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Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre juridique international et Droits de l'Homme

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THE ITALIAN DRAFT REFORM OF CRIMINAL PROCEEDINGS IN THE FRAMEWORK OF THE RIGHT TO A REASONABLE LENGTH OF THE "FAIR TRIAL": LIGHTS AND SHADOWS AMONG TRIAL WAIVER SYSTEMS, NEED FOR ORGANIZATIONAL ACCOUNTABILITY OF THE JUDICIARY AND DISCIPLINARY LIABILITY

SUMMARY: 1. Introduction: the draft reform as a counterbalance of the recently enacted Law on the suspension of the statute of limitations after the first instance judgment. – 2. Principles concerning investigations and preliminary hearing: new rules for assessing the need for a trial, deadlines for the investigation phase and priority criteria. – 3. Amendments to the trial waives systems: more space for the plea bargaining and risks of abuse for the abridged trial. – 4. The new criteria allegedly aimed at speeding up the trials, the abandon of the taboo of the "principle of immediacy" and the extension of the preliminary filter. – 5. Deadlines for the proceedings: lack of procedural sanctions and inflation of disciplinary liability. – 5.1. The specific rules envisaged for appeal proceedings following a conviction: the escalation of the "reasonable length" of the proceedings from "obligation of means" to "obligation of results" and the direct engagement of the Presidents of the Courts. – 6. Other principles as to the execution of judgments of the ECtHR, notifications, restriction of the appeal powers, essential procedural elements and financial investments for reducing the backlog.

1. *Introduction: the draft reform as a counterbalance of the recently enacted Law on the suspension of the statute of limitations after the first instance judgment*

The Italian draft Law for legislative delegation to the Government in order to achieve the efficiency of criminal proceedings and the expedite definition of criminal proceedings before the Courts of appeal *(«Schema di disegno di legge recante deleghe al Governo per l'efficienza del processo penale e disposizioni per la celere definizione dei procedimenti giudiziari pendenti presso le Corti d'appello»*), issued by

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the Presidency of the Council of Ministers on 13 February 2020, represents the complement of the Reform of the criminal proceedings statute of limitations, enacted with the Law no. 3 of 9 January 2019, entered into force on 1th January 2020.

Indeed, the aforementioned Reform introduces, *inter alia*, an amendment to Art. 159 par. II of the Criminal Code, prescribing the suspension of the limitation period of the crime from the first instance judgment, up to the moment the latter becomes final.

That rule, aimed at radically solving the problem of the massive number of criminal proceedings statute-barred after the first instance judgment and meeting the need for justice of the victims and for protection of the community, had encountered strong resistance and perplexity on the part of the Lawyers Bar Association[1], some Academics[2] and even a portion of the judiciary[3], which feared the risk of subjecting the accused person to a markedly Kafkaesque *sine* die trial.

The rational of the draft Law for legislative delegation (hereinafter: draft Reform) is therefore to avoid the risk of being under criminal proceedings for an excessive period of time beyond the limits of the limitation period (suspended precisely), guaranteeing the reasonable length of criminal proceedings, in all their phases: investigation, first instance trial, appeal and Court of cassation.

2. *Principles concerning investigations and preliminary hearing: new rules for assessing the need for a trial, deadlines for the investigation phase and priority criteria*

In order to achieve the goal of the reasonable length of the proceedings, the Lawmaker firstly focuses on the issue of the excessive amount of proceedings pending before the Courts, trying to solicit and facilitate a higher number of investigative dropping out, thanks to the introduction of a new specific rule for assessing the need for a trial, to be respected by prosecutors in their choices about terminating *notitiae criminis* (*«richiesta di archiviazione»*) and by

[1] See the document issued by the Italian Union of Criminal Bar Associations (*"Unione delle Camere Penali Italiane"*) on 19 December 2018 and signed by 110 Academics, *Controriforma della prescrizione: l'appello dell'Accademia e dei Penalisti italiani al Presidente della Repubblica*, in *https://www.camerepenali.it/cat/9615/controriforma_della_prescrizione_lappello_dellaccademia_e_dei_penalisti_italiani_al_presidente_della_repubblica.html.*

[2] See G. SPANGHER, *Il processo penale: 30 anni dopo, attendendo la riforma della prescrizione*, in *Arch. pen.*, 3, 2019, 24 November 2019; G. LOSAPPIO, *Il congedo dalla prescrizione nel processo penale. Tempus fu(g)it*, in *www.dirittopenalecontemporaneo.it*, 1TH July 2019; conversely, in nuanced positive terms, see G. L. GATTA, *Una riforma dirompente: stop alla prescrizione del reato nei giudizi di appello e di cassazione*, in *www.dirittopenalecontemporaneo.it*, 21 January 2019.

