

Destruction of illegal things and devices to contrast the counterfeiting

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Abstract

The movement of goods illegal and counterfeit in the circuit of the economy and the labor market, has put in place of criminal policy internal supranational and a primary need of confiscation and destruction in relation to safety issues transnational linked to all forms of counterfeiting, piracy agro-food to fraud in industrial brands of high fashion et similia: from here the major node of the procedure of destruction of goods illegal and counterfeit subject to seizure and confiscation and respect of guarantees communities of the criminal process, especially in the light of the amendment of art. 260, co. 3 bis and ter, c.p.p. with the d.l. 23-5-2008, n. 92 and subsequent amendments (so-called Safety Package). In line with the criminal policy of "security", in l. 23-7-2009, n. 99, the so-called Decree Development, between the "darrangements for the development and the internationalization of enterprises, as well as in the field of energy" and wanted to redesign, with analytical provisions of particular edge, the perimeter of the criminal-law protection "Dei property rights industrial" through the introduction of four new hypothesis of offenses of counterfeiting (artt. 473, 474, 474 b and c, 517 b and c, c.p.) and related hypothesis of obligatory confiscation (art. 474 bis and 517 ter c.p.), with implications concerning the regime differentiated penitentiary (art. 4 bis, co. 1 ter, ord. penit.) in

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relation to the cases of belonging to criminal association aimed to commit new offenses referred to in articles 473-474 c.p. (arts. 416 bis, 6^o Co., c.p. and 51, co. 3 bis, c.p.p.), as well as the regulatory body containing the so-called "responsability of administrative entities", within the meaning of art. 19, d.lg. 8-6-2001, n. 231.

Key Words: Destruction; Confiscation; Industrial Property; Customs Code; UE Guarantees

1. Systematic classification: from the paradigm of minimum interference of the process to incidental polymorphism of the destruction process in justice criminal assets.

The method of destruction of things seized subject to obligatory confiscation falls between the complementary investigations¹ active during the preliminary inquiries. The positive discipline and springing from the modification to the discipline of the destruction of the things in the seizure by the art. 2(a), d.l. 23-5-2008, n. 92, converted with changes in l. 24-7-2008, n. 125 that has introduced two new subparagraphs (3 bis and 3 ter) in the provisions of art. 260 c.p.p., whose address book, originally entitled "seals affixed to the things seized. Perishable things" and 'now built by the "Destruction of seized things", as provided for by art. 2, lett. a bis) of the aforesaid legislative decree n. 92/2008². The art. 260, 3^o co., bis, c.p.p. provides for the possibility that the competent judicial proceed, "even on request of component accertatore", the destruction of things of which prohibited the manufacture, possession, detention or marketing, if their custody is "difficult", "particularly burdensome" or "dangerous for the health, safety or hygiene public", or even when - even after technical investigations not repeatable ex art. 360 c.p.p. - appear "obvious" the violation of the aforementioned prohibitions (260, co. 3 bis, c.p.p.). The given that justifies the unprecedented anticipation of the effects of the

¹ ANTINUCCI, *Sequestro probatorio e procedimento per la distruzione di merci illecite e contraffatte*, in I procedimenti complementari, coordinato da Montagna, in *La giustizia penale differenziata*, a cura di Gaito-Spangher, III, Torino, 2011, 829; Id., *Distruzione delle cose in sequestro*, in *La giustizia patrimoniale penale*, a cura di Bargi-Cisterna, Torino, II, 2011, 2240; FURFARO, *Procedimenti incidentali e procedimenti complementari*, ivi, 2011, 49.

² DIDDLE, *Norme in materia di sequestri ed esecuzione penale*, in *Il Decreto Sicurezza*, a cura di A. Scalfati, Torino, 2008, 124;

measure (destruction), you must locate in two types of "situations alternatives of fact and of law": a) the burden of the deposit; (b) the anticipated investigation of the illicit nature of the goods. In operating key emerges the link between the normative concept of things seized susceptible of destruction in application of art. 260, co. 3 bis, c.p.p. and that of things subject to obligatory confiscation ex art. 240, 2^o co., c.p. in relation to the prohibitions of detention, possession, manufacturing and marketing. In unpublished form, therefore, the new process for the destruction of the things subject to obligatory confiscation ex art. 240 c.p. (even if not perishable and independently from the depot onerous or excessively expensive), provides that the illegal origin of assets seized can legitimize in re ipsa a fatal outcome (which the destruction of the res), with significant effects on criminal proceedings main. In times of fair the European process the fate of illegal things subject to seizure and confiscation mandatory raises procedural issues of major importance both in terms of the conservation of the test wells (and therefore of the exercise of the right of defense), both with respect to the protection of intellectual property rights by the third party unconnected to the offense, is especially with regard to the effectiveness of the controls by means of opposition and incident of execution, also in reason of the recent landing in cassation of the principle of the double degree of merit *in executivis*³.

