of the market and its continued growth, unfortunately, are sometimes hindered by forms of "economic crime" (or "profit crime") that alter the game's rules, undermine the principles and values of the democratic state, distorting the market, debasing the work and, ultimately, hindering the freedom of enterprises, credit and investment.

Profit crime includes a number of diverse phenomena, whose common characteristic can be identified in wrongful behaviors constituting offenses, direct to illicit enrichment.

Among different forms of profit crime, a leading role is represented by three sectors, indicated by many as a major cause of lawlessness and lack of growth in the country: mafias, corruption and tax evasion.

The penetration of these illegal economies in legal economy entails effects that impact not only on the value of what is produced through criminal activity, but also on the value of what was not produced because of distortion caused by the spread of crime.

Since crime prevention represents a fundamental and essential task of every organized society, to combat these forms of profit crime, which obviously have a high cultural, social and economic cost, Italian legislator decided to use the agile and effective tool of preventive measures.

However, said task should be carried out without disfiguring the face of a democratic state, trying to maintain a balance between warranty requirements and requirements of efficiency.

The necessity to maintain a balance between these two different kinds of warranties has been the guideline for Italian legislator, who issued, in 2011, the so called “Codice antimafia e delle misure di prevenzione” (Legislative Decree no. 159/2011), which brings in a single legislative text the whole preexisting scattered legislative material.

This “Code” provides for preventive personal and financial measures, which – among warranty requirements and requirements of efficiency – limit two types of rights: the right to personal freedom (personal

measures) and the right to property and business (pecuniary measures).

In this “protective” perspective, both national and conventional (ECHR), if the deprivation of liberty must be protected to the maximum extent, the right to property can be limited to certain conditions, when the general interest prevails, with a proportionate sacrifice.

The present work, in particular, is focused on pecuniary preventive measures, on their substantive (Chapter II) and procedural (Chapter III) aspects and on the need for protection of third parties and protection of credit (Chapter IV).

With respect to substantive aspects of the matter, in Chapter II, attention is paid to the nature (criminal or administrative, or hybrid) of pecuniary preventive measures, by underlining that the essence of Italian legal system is the ability to attack illegally accumulated wealth with the preventive confiscation in a “criminal” but “simplified” procedure, which does not depend on conviction.

Perhaps, this is the most significant peculiarity of Italian experience, where the aim of prevention measures is not to punish the person, but rather to acquire, in favor of the State, assets which, illegally entered in the availability of dangerous people, have to be subtracted to them, in order to prevent further manifestation of their dangerousness.

The application of this “confiscation without conviction” has caught, in recent decades, the attention of doctrine and jurisprudence, not only in Italy but also in other “supranational” systems, and posed the question of compatibility of prevention measures with European Convention on Human Rights.

In Chapter III, by underlining the substantially “penal nature” of preventive measures, attention is paid to procedural problems, with specific regard to the need to guarantee a due process and a fair trial with the application of the right to confrontation.

The “right to be heard” and, in general, the right to confrontation is an issue which is raised also in Chapter IV, with respect to third parties, whose right to credit is inevitably compressed by these pecuniary preventive measures.