[3] See the document issued by the National Magistrates Association *("Associazione Nazionale Magistrati"*) on 10 November 2018, *Proposte di riforma dell'Associazione Nazionale Magistrati in materia di diritto e processo penale*, , in *https://www.associazionemagistrati.it/doc/3146/proposte-di-riforma-del-processo-penale.htm*; as well as the consultative opinion delivered by the High Council for the Judiciary on 8 January 2019, *Legge spazza-corrotti e riforma della prescrizione del reato: il parere del CSM*, in *https://www.csm.it/documents/21768/92150/parere+anticorruzione+19+dicembre+2018/056918e6-48e3-bc35-52da-c399ccb070ef.*

pre-trial judges in their "filter" activities on the indictments issued by prosecutors in the framework of the preliminary hearing *(«udienza preliminare»)*[4].

Indeed, Art. 3 lett. a) and i) of the draft Reform provides for the shift from the rule of the "suitability of the evidence collected during the investigation to support the indictment before the Court" (*«inidoneità degli elementi raccolti a sostenere l'accusa in giudizio»*)[5] to the rule of the "reasonable expectation of success of the accusation before the Court" (*«ragionevole previsione di accoglimento della prospettazione accusatoria in giudizio»*).

Actually, we are not facing a real novelty, as the draft Law simply proposes the adoption of one among the two interpretative options which have so far emerged from the jurisprudence, already endorsed by the Plenary Session of the Supreme Court and the Constitutional Court[6], *id est*, the one that most encourages the possibility of early termination of proceedings before the trial.

In other words, the Legislator chooses the evaluation rule which allows prosecutors and pre-trial judges to make a "prognostic and predictive" assessment on the success of the prosecution on the basis of the evidence "already gathered" during the investigations[7], whereas the other, more restrictive interpretative option allowed a closure anticipated substantially only in the rare cases in which the possibility of "new evidence scenarios" during the trial had to be "absolutely excluded"[8].

As a result, it is reasonable to believe that the adoption of the aforementioned evaluation criterion can greatly reduce, upstream, the number of trials to be celebrated before the Courts, thereby helping to speed up the definition of those currently pending.

The draft Reform also dedicates particular attention to the need for a reasonable length of the specific investigations phase[9].

Three different deadlines are fixed for the conclusion of the pre-trial proceedings (six months, one year and one year and half), according to the different gravity and complexity of the crimes under investigation[10].

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[4] See, in doctrine, M. DANIELE, in M. DANIELE-P. FERRUA, *Venti di riforma dell'udienza preliminare e del patteggiamento: un subdolo attacco al processo accusatorio*, in *www.penalecontemporaneo.it.*, 2019, 5, pp. 75-81; F. CASSIBBA, *Udienza preliminare e controlli sull'enunciato d'accusa a trent'anni dal codice di procedura penale*, in *Arch. Pen.*, 3, 2019, p. 843.; C. CONTI-G. QUAGLIANO, *La regola di giudizio nell'udienza preliminare: una decisione bifasica*, in *Dir. pen. proc.*, 2016, p. 346.

[5] See Art. 125 of the Rules Implementing the Code of Criminal Procedure.