In a perspective of systematic placement of the procedure foreseen by the art. 260, co. 3 bis and ter, c.p.p. among methods complementary, with differentiated modules of investigation with respect to the capacity of sealing of the judgment with accusatory rite, and 'are in no doubt that the destruction of illegal things unusable induces the interpreter to reflections of general theory concerning verification of the additionality principle as fundamental relation in the right process (articles 6 ECHR, 111 Const.), in the light of the impact that is determined between the unpublished story of the destruction of things constituting the body of crime (or things relevant thereto) and the main method in which it puts its procedural question (art. 187, 2^o co., c.p.p.) . There are many occasions in which the code of criminal procedure speaks of issues, even if only in some of them offers a some specification, which however, in principle, does not apply to define them as

³ GAITO-ANTINUCCI, *Prescrizione, terzo estraneo e confisca dei beni archeologici (a margine della vicenda dell'Atleta Vittorioso di Lisippo)*, in *La giustizia patrimoniale penale*, a cura di Bargi Cisterna, Torino, II, 2011, 1199;

to the nature and subject matter (art. 2, 2° co., 3, 478, 491 c.p.p.). In these cases, the code the qualification differently⁴, "the questions referred for a preliminary ruling", "preliminary matters" and "incidental questions" offer a varied landscape that from space to any differentiation, entering into the game metrics that are apart from scientific definition of each of them to consider, now the way of introducing it, now the means arranged to resolve it. The same happened in the validity of the code of procedure of 1930 that, as it is known, has constituted the terrain on which it held the fruitful dispute concerning the identification of the "incident", "incidental questions" and "incidental process" and related distinctions, almost to emphasize how the changing of the rite has not led to any change, nor in terms of legislation, it's in point of dogmatic development; and, we might add, so enough for a penal process of matrix inquisitoria that had linear character, modular, forced⁵. There were differentiated rites, processes incidental had an embryonic character, especially there were alternatives decisorie for the parties, to which in principle were not delegated strategic choices: had full citizenship a fundamental principle, alternative to the principle of estoppel organic to the process of parts, that of non-regression of the process⁶ and the theoretical part of the Sabatini⁷, in his monumental work, "effectively reflects that system". The paradigm of the complementary process and changed under the Code of 1989 precisely because they are changed the horizons of value to the genetic mutation of the new procedural scenarios where the focusing on parts and new powers to the same granted by procedural system, on the one hand, and the attention toward the protection and respect for the fundamental rights of the individual from another, have generated the multiplication of controls of the moments of warranty within the criminal process in a dimension today european necessarily: our thought goes to the famous cases Dorigo, wherein the Strasbourg Court has considered the ineffectiveness of

⁴ CATALANO, *Regole ordinarie sulla prova e ed accertamenti complementari*, in *I procedimenti complementari*, coordinato da Montagna, in *La giustizia penale differenziata*, a cura di Gaito Spangher, III, Torino, 2011, 45.

⁵ SILVESTRI, *Le preclusioni nel processo penale*, AP, 2011, 2, 547; Id., *Opinioni a confronto. Preclusioni processuali e ragionevole durata del processo*, Criminalia, 2008, 242.

⁶ IACOVIELLO, *Procedimento penale principale e procedimenti incidentali. Dal principio di minima interferenza al principio di preclusione*, CP, 2008, 2190.

⁷ GIUS. SABATINI, *Trattato dei procedimenti incidentali nel processo penale*, Torino, 1953, 737; Id., «Incidenti (dir. proc. civ. e pen.)», in N.D.L., VIII, Torino, 1962; Id., *Vecchio e nuovo nella teoria dell'azione penale*, AP, 1962, 145 ss

executive title that declared pursuant to art. 670 c.p.p. makes executable not the sentence of condemnation; and Case Somogyi in which the same European Court of Human Rights has deemed practicable the remedy of refund in terms ex art. 175 c.p.p. (as amended by d.l. 21-2-2005, n. 17 conv. with mod. in the 224-2005., n. 60) in order to allow the appeal "The Late" of the judgment that has defined the process by default. According to authoritative address in literature⁸. The problem of the identification of the processes incidental may be resolved through a hermeneutic operation directed to ascertain the relationship of the practical question with the penal process and its impact on the procedural dynamics. Once enucleated the autonomy of each other with respect to the fact that constitutes a criminal offense, remains identified the constitute a question: where it is essential for the continuation and definition of the process, it should be reduced in other schemes, while, not occurring, correctly speak of incidental question. If certain that where a particular procedure is exclusively coordinated instrumental key and possibly to a penal process already established may talk certainly incidental method, does not appear sustainable the reciprocal proposition for which the resolution of an incidental question would always rise to a process incidental. In particular to establish when one is faced with a process incidental rather than to a mere incidental question, it is necessary to establish precisely the existence of a structure autonomous procedimentale predetermined by law. This place should be clearing the field of investigation from all situations that constitute cases sure essentialia iudici, relate them to all matters concerning the permissibility ' and lawfulness of the test, the constitution of the civilian part, the issues called for a preliminary ruling, controls on the admissibility of appeals and whatever else concern in turn procedural aspects are essential. The function of the incidental method, on the other hand, requires the recruitment of suitable shapes to protect the subjective situations of the parties which reproduces the typical connotations of cognition (immediacy and contradictory) and in such a way are outlined the minimum characteristics of the structural autonomy of incidental process: accessory nature of the object, guarantee of contradictory decision in the form of order, actionability and control. Under the logical profile-systematic, therefore, a clear positive judgment on the reliability of the accident of execution governed by articles 665 and s.s. c.p.p. as a generic

⁸ CONSO, *I fatti giuridici processuali penali*, Milano, 1955, 137

instrument control and guarantee in the penal process as a model of all incidental processes is derived from the provision of art. 127 c.p.p. valid for all decisions taken in the council room, ranging from questions of ritual to the situations regarding the substance of the case, up involve decisorie evaluations on the same *regiudicanda*. On the other hand constitutes a firm point in the scientific elaboration that the structural autonomy of incidental process would result in a mere external lustra without appreciable consequences if it were not accompanied by a sort of substantial autonomy resulting on the plane objective, in the sense that object of the proceeding incidental has to be a particular matter to be treated and resolve in this forum: a question profilatasi during a process and not profilabile in another way, namely a purely related to the realisation of the process⁹.