[6] See Court of Cassation, Plenary Session, 30 October 2002, no. 39915, in *www.italgiure.it*, and Constitutional Court, 8 July 2002, no. 335, in *http://www.giurcost.org/decisioni/2002/0335s-02.html.*

[7] See Court of Cassation, VI Section, 30 April 2015, no. 33763, in *Diritto penale e processo*, 2016, 3, p. 332, with comment of C. CONTI-G. QUAGLIANO, *La regola di giudizio nell'udienza preliminare: una decisione bifasica*; conf., *ex plurimis*: Court of Cassation, VI Section, 3 June 2015, no. 29156; Court of Cassation, VI Section, 26 June 2014, no. 36210; all in *www.italgiure.it.*

[8] See Court of Cassation, II Section, 7 April 2016, no. 15942, in *www.italgiure.it*; conf., *ex plurimis*: Court of Cassation, V Section, 26 October 2016, no. 565; Court of Cassation, II Section, 5 November 2015, no. 46145; Court of Cassation, II Section, 14 November 2013, no. 48831; all in *www.italgiure.it.*

[9] The ECtHR is consecrating a special interest in the issue of the excessive length of the investigation phase, as evidenced by its last judgments: see, *inter alia*, ECtHR 27 September 2018, no. 57278/11, *Brazzi c. Italia*, in *Giust. pen.*, III/2019, p. 74, with comment of A. TARALLO, *La disciplina interna del decreto di perquisizione domiciliare tra indipendenza della magistratura requirente ed esigenza di un controllo efficace: nota alla sentenza della Corte Europea dei Diritti dell'Uomo resa nel caso Brazzi contro Italia.*

[10] Pursuant to Art. 3 lett. c) of the draft Reform, the three categories of crimes are precisely divided into: crimes punished with a mere pecuniary sanction or with a prison sentence not higher than three years (deadline of six months); major social alarm crimes as indicated in Art. 407 par. 2 of the Code of Criminal Procedure (deadline of

A prorogation of such deadlines can be requested by the prosecutor to the pre-trial judge only once and for a no longer period than six months[11].

Then, within the time-limit of three months[12] before the expiration of the deadlines, the prosecutor has to serve the notice of conclusion of the preliminary investigations to the suspect or, alternatively, to ask the pre-trial judge for the termination of the proceedings in the event of insufficient evidentiary material not allowing "to support the indictment before the Court".

If, on the one hand, the aforesaid principle concerning the introduction of precise deadlines for the closure of investigations is quite clear and unambiguous, on the other hand, it should be noted that the sanctioning system envisaged for the case of violation of such rule is somewhat complex and cumbersome.

The Legislator envisages, as a matter of fact, a sort of bi-phase sanctioning system.

First of all, in the event of infringement of the deadline for the closure of investigation, two different forms of sanctions are set out: one of a procedural nature and the other of a disciplinary nature.

The procedural sanction is represented by the obligation, in charge of the prosecutor, to serve without delay to the suspect (and to the victim if the case requires so) the notice of the deposit of all the documentation related to the undertaken investigation, informing them of the right to view and extract a copy of such evidentiary material[13]. Substantially, the procedural sanction is embodied by the disclosure of all the evidence gathered by the prosecutor's office during the course of the investigative phase.

The disciplinary sanction is envisaged for the public prosecutor - mind, not for the fact in itself represented by the expiration of the term of duration of the preliminary investigations - but only for the event where, once exceeded the aforementioned deadline, he/she has not accomplished the disclosure obligation, because of "inexcusable negligence"[14].

Secondly, once implemented the discovery, both the suspect and the victim have the right to solicit the prosecutor asking for a decision to be taken at the end of the investigation phase (terminating the proceedings or filing the indictment).

In the event of lack of decision within the deadline of thirty days from the reminder, no procedural sanction is envisaged by the draft Reform: only a sanction of disciplinary nature is prescribed against the inert prosecutor, in case of "inexcusable negligence"[15].

Such sanctioning scheme, above all for its second phase (consequences in case of lack of prosecutor's decision despite the reminder of the suspect or the victim) seems to reveal quite ineffective, as disciplinary measures, even if duly implemented, in any case don't reintegrate the

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one year and half); residually, all the other crimes not included in the afore-mentioned categories (deadline one year).

[11] See Art. 3 lett. d) of the draft Reform.

[12] In detail, such term can shift from three to six or twelve months, depending on the seriousness of the crime: see Art 3 lett. e) of the draft Reform.

[13] Pursuant to Art. 3 lett. e) of the draft Reform, the disclosure obligation can be, actually, postponed in case of proceedings regarding major alarm crimes, but only for a "limited period of time" and under a "grounded decision" of the prosecutor.

[14] See Art. 3 lett. f) of the draft Reform.

[15] See Art. 3 lett. g) of the draft Reform.

violation of the right to a reasonable length of investigation, entitled to the person under suspicion or the victim[16].

Moving on, the draft Reform addresses the sensitive issue concerning the identification of priority criteria for the treatment of cases in prosecutor offices, in the light of the huge and unmanageable number of pending investigations, which does not make it possible, *de facto*, to comply with the "principle of mandatory prosecution" enshrined within Art. 112 of the Constitution[17].

The introduction of "transparent" and "predetermined" priority criteria on the part of the local chief prosecutor, taking into account the "specific criminal and territorial realities" and the "technological, human and financial resources", in the framework of a decision-making process involving territorial general prosecutors and Presidents of the Courts[18] is to be welcomed, since it aims at reducing arbitrariness in the selection of the *notitiae criminis* to be investigated with precedence[19].

3. *Amendments to the trial waives systems: more space for the plea bargaining and risks of abuse for the abridged trial*

Deal making and trial waiver systems in criminal proceedings (plea bargaining, abbreviated trials, summary procedures, out-of-court settlements, *etc.*) are a keyword aimed at making procedural regulatory frameworks totally or partially inspired to the "adversarial system" - like the Italian one after the Reform of 1989 - sustainable.

The full respect of the principles of "equality of arms", "concentration", "orality" and "immediacy" in the course of trials, as long as the implementation of the cross-examination "in" the moment of evidence gathering and not only "on" the evidentiary material already collected

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[16] Scholars discussed with regard to the possibility of introducing a more rigorous and adequate procedural sanction, such as, for example, the "neutralization" of the prosecutor's power to file indictment once the deadline has expired, envisaging at the same time as a "counter-limit" of such a draconian prescription the possibility for the prosecutor to deliver request for termination of proceedings without motivation (without prejudice to the pre-trial judge obligation to adopt the related archiving decrees - certainly having a "decisional" nature - with possibly "simplified" motivation, thus ensuring compliance with the constitutional precept referred to in Article 111 paragraph 6 of the Constitution). Obviously, such perspective doesn't seem to take into account the need for protection of the victims, who in this way would prove to be unprotected in the framework of the criminal proceedings without this being attributable to any profile of negligence on their part. A particular sanction consisting in the nullity of the indictment possibly served in breach of the obligation of discovery is suggested by F. GIUNCHEDI, *L'insostenibile conciliabilità tra* "smart" process *e* due process of law *(riflessioni minime sul d.d.l. per la riforma del processo penale)*, in *Arch pen.*, 20 March 2020, p. 8.

[17] For a brief literature review, see, among others: C. VALENTINI, *La completezza delle indagini tra obblighi costituzionali e (costanti) elusioni della prassi*, in *Arch. pen.*, 2019, 3, p. 749; M. CHIAVARIO, *La fisionomia del titolare dell'azione penale, tema essenziale di dibattito per la cultura del processo*, in *Pubblico ministero e riforma dell'ordinamento giudiziario*, Milano, 2006; A. CAMON, *La fase che "non conta e non pesa": indagini governate dalla legge?*, in *Legge e potere nel processo penale*, Padova, 2017; O. DOMINIONI, *La formulazione dell'imputazione*, in *Imputazione e prova nel dibattimento tra regola e prassi*, Milano, 2018; G. FIORELLI, *L'imputazione latente*, Torino, 2016.

[18] See Art. 3 lett. h) of the draft Reform.

[19] G. ILLUMINATI, *Criteri di priorità e meccanismi sospensivi: un difficile connubio in tema di accelerazione dei tempi processuali*, in O. MAZZA-F. VIGANÒ (eds.), *Misure urgenti in materia di sicurezza pubblica*, Torino, 2008.

during the investigation phase[20], unavoidably requires the wide utilization of different types of trial waiver system, in order ensure an important reduction of the number of trials and a significant saving of material and human resources, obtaining, as a result, the final objective of an expedite trial, duly terminated in a "reasonable" time[21].