Once excluding the direct impact of incidental decision in the dynamic constitutive of the decision of the penal process, and qualified the latter as pronouncement of merit, correspondingly the other is identified as interim pronouncement with effectiveness purely procedural, even though they may have external effects: hence the peculiarity of its ancillary nature of the object as a constant note of proceedings incidental, in the limited sense that here the object detects only as legal fact of criminal procedure, whatever the intrinsic nature. Here it repropose the summa divided between accident likely to have a direct influence on the formation of the decision on the merits and incidents that do not have this ability. The phenomena can be traced to the first category should be denied the nature of incidental process even in the presence of structural autonomy; different conclusion must instead be reached for the other category in which converge the incidents which, resolved in an autonomous process celebrated in contradictory and defined by order of actionable, while in broadening the subject matter of the investigation, are completely outside the object of the process and as such are unfit affect the fate of the entire process or a step of it, leading however to the concrete fulfilment of claims submitted. This place, the careful interpreter observes that the finding complementary operated with the destruction procedure dictated by the art. 260, co. 3 bis and ter, c.p.p. and under minus quam perfecta, characterized by the accessory nature of the object and formal autonomy, although with peculiar connotations under the profile of the absence of the module procedimentale chambers of the art. 127 c.p.p. and irreversibility of the destruction of the

⁹ GAITO, *Incidente di esecuzione e procedimenti incidentali*, cit., 462.

body of the offense (or of things relevant thereto) in phase investigation (art. 253, 2° co., c.p.p.), minus that determines in the abstract fallouts on the guarantee of the right of defense and of controls, especially with respect to third parties are not to blame. When the nature of the institute bends to the objectives ' to pursue, come into play the values of legality and of a fair trial¹⁰.

The cultural frame, in substantial key, and similar to the case of the compulsory confiscation or, as has been underlined icasticamente, of confiscations where "the link between the offense and good object of apprehension fades in direct proportion to the punitive incidence of same ablation"¹¹.

The marked deformalizzazione investigations of evidence, the adoption of procedural modules contracts, renunciation of orality, the accentuation of powers officiosi instructors and the diversification of the evidential framework, the involvement of interested third parties, the fading of the rate of equity of the system constitute different aspects peculiar to the polymorphism of the subject method, that there is no lack of mark as many deviations with respect to the rules of evidence which are ordinary and impermeability to the values and culture of a fair trial.

Starting from the assumption that the fundamental right of the penal process are constituted by the autonomy of the third judge and impartial in the verification of the theme in the process from the guarantee of contradictory in the public hearing and of the right of defense, from the right to the control of decisions, from reasonable duration of the process, and ' clear that combine the latter with the substantial protection of defensive guarantees, is as controversial as demonstrated by the never placated debates on point, members to magnify when moves the center of gravity of the survey from the process of knowledge to that of complementary investigations .

Recently the appeal to the reasonableness of the times of the process and was hired as an element to justify the questionable choices of the legislature, contrabbandando with the slogan of the efficiency of justice a

¹⁰ BRICOLA, *Forme di tutela ante delictum e profili costituzionali della prevenzione*, in *Politica criminale e scienza del diritto penale*, a cura di Bricola, Bologna, 1975, 65; BARGI, *Il procedimento di prevenzione e i principi del giusto processo*, in *Misure di prevenzione*, coordinato da Furfaro, Torino, 2013, 65.

¹¹ GIUNCHEDI, *Le deficienze probatorie e di tutela effettiva*, in *Misure di prevenzione*, coordinato da Furfaro, Torino, 2013, 81.

dangerous tendency to reduce the guarantees for the accused in the deliberate order to speed up the duration of the criminal process by forcing the same judgments of the Constitutional Court according to which "the principle of reasonable duration of the process must be reconciled with the requirements of the protection of other rights and interests constitutionally guaranteed relevant in the penal process"; this is a position taken by the dictatorial and inconsistent with the systematic penalistica that must be dismissed with firmness in order to curb the predictable inquisitoria derives wherein it is slipping . With respect to the capacity of sealing of judgment cognition with accusatory rite, the destruction of illegal things subject to obligatory confiscation is carried out at a time trial in which have not yet been completed a final determination on the nature of the res illegal and in virtue of measures issued unilaterally by the public ministry and which do not stem from an actual contradictory in total absence of checks with consequent withdrawal in doubt of the inherent propensity precautionary measure emitted ablation upstream of complementary process.

In unpublished key, therefore, in a system in which the principle of legality pretends efficiency and completeness of the preliminary investigations, the new process governed by art. 260, co. 3 bis and ter, p.p.c. of destruction fraudulent goods subject to obligatory confiscation, on the one hand does not find convincing placement and completion in the structure and dynamics of the probative process according to the embodiment of the fullness of the contradictory and genuine checks in step of the appeal ex artt. 111 Cost., 6 and 13 ECHR; on the other hand affects phenomena of great crime linked to heritage, theme of burning news for the macroeconomic effects of alteration of the operating rules of the transnational market. Several reasons suggest that the same Public Minister the exclusive owner of the Destruction procedure, in quality of procedural part, the right to exercise the right to test in judgment based on the facts of which the illegal goods destroyed constitute the body of crime (arts. 187, 190, 253, 2° co., c.p.p). If we put aside the doubts and uncertainties of the legislature on the plane of the formal rigor with respect to the adaptation of the sampling of goods, performed according to a module procedimentale extraneous to the chambers of commerce model provided by art. 127 c.p.p., the procedural fact of the destruction of the body of the offense (or of things relevant thereto) in step d the survey has the effect of foreclosing the right to show the same procedural part that has decided to activate its

ascertainment incidental, namely the Public Minister, thus altering the physiology of probative process in the judgment *dibattimentale* with irreversible effects on the effective exercise of the right to a hearing of the accused and of the possible third concerned (art. 6 ECHR, 111 Const.).