The available statistics show that the percentage of proceedings closed in Italy through a trial waiver system doesn't arrive to 10% (5,4% of abbreviated trials and 4% of plea bargaining), whereas the remaining 90% is adjudicated in the context of a trial[22].

It is clear that such a system is destined to implode and to collapse, as such percentage are very far from that of other Countries, where the percentage of plea bargaining moves from the 41% of Bosnia and Herzegovina, the 43% of Poland, the 64% of Russian Federation and Estonia , up to the 70% of United Kingdom[23].

Causes of the lack of success of trail waiver system in a domestic procedural system can be several, including, *inter alia*, limitations and conditions of access to such deal-making proceedings.

In this perspective, the prescription under Art. 4 lett. a) no. 1) of the draft Law deserves to be welcomed, insofar it elevates the maximum penalty limit that can be imposed through plea bargaining from five (the limit currently in force) to eight years of imprisonment (alone or in conjunction with a pecuniary penalty).

That extension of the penalty range susceptible to be imposed as an outcome of the plea bargaining will allow a larger adoption of such trial waiver system, in cases where, so far, both prosecutors and defendant were ready to reach a deal, above all in the light of evidentiary material gathered in the investigation phase which univocally directed the outcome of the proceedings towards a conviction, but the law in force didn't permit to do so because of the gravity of the crimes charged, which would have imposed a prison sentence as an effect of the plea bargaining higher than the limit of five years.

Unfortunately, on the other hand, the rule envisaged under Art. 4 lett. a) no. 2) of the draft Law, prevents the admissibility of plea bargaining over the afore-said limit of five years in cases related to a special list of heterogeneous crimes[24], without that legislative choice being

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[20] See A. FURGIUELE, *La prova per il giudizio nel processo penale*, Torino, 2007.

[21] The need for enhancing the recourse to summary procedures, out-of-court settlements and simplified procedures, inclusive of simplified delivery of judicial decisions, in order to achieve the result of solving the problem of excessive length of criminal proceedings, was firstly addressed by the Committee of Ministers of the Council of Europe in the Recommendation no. R (87) 18 concerning the *simplification of criminal justice*, adopted on 17 September 1987, in *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804e19f8*.

[22] See the Report *on the criminal proceedings – synthesis* (*"Rapporto sul processo penale – sintesi"*) of the Italian Union of Criminal Bar Associations (*"Unione delle Camere Penali Italiane"*), September 2008, p. 3, in *http://www.astrid-online.it/static/upload/protected/euri/eurispes-sintesi-rapporto-processo-penale_25_09_08.pdf*.

[23] See the table summing up data collected by the NGO "Fair Trials" in the Report of Parliamentary Assembly of the Council of Europe on *Deal-making in criminal proceedings: the need for minimum standards for trial waiver systems"*, 17 September 2018, p. 8, in *http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yNTA0MSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTI1MDQx*.

[24] Namely massacre, coercion to marriage, mistreatment in the family, murder, aggravated infanticide, murder of a consenting person, incitement to suicide, assault, corruption of minors, stalking and revenge-porn.

anchored to specific and explained criminal preventive needs and entailing, as a result, a sturdy weakening of the aforementioned expansion of the radius of access to that special rite[25].

Conversely, the plea bargaining system shaped by the Italian regulation (Art. 444 and ff. of the Code of Criminal Procedure), providing the suspect or accused with all the necessary safeguards, checks and balances, such as the mandatory involvement of a lawyer in the course of the proceedings and the control on the effective will of the defendant (Art. 446 c.c.p.), minimum requirements for investigation and the disclosure of its results, guarantee of a jurisdictional scrutiny of key elements of the plea bargaining (Art. 444 par. 2 c.c.p.), limitation to one third of the "trial penalty" (Art. 444 par. 1 c.c.p.), appeal rights and prohibitions of the use of a confession as evidence after the failure or revocation of an agreement (Art. 448 par. 2 *bis* c.c.p.), would have straightforwardly permitted the abolition not only of the aforementioned conditions (together with the others already currently indicated in Art. 444 par. 1 *bis* c.c.p.), but also of any maximum penalty, permitting to go even beyond the envisaged new limit of eight years without any risk of breach of the fundamental right of defense[26].