According to authoritative address in literature.¹² If the foreclosure may be the cause or the occasion of the birth or the extinction of a law or a legal situation, seems correct to describe the foreclosure as a legal fact procedural of the act through the cause which does not expire or prevents the whole process, but only one faculty procedural and consequently the fulfilment of certain acts; and nothing detects that the immediate cause of foreclosure is constituted by an act or by a fact, such cause or procedural or extra-procedural. The foreclosure concerns directly to the substance of the act, which prevents the fulfillment not for reasons ascribable to the inactivity at the prescribed times or in any case the lack of formal requirements laid down by law, but by reason of prior fulfilment of certain activities in contrast with the legal reason for the exercise of the right or of the faculty procedural.

Otherwise opinando, for example, it would be difficult to hypothesise that the Public Minister can ask the condemnation of guy for receiving stolen a bank check on the grounds which kit evidence the photocopy of the check in the absence of the original whose destruction had been ordered from him in stage of the inquiry. You could speak of decadence since according to the doctrine more accredited, the decadence and a particular type of procedural sanction that pertains to the right or the faculty ' procedural law that could no longer ' assert themselves to be after a certain time - fixed by law - useful to its exercise then and a particular species of invalidity own failures to comply with the terms and has the substantial effect to extinguish the situation the subjective right, power or entitled in the abstract recognized by law to certain subjects. On the other hand to the fulfilment of a procedural act on the part of whoever is deprived of the correlative right (e.g. appeal), necessarily follows the situation of inadmissibility. In this case the decadence regards the exertion of law (or power or entitled), the inadmissibility strikes the act that despite the occurrence of decadence, has been also made by those who could no

¹² GAITO, "Electa una via". *I apporti tra azione civile e azione penale nei reati perseguibili a querela*, cit., 158. CONSO, *Il concetto e le specie di invalidita'*, Torino, 1955, 60; DELOGU, *Contributo alla teoria dell'inammissibilita' nel diritto processuale penale*, 1938, Roma, 50.

longer make legitimate exercise. In a system of criminal justice asset necessarily today Parliament, the escape toward the establishment presuntivo of application conditions of real caution with respect to res subject to obligatory confiscation and destruction procedure, poses today a verification problem for a preliminary ruling in the community, especially with regard to the position of the third in good faith. Consider for example the controversial issue of relations between failure and seizure antimafia in function of confiscation¹³, in the case in which the subject declared failed to coincide with the infringer of illegal goods subjected to destruction procedure in application of art. 260, co. 3 bis c.p.p.: highlights the delicate position of third party unconnected, despite himself overwhelmed by the effects of the insolvency proceedings. We must ask ourselves the question as to which is the standard minimum guarantee and protection of third party unconnected innocent suffering (or has suffered) proprietary effects of the liability that a criminal established in respect of the others or even a failure to detect the same responsibility, i.e. what is the remedy supranational to activate. Whenever there has been a breach of Community law the object of specific standardisation (former framework decision), to know the interpretation conforms to the law and the jurisprudence supranational era of fair trial parliament in the wake of the Treaty of Lisbon, seems of obligation the opinion by the national court of last instance before the Court of Luxembourg through the Institute of Community ruling. Compared to the standard control, when they are in discussion subjects, such as the confiscation or the European arrest warrant, are the subject of framework decisions (or other source Community legislation), the opinion before the Court of Justice in Luxembourg national courts of merit and optional, while becomes mandatory (if that doubt not yet been solved) for the national court of last instance. In the application of the standard "real" supranational that delimits the scope of recognition of any expropriation of assets and things in accordance with the recent standards provided for by the framework decisions of the European Union in accordance with the principles of the case law of the European Court of Human Rights and the European Court of Justice, and no doubt that every form of aggression assets not consequent to the judicial investigation of an offense must be regarded as extra legem. After the leading houses of Punta Perotti concerning infringement of art. 7 and art. 1 of the Additional

¹³ GAITO, *Sui rapporti tra fallimento e sequestro antimafia in funzione di confisca*, RDP, 1996, 393.

Protocol 1 ECHR, the theme of criminal justice wealth of defensive guarantees and protection of third parties and of growing news. Yet in other occasions in Italy, in terms of legislation of customs infringements and confiscation, the constitutional court and more times with judgments additive of principle for the protection of third party unconnected innocent with respect to the application of the same confiscation.

The question of customs controls enrolled in a more broad context that and that of the relationship between the internal circulation and transnational fraudulent goods subject to the procedure of destruction and the taxation of wealth illicit subject to confiscation¹⁴, the theme of burning topical criminalistics. Think about the case (now becoming more popular ' in the absence of institutional checks on the digital market) of the so-called e-commerce or digital market indirect, where the commercial transaction takes place by telematic means, but the customer receives the physical delivery of the goods at home according to the traditional channels, i.e. through carrier or freight forwarder. Fiscally, you configure an import/export where the good enters or leaves the customs territory of the EU or a sale at a distance, in the case in which the operation is carried out in the Community framework between a supplier and a consumer resident in two different states, both belonging to the European Union or, more simply, in the national context. In these cases may rightly doubts if the person liable for payment of the customs debt coincides with the subject undergoing the procedure for locking the movement of illegal goods and consequent destruction, i.e. always coincide customs debtor and investigated (writing in Italy in the register of the news of crime of persons known with the so-called mod. 21) in application of art. 260, co. 3 bis c.p.p. According to the recent address of the Court of Justice in Luxembourg the hypothetical good faith of the importer does not exempt from liability since he is the registrant of the imported goods, even if accompanied by certificates incorrect or falsified unknowingly; not being the European Community obliged to suffer the consequences of behavior of suppliers of its citizens, that fall in the risk of activity ' commercial, against which economic operators may well guard within the scope of their trading relationships and where the choice made by the company taxpayer regarding the subject supplier/ exporter with which conclude trade

¹⁴ ACQUAROLI, *La ricchezza illecita tra tassazione e confisca*, in *Temi di attualita` penalistiche*, a cura di Coppi-Insolera-Lanzi-Macello, Roma, 2013, 7;

relations and the intensity and the protraction in time of such relations posed the company itself under the conditions to examine the goods imported and To identifying the origins as less, for example, through the verification of the characteristics, techniques and ways of working.