In other words, the Lawmaker missed the opportunity of the Reform to completely eliminate the maximum ceiling of prison sentence which can be imposed via plea bargaining and also to abolish the further conditions linked to the nature of the charged crimes, thereby finally giving wide scope to the adoption of such trial waiver system, indispensable for the sustainability of the "adversarial" or "mixed" procedural systems.

Turning to the Reform of another trial waiver system, represented by the "abridged trial" (adjudication of the case by a judge on the basis of the evidentiary material already gathered in

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[25] In this sense, see E. N. LA ROCCA, *La prima delega del decennio per la riforma del processo penale: una corsa folle contro il tempo che ora scorre senza contrappesi*, in *Arch. pen.*, 20 febbraio 2020, pp. 10-11.

[26] For a complete and deep analysis of advantages and risks deriving from trial waiver systems, see the aforementioned Report of Parliamentary Assembly of the Council of Europe on *Deal-making in criminal proceedings: the need for minimum standards for trial waiver systems*, pp. 9-14; See also the Motion for a resolution on *Out-of-court settlements procedures in criminal justice: advantages and risks*, in *http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzk2MCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIzOTYw*, the Resolution no. 2245 (2018) and Recommendation no. 2142 (2018) on *Deal making in criminal proceedings: the need for minimum standards for trial waiver systems*, adopted by the Parliamentary Assembly on 12 October 2018, *in http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yNTE4OCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTI1MTg4 and http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yNTE4OSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTI1MTg5*; as well as the Reply to Recommendation 2142 (2018) adopted by the Committee of Ministers of the Council of Europe on 5 February 2019, in *http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yNTQ0NSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTI1NDQ1*. In doctrine, see M. DANIELE, in M. DANIELE-P. FERRUA, *Venti di riforma dell'udienza preliminare e del patteggiamento: un subdolo attacco al processo accusatorio*, cited above.

the course of the investigation), the envisaged amendments in the matter of "conditional" abridged trial raise concern.

Indeed, Art. 4 lett b) no. 1) stipulates the replacement of the admissibility condition[27] of the abbreviated trial "conditional" on an integration of evidence, currently represented by the "compatibility" of the request with the "procedural expeditiousness typical of the abbreviated rite"[28], with that, quite different, of the "procedural expeditiousness compared to the times of a trial".

As a result, the defence will be potentially able to access to such trial waiver system even asking for a substantial evidentiary integration, capable of considerably slowing down the rhythm of the abbreviated trial (for example, the examination of countless witnesses and expert witnesses), as any request of evidentiary integration, however large, will still allow a minimum of savings of time if compared to the length of the ordinary trial.

That prescription, therefore, risks distorting the meaning and function of the abbreviated judgment, which is not simply to spare the examination of few witnesses compared to the ordinary trial, but to allow the judge to issue, as a rule, a decision based only on the evidentiary material collected during the preliminary investigation phase (*«allo stato degli atti»*).

Furthermore, at present it is not possible to exclude a latent abuse of the regulatory change in exam by defensive strategies, aimed at instrumentally requesting access to abbreviated trials "conditional" on massive supplementary evidence gathering, for the sole purpose of obtaining the "trial penalty" of the reduction of a third of the sentence imposed, without this resulting in any tangible and substantial benefit for the length of the proceedings.

Other prescriptions concerning further trial waiver systems are under in Article 4 letters c) and d) of the draft Reform, notably "immediate judgment" (*«giudizio immediato»*) and "proceedings by decree" (*«procedimento per decreto»*).

As regards the "immediate judgment", Art. 4 lett c) nos. 1) and 2) aims at clarifying a disputed issue in the Supreme Court's case-law, stating clearly that, in the event of rejection of a request of abridged trial "subordinated" to an evidentiary integration, the accused should be entitled to request the "pure" abridged trial (namely an adjudication on the basis of the evidentiary material already gathered during the investigation) or, alternatively, to access to plea bargaining[29]; in parallel, in case of non-consensus of the prosecutor or rejection by the pre-trial judge of a penalty proposed by the accused in the framework of plea bargaining, the latter should be entitled to ask for abridged trial[30].

As regards the "judgment by decree", amendments to the regulation are envisaged with the purpose of guaranteeing the effective payment of the sum determined by the judge to be

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[27] For further reflections on the issue of the assessment of the admissibility conditions of the so-called "special rites", see F. GIUNCHEDI, *Introduzione allo studio dei procedimenti speciali*, Milano, 2018, pp. 49 ff.

[28] Together with the other requirement represented by the "need for decision purposes"; see Art. 438 par. 5 c.c.p.

[29] Such interpretative solution has already been adopted by the largely prevalent Supreme Court's case-law: see, *ex multis*: Court of Cassation, I Section, 3 April 2019, no. 21439; Court of Cassation, II Section, 7 June 2016, no. 29912; Court of Cassation, IV Section, 7 June 2012, no. 34151; all in *www.italgiure.it*.

[30] The well-established jurisprudence of the Supreme Court doesn't award in such event the right of the accused to access to "abridged trial"; see, *ex plurimis*: Court of Cassation, II Section, 18 November 2014, no. 8997; Court of Cassation, II Section, 22 December 2009, no. 2765; Court of Cassation, I Section, 26 January 2006, no. 7390; all in *www.italgiure.it*.

paid by the convicted in order to obtain the extinction of the crime (payment within a deadline of ten days from the notification of the decree, necessary for obtaining the extinction of the crime).

4. *The new criteria allegedly aimed at speeding up the trials, the abandon of the taboo of the "principle of immediacy" and the extension of the preliminary filter*

Letters a), b), c) and d) of Art. 5 of the draft Reform set out legislative tenets clearly inspired by the aim of speeding up the rhythm of criminal proceedings, abstractly trying to give more organization and rhythm to the procedural activities.

Firstly, through the rule under lett. a), the Lawmaker extends the tool of the "calendar of the hearings", previously introduced in the field of civil proceedings[31], to criminal proceedings, prescribing that the judge, just after having issued the decision on the admissibility of the evidence, has to communicate to the parties a work calendar indicating the days for both the evidence gathering procedural activity and the final statements of the parties.

Such procedural instrument, albeit theoretically useful for the management and the conduction of trial activities, doesn't seem to represent in itself effective, above all if contextualized in a framework of massive workload and significant inherited backlogs[32].

Actually, its previous introduction in the civil procedural law has already shown that the auspicated results were not attained, hence the real rationale for the extension of such prescription in the criminal field is really difficult to understand.

Secondly, the precept under letter b) of Art. 5 appears even less comprehensible, where the parties are expected to explain, after the declaration of the opening of the hearing, an "illustrative report" on the requests for evidence.

Such prescription, although perhaps intended to delimit the evidentiary activity of the parties within the limits of the charges defined in the indictment, in reality it reveals completely unsuitable for such purpose, resulting into a mere duplication of the rule already laid down in Art. 493 par. 1 of the Code of Criminal Procedure, insofar it stipulates that, just after the declaration of the opening of the hearing, the parties "indicate the facts that they pretend to proof" and ask for the admission of the correspondent evidence[33].

Actually, it seems rather that a real delimitation of the parties' evidentiary activity, aimed at eliminating unnecessary evidence gathering activities and avoiding the excessive length of the proceedings, could better be obtained by enhancing and guaranteeing the effective

[31] See Art. 81 *bis* of the Rules Implementing the Code of Civil Procedure, introduced by the Law no. 148 of 14 September 2011.

[32] Judges more results-oriented and sensitive to organizational issues have already made extensive use of court-hearings calendars before the envisaged regulatory reform, in a fruitful way where the sustainable starting work conditions allowed the adoption of such organizational plans.

[33] Deep criticism on that prescription, perceived as a "return to the past" potentially undermining the impartiality of the judge, with reference to the institution of the "introductive relation" required under the previous "inquisitorial system", is expressed in E. N. LA ROCCA, *La prima delega del decennio per la riforma del processo penale: una corsa folle contro il tempo che ora scorre senza contrappesi*, cited above, pp. 12-13.

implementation of the rule under Art. 468 of the Code of Criminal Procedure, where it is expected that the list of witnesses, experts and technical consultants to be filed by the parties seven days before the first hearing, should refer to the "circumstances on which the examination will concern", thus allowing the judge to deeply and effectively verify the relevance or superfluity of the required evidence (pursuant to Articles 468 paragraph 2 and 495 paragraph 4 c.c.p.)[34].