2. The new forms of confiscation in the criminal-law protection of property rights industrial and issues of coordination

The movement of goods illegal and counterfeit in the circuit of the economy and the labor market, has put in place of criminal policy internal supranational and a primary need of confiscation and destruction in relation to safety issues transnational linked to all forms of counterfeiting, piracy agro-food to fraud in industrial brands of high fashion et similia: from here the major node of the procedure of destruction of goods illegal and counterfeit subject to seizure and confiscation and respect of guarantees communities of the criminal process, especially in the light of the recent amendment of art. 260, co. 3 bis and ter, c.p.p. with the d.l. 23-5-2008, n. 92 and subsequent amendments (so-called Safety Package)¹⁵. In line with the criminal policy of "security"¹⁶, into l. 23-7-2009, n. 99, the so-called Decree Development, among the provisions for the development and the internationalization of enterprises, in terms of energy and ' wanted to redesign, with analytical provisions of particular edge ', the perimeter of the criminal-law protection of property rights industrial through the introduction of four new hypothesis of offenses of counterfeiting (arts. 473, 474, 474 b and c, 517 b and c c.p) and related hypothesis of obligatory confiscation (Art. 474 bis and 517 ter c.p.), with implications concerning the regime differentiated penitentiary (art. 4 bis, co. 1 ter, ord. penit.) in relation to the cases of belonging to criminal association aimed to commit new offenses referred to in Articles 473-474 c.p. (arts. 416 bis, 6^o co., c.p. and 51, co. 3 bis, c.p.p.), the regulatory body containing the so-called "responsability of administrative entities", within the meaning of art. 19, d.lg. 8-6-2001, n. 231.

The art. 474 bis c.p. introduces a new form of confiscation by stating that "in the cases referred to in articles 473 and 474 and always tidy (...) the

¹⁵ ANTINUCCI, *La sorte dei beni sequestrati o confiscati*, cit., 1153; Id., *La distruzione delle cose confiscate non utilizzabili*, ivi, 1165.

¹⁶ GIARDA, *Ridisegnato il perimetro della tutela penale dei diritti di proprietà industriale*, CorM, 2009, 11, 1057.

confiscation of things that served or were intended to commit the offense and things which are the subject, the product, the price or the profit, to anyone belonging". Does not escape that a sentence of the same paragraph shall be without prejudice to the rights of the offended person to refunds and for compensation for the damage"; apart from the fault of the reference to the person offended by the crime, since, in a manner more ' precisely, the legislature would have had to call the damaged by the crime, it remains firm determination for which the same legislature excludes from the subject of the confiscation cio ' that must be returned or in terms of subject of repairing the damage or in terms of the subject of the action restitutoria, which is the responsibility of the person who from the facts of the offense has suffered damage civilly compensable; this is a sort of interpretation also authenticates the scope of art. 19 d.l.g. 8-6-2001, n. 231. The art. 474 bis, 2° co., c.p. reiterates the possibility that the court intervenes with a confiscation for equivalent: all times that "it is not possible to perform the measure referred to 1° subparagraph" is ordered the "confiscation of goods to which the offender has the availability to a value corresponding to the profit".

It should be stressed as in force for the recall of 3° co. of art. 322 ter c.p.p., the judge must determine exactly the sums of money or to identify the goods to be subject to confiscation for equivalent. Arouses the attention of the interpreter, especially for issues of coordination with the discipline civilistica, art. 474 bis, 3° Co., c.p. especially if you consider what is specified in the final sentence of paragraph 1, where ' the legislator wished to emphasize how the confiscation must strike illegal things, (the object, the product, the price or the profit of the offense) "anyone belonging". The indication thus explicit must however make the accounts with the forecast of 3° subparagraph precisely that addresses the case where things that served were intended to commit the offense, things that are the object, the product, the price or the profit, belong "per person extraneous to the crime itself".

In this circumstance, the 3° subparagraph provides that they can apply the provisions of the art. 240, 3° and 4° co., c.p., is excluded the possibility of confiscation in an objective manner, provided however that the third parties extraneous to the offense can prove "not having been able to predict the illicit use, even occasional or illicit origin and not be guilty of a defect of surveillance". The last paragraph of art. 474 bis c.p. follows regulatory choices that did discuss from several points of view, but which were

maintained blindly in all the legislative interventions; the provisions discussed the theme of confiscation must be observed even "in the case of application of the penalty at the request of the parties pursuant to Title II of Book VI of the Code of Criminal Procedure"; we are aware of the needs of criminal policy that are at the basis of the arrangement, but it cannot be ' not emphasize how the same should be regarded as an example of a counter pressure to the adoption of the special process of negotiation on the penalty; and ' said more times that the latter can take root more in daily practice of hole only in the hypothesis where there is the neutralization of any criminal effect deriving from the settlement, with the consequent widening of the premialita ' of this Institute; it must instead record the maintenance of negative effects of particular significance, that in practice they end up eventually to condition the adoption of such a solution of the penal process. But the problems of coordination between the legislation on anti-counterfeiting confiscation (art. 474 bis, 517 ter c.p.) and the destruction procedure fraudulent goods or contraffatte (art. 260, co. 3 bis and ter, c.p.p.) are in fact more. For example, in operating key, remains the doubt about what can occur if the theme of commerce of products with signs false (art. 473 c.p.), the vehicle used for the transport of the same which has been arranged the preventive seizure will not ' returned ex art. 324, 7° co., c.p.p. in the outcome of the proceedings for review of the decree that imposed the precautionary constraint, since it is well intended to obligatory confiscation in application of art. 474 bis c.p. according to the law in the case under examination, in fact, the special nature of the body of the offense within the meaning of art. 253, 2° co., c.p.p., of the object of obligatory confiscation ex art. 474 bis c.p., renders superfluous any motivation also in terms of other needs' functional, prominent making the function of ensuring the effectiveness of confiscation, even with the effect interdittivo of prohibition of drawback referred to in art. 324, 7° co., c.p.p. In this case, otherwise opinando, precisely because of the link between the art. 240, 2° co.,c.p. and art. 321, 2° co., c.p.p., the vehicle subject to obligatory confiscation ex art. 474 bis c.p., falls within the scope of application of the rules governing the procedure of destruction of goods infringing counterfeit or in application of art. 260, co. 3 bis and ter, c.p.p., without any investigation into contradictory. On the other hand consider the art. 16 of l. 23-7-2009, n. 99 laying down certain provisions concerning the "destination of goods seized or confiscated in the course of operations of the judicial police for the repression of the offenses referred to in Articles 473, 474, 517

b and 517 quater of the criminal code". In particular art. 16, 1^o co., provides that the movable assets recorded in public registers, ships, boats, boats and aircraft seized in the course of the judicial police for the repression of the offenses referred to in Articles 473, 474, 517 b and 517c of the penal Code are entrusted by the competent judicial in judicial case the police who request them to be used in the activities of the police or may be delegated to other organs of the State or other public entities not cheap, for purpose of justice, of civil protection or environmental protection. In the next 3^o co., art. 16 specifies that in the case in which there is no instance of expectation in judicial case within the meaning of 1^o co, the authority judicial authority has the destruction of assets seized in accordance with the procedure referred to in art. 83 rules of implementation, coordination and transitional measures of the code of criminal procedure, referred to in d.lg. 28-71989, n. 271; in the case of destruction, the cancellation of vehicles from public registers and ' performed in exemption from any tax or law. Also in this there is a possibility of overlap of the substantive rules on the subject of the confiscation and destruction dictated by the so-called Development Decree and the destruction procedure introduced by the recent amendment of art. 260, co. 3 bis and ter, c.p.p. with the news of the D.L. 23-5-2008, n. 92 and subsequent amendments (so-called Safety Package). According to a recent address of case-law, with respect to the assumptions of the so-called environmental offenses provided and punished by d.lg. 3-4-2006, n. 152, respectively in articles 256 (Activities of waste management - not authorised), 259 (illegal traffic of waste) and 260 (Activities organized for the illegal traffic of waste), "cannot be arranged the refund ex art. 324, 7^o co., p.p.c. of the medium used for the illicit transportation of waste which has been the subject of preventive seizure aimed to confiscation as the preventive seizure of things and ' permitted the confiscation is justified for the danger 'intrinsic hazardous waste"; Moving from these premises the interpreter should not be surprised even where in the application of the norms that regulate the destruction procedure (art. 260, co. 3 bis and ter, c.p.p.), in the case of crime linked to illegal traffic of waste, all things pertinent offense in application of art. 253, 2^o co., c.p.p. followed the fate of every other res illegal as dangerous in re ipsa, therefore subject to destruction.

3. The effects of the destruction of illegal goods on relations between civil and criminal action

The practice not infrequently has unexpected situations which seem to escape the codicistica discipline. In particular in the processing of case law of criminal acts in the field of counterfeiting sections joined¹⁷ have recently solved the question "If may be regarded a liability by way of handling stolen goods for the final purchaser of a product with counterfeit trademark or anyway of origin different from that indicated" by stressing the following principle of law: cannot constitute a criminal liability for the final purchaser of things in relation to which they have been violated the rules of origin and provenance of the products and in the field of industrial property have recently solved the question "If may be regarded a liability by way of handling stolen goods for the final purchaser of a product with counterfeit trademark or anyway of origin different from that indicated" by stressing the following principle of law: cannot constitute a criminal liability for the final purchaser of things in relation to which they have been violated the rules of origin and provenance of the products and in the field of industrial property. This place, the illegal things "in relation to which they have been violated the rules of origin and provenance of the products and in the field of property ' industrial" held by the final purchaser responsible for administrative offenses, indisputably are subject to mandatory procedure of destruction dictated by art. 260, co. 3 bis and ter, c.p.p. In principle, therefore, both the final purchaser of the goods illegal responsible of administrative offenses (art. 1, 7^o Co., d.l. 14-3-2005, n. 35 conv. with modif. on l. 14-5-2005, n. 80) as the third in good faith the offended person in the hypothesis of formulation and/or counterfeiting of illegal goods [articles 648, 473 c.p. as amended by art. 15, 1^o co. (a), l. 23-7-2009, n. 99], all having because a separate title in the action of civil liability by offense against the accused of offenses of counterfeiting and receiving stolen goods illegal in application of articles 185 c.p. and 75 ss. c.p.p., might be precluded their procedural choices in civil headquarters in reason of the irreversible destruction of illegal things at the stage of preliminary investigations in criminal law. Thus and pacific that in cases of civil liability by the offense of counterfeiting (arts. 473, 474, 517 b and 517 c c.p.)

¹⁷ Cass. pen., 8-12-2012, con nota di Antinucci, Legalita ` della fattispecie penale e dispositivo di contrasto alla contraffazione, AP, 3, 1117.

connotations, from exhaustion upstream of the destruction procedure of res illegal (art. 260, co. 3 bis and ter, c.p.p.), are ab imis precluded the civil actions for the refunds were emerging from crime (art. 185 c.p.), attributable to the systematic civilistica of damages actions in specific form implementation in specific form in application of art. 2058 c.c. which obliged the author of any criminal offense¹⁸. Symptomatic in this regard to art. 62, n. 6, c.p. that, in stating the mitigating circumstances common indifferently speaks of the activities and results of the behavior of the defendant due to the common denominator of refund; or have, before judgment and outside the case anticipated in the last paragraph of art. 56 c.p., used spontaneously and effectively to obliterate or attenuate the harmful consequences or dangerous of the offense. Of equal the art. 165, 1^o co., c.p. in disciplining the institute suspended sentences, refers to the obligation of the refunds without further specifications. It does not matter on systematic plan and therefore of relations between civil and criminal action, one could observe, the refund of a Thing illegal in re ipsa in terms clarified in application of art. 240, 2^o co., c.p. and indeed the prospect changes radically from the point of view of civil action activated by the proprietor of the trade mark counterfeit industrial, which may ' in utilibus recourse to the innovative institute statements called retroversion of the profits of the infringer governed by art. 125 d.lg. 10-2-2005, n. 30 ss. mm. (so-called Code of the Property Industrial) indexed "damages and restitution of the profits of the infringer" that 3^o subparagraph provides: "In every case the holder of the right infringed may request reimbursement of the profits made by the infringer, alternatively to compensation for loss of earnings or to the extent that they exceed such compensation".

The relative civil action is activated first of the specialised sections in respect of the undertaking, established since 2012 at the Courts and Courts of appeal having their headquarters in the capital of each region. The rule of "reversion or retroversion or refund of profits" referred to in art. 125, 3^o co., IPC in theme of compensation and liquidation of the damage represents a significant news ' resulting from the rewrite of the entire art. 125 operated by art. 17, d.lg. 16-3-2006, n. 140, in accordance to directive n. 2004/ 48/EC of 29 April 2004 on respect for the rights of property ' intellectual and industrial brands (c.d. Directive enforcement), in force since 8 April 2006. If on the one hand, in fact, and it is conceivable that the

¹⁸ GAITO, "Electa una via", cit., 159.

legislature intended to locate a mere procedures for the clearance of the damage, on the other hand it must be considered that the right to the refund of profits fits on a different plane with respect to the damages (art. 2041 c.c.), either because it would not be noticeable a ratio of necessary correlation between the sales of the infringer and lost sales of the holder, both because the recognition of the right would be inspired by the need to prevent the infringement of the patent is the occasion of enrichment for its author, all times in which the gain realized exceed the actual loss of the holder of the right infringed. In systematic key, in the application of the rules of the code of the property ' industrial, the condemnation of the responsible to the refund of earnings not and then, conditioning the proof of the existence of a compensable damage ex adverso required by art. 185 c.p. to actuate the protection civilistica which inevitably would find application in cases of destruction of illegal goods, ascertaining incidental precisely the phase of the preliminary investigations (both against known that against unknown as provides respectively the co. 3 bis and ter of the art. 260 c.p.p.). To tacer on the other, the introductory statement of the art. 125, 3° co., I.P.C. - "In any event" - allows you to ask the "giving back profits" in all cases of violation of a right to property industrial ' irrespective of the good or bad faith of the subject author of the lesion to say the abstracted (the protection compensatory has as an essential prerequisite to the subjective element in the form of the guilt, which instead is not mentioned in the rule in question). The applicability of the arrangement in the concrete case requires, however, the verification of two assumptions; in the first place it is necessary to ascertain profits achieved; secondly, jackets ' the provision confers on the proprietor of the right infringed the gains made through a conduct prohibited by legislation on property industrial ', and ' need a causal relationship between the breach and the profit achieved; in the case of infringement of a trade mark and then, necessary that profit is attributable exclusively or mainly to the use of the others distinctive sign, assessment in civil which is influenced by the interference of the investigation incidentally to destruction in penal law, especially in cases of investigations against unknown in application of art. 260, co. 3 ter C.P.P., the case in which, in the absence of suspects natural or legal persons notes, the complex econometric evaluations of quantification of useful foreseen by art. 125 IPC would be revoked in doubt from destruction "senza contradictory" of the only existing test, the illegal goods counterfeit. The method incidental impacts thus also on the procedure for

the exercise of a civil action not compensatory of retroversion of profits in the protection of property rights industrial (art. 125 c.p.i.), which remains structurally autonomous although openly by peculiarity ' in the physiology of the probative process precisely by reason of the fact procedural law of destruction of goods contraffatte criminal prosecution.

The autonomy of the civil action of retroversion of profits in the protection of property rights industrial (art. 125 c.p.i.) subscribes to full title in the system of civil liability by crime governed by the legislator technical delegate of 1989¹⁹, that having deleted any reference to the so-called criminal ruling has favored the line of separation of the civil judgment from the criminal proceedings (art. 75 c.p.p.), in accordance with the maximum simplification in the carrying out of the process, according to the rule indicated in art. 2, Directive n. 1, l. delegation. For more significant, from the theoretical point of view of relations between civil and criminal after ascertaining incidental destruction of counterfeit goods (art. 260, co. 3 bis and ter, c.p.p) and ' instead the change implemented by art. 52 d.lg. n. 131/2010 that has added a new co. 6 bis in art. 120 of the code of the property industrial, by providing that the rules of jurisdiction and competence laid down in the said Article should apply "also to actions by negative ascertainment also proposed as a precautionary measure": and ' clear that the new formulation of co. 6 bis mentioned consecrates the permissibility ' in litigation on the right of the property ' industrial actions negative ascertainment even where proposals as a precautionary measure in the vicissitudes of infringement of industrial brands relevant penal law (so-called action of non-counterfeiting).

And well known in the literature processualcivilistica that actions negative ascertainment, aimed at ascertaining the absence of the right claimed stragiudizialmente from a subject in order to demonstrate, indirectly, the existence or the fullness of the opposing right of the petitioner or his freedom from obligations in respect of the defendant, and very debated both in terms of the admissibility both in relation to the distribution of the burden of proof.

Admit in civil that through the action conservatory you can obtain effects of negative ascertainment means admitting that the precautionary process can be used not for the protection in via anticipatory of a subjective right to assert in the ordinary way, but ' in order to prevent the damage

¹⁹ ZENO ZENCOVICH, *La responsabilita `civile da reato*, Padova, 1989, 85.

that could be caused to the applicant by a judicial initiative of resistant; means configuring the precautionary protection against a judicial request precautionary or ordinary, which should be expected from the opponent and in the prevention of the measure consequent, fearing that the same can be negative.

This admissibility is justified on pragmatic plan if it is borne in mind that in a system of free competition, the objective lawful of each of the competitors is that of obtaining a competitive position and to exercise the right to the free exercise of her own activity, constitutionally guaranteed (art. 41 Const.). In this respect the interests of the applicant in mere negative ascertainment seems therefore qualify as an interest in obtaining a provisional regulation of the legal situation, which allows to overcome the uncertainty and to affirm, albeit always provisionally, the legality of its conduct: it is obvious that in the case of negative ascertainment of counterfeiting, the usefulness of the precautionary measure would reside precisely in the capacity of the latter to experience the real interest and current of the economic operator to see exceeded the uncertainty on the legality and legitimacy of his action on the market, eliminating any disturbance and allowing it to operate freely .

It does not seem, then only theoretical in the case in which the circulation of illegal goods blocked through the destruction procedure "Extra contradictory" in step d the investigations into criminal law in application of art. 260, co. 3 bis and ter, c.p.p., can ex adverso be lawful in seat civil injunction through the correct experiment by the action of precautionary assessment negative ex art. 120, co. 6 bis, i.pc. (c.d. action of non-counterfeiting). And emerges the doubt, in the key of a guarantee, in the case in which the destruction of goods takes place in the context of an investigation against unknown enrolled in the register of the news of crime in application of 260, co. 3 ter c.p.p., news learned from the investigated only subsequently in the step of extending investigations ex art. 407 c.p.p. An exact classification of the destruction process systematic key, however, suggests reflections and questions of similar tenor with specific regard to other institutes of precautionary protection of property rights industrial ' (c.d. actions of non-infringement) introduced by the aforementioned news of 2010.

4. Conclusions

In date 12-6-2013 the European Parliament and the Council have adopted the Reg. Eu n. 608/2013 (80) relating to the protection of property rights intellectual on the part of the authorities ' customs and repealing Reg. Ec n. 1383/2003 of the Council concerning the customs intervention in respect of goods suspected of infringing intellectual property intellectual and replaced by the updated version, according to the forecasts of the art. 38 of the new legislative text, in force since 1 January 2014. The Union is founded on the customs union. In the interest of both the economic operators both of the authorities duties of the Union, the European legislator considered it appropriate to bring together the current customs legislation in a code with the Reg. n. 952/2013 that, in date 9-10-2013 (81), has established the "Custom Code of the Union". The facilitation of legal trade and the fight against fraud require regimes and customs procedures are simple, quick and consistent mainly through the use of computerized procedures and electronic equipment, according to the indications of the European Economic and Social Committee. The update has essentially the purpose to introduce instruments to combat the entry into the European Union of counterfeit products shipped in small quantities ' ; the explosion of the so-called e-commerce has in fact led to a strong growth of postal channel as conditions and terms of delivery of false directly to the end user. Section II of Chapter III of the Regulation entitled 'The Intervention of the authorities' customs', is entitled "The destruction of goods, initiation of the procedure and early release of goods" and certainly represents the most interesting ' of the new Community regulation with which we recognize in the head to the authorities duties of the Member States the power to arrange - in application of a contradictory procedure governed by detailed rules dictated by articles 23 - the destruction of illegal things or counterfeit. The new procedure introduced by the updated version of the Regulation allow therefore to the customs authority to proceed directly to the destruction of minimum quantities of counterfeit products subject to notification to the importer, which will have ten working days to oppose the destruction, time limit beyond which scattera' silence-consent; the holder of the right to intellectual property object of infringement will not be involved in the procedure, nor will receive news of seizure.

In operating key the art. 23 of Reg. n. 608 provides that within ten working days from the date of notification of the detention of the goods,

the addressee of the decision, the declarant or the holder of the goods should confirm in writing their consent to the destruction of the goods. In case of failed confirmation by the declarant or the holder of the goods, the addressee of the decision has the obligation to initiate a process that establishes the violation of the right to property intellectual¹. This procedure, already provided for in the existing Reg. 1383/ 2003, has not been ever applied by the authority¹ Italian customs as presents elements of incompatibility with the national legislation in force dictated by the code of criminal procedure; such an agreement would be, in fact, of type privatistico between the parties and stands in contrast with the requirement in the head to customs officers in their capacity as official P.G., to report without delay to the competent judicial¹ in application of art. 347 C.P.P. The destruction of goods sent in small consignments are suspected of being counterfeit or pirated goods, in accordance with the conditions laid down in Articles 25 and 26, may be effected only by the counterfeit and pirated goods, not perishable and which are covered by a decision to grant a request for intervention. It is noted in this regard, a further profile of the criticality of the Destruction procedure union with respect to the rules of due process, with specific reference to the hypothesis of immediate destruction of the goods before having ascertained the offense.

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