Thirdly, the prescription under lett. c) also concerns the crucial issue of admitting and revoking evidence, envisaging the amendment of the current rule set out in Art. 495 par. 4 *bis* of the Code of Criminal Procedure, insofar it requires, in the event of waiver of a party to the evidence admitted on its request, the consensus of the other parties in order to obtain the acceptance by the judge of the waiver request.

Such rule is certainly positive, as it allows avoiding possible abuses by the other parties, in the event they intend to unduly delay the length of the trial without having any interest in an evidentiary activity which was not originally required by them.

Lastly, letter d) aims at formalizing a pragmatic and organizational rule already adopted by a great part of judges in the matter of reports of technical consultants and experts, requiring that the said reports must be deposited in duly advance before the court-hearing fixed for their examination, in order to allow the parties their study in time for the moment of the examination before the Court; conversely, in the event of contextual deposit of the report on the day of the examination, the parties could request a postponement in order to proceed with the in-depth examination of the report, thereby lengthening the time of the proceedings.

Moving on, the most effective novelty for the achievement of the objective of the reasonable length of criminal proceedings seems to be, in this framework, the one laid down in Art. 5 lett. e) of the draft Reform, whereby it is possible to keep and use for the decision the evidentiary material already gathered at trial (notably, the testimonies), in the eventuality of replacement of one of the members of the judging panel.

That rule certainly represents a derogation from the "principle of immediacy" - whereby there should not be any intermediate element between the judge who ultimately decides the case and the evidence, the latter to be gathered directly before the judge in the course of the trial - which represents one of the corollaries of the "adversarial system" together with the "principle of orality" - verbal activities as a rule and written statements as an exception - and the "principle of concentration" - all trial activities to be concentrated in a lapse of time and place as narrow as possible -.

[34] The daily judicial experience of the courtrooms shows, indeed, that in most cases the required evidence is, at first, indiscriminately admitted, and then reduced, subsequently, pursuant to Art. 495 paragraph 4 c.c.p., thus creating confusion and not allowing an exact planning of the foreseeable times of the proceedings since its beginning.

Such intervention by the Legislator does not come unexpectedly but it was, somewhat, desired by both the Constitutional Court[35] and the Plenary Session or the Court of cassation[36], which in two recent rulings underlined the need to limit the "principle of immediacy", to the purpose of ensuring the "procedural efficiency", the "preservation of the evidence already gathered" and, overall, the "need to limit the length of the proceedings".

To the extent that the draft Reform envisages that the derogation from the "principle of immediacy" can take place only in the event of a change of "one of the members" of the panel (*«[…] mutamento della persona fisica di uno dei componenti del collegio […]»*), it should be stressed that the reform appears appropriate to achieve the aim of efficiency pursued, without that irreversibly affecting the "principle of immediacy" and, *lato sensu*, the right to a "fair trial"[37], since the persistence in the panel of the other two components, who will therefore represent the "historical memory" of what happened, directly before them, during the gathering of the evidence, seems to adequately guarantee the "transmission" of this relevant knowledge heritage to the only replacing judge.

Turning to the extension of the preliminary filter, envisaged by Art. 6 of the draft Reform for the criminal proceedings which do not currently pass through the "preliminary hearing" already set out in the Title IX of the Book V of the Code of Criminal Procedure (listed in Art. 550 c.c.p.), it should be *prima facie* noted that the application of the new evaluation rule forged also for the prosecutor's determinations on dropping out proceedings and for the preliminary hearings to be held by pre-trial judges[38], doesn't seem to have a decisive role with the aim of reducing the huge number of cases arriving to trials.

Indeed, the new system provides such proceedings with a specific court-hearing, to be held by a trial judge - different from the one destined to celebrate the possible trial - consecrated to the assessment of the evidentiary material gathered during the investigation and to the evaluation of their "capacity, even if confirmed before the Court, to conduct to the upheld of the prosecutorial accuse" (*«[…] se gli elementi acquisiti […] non consentono, quand'anche confermati in giudizio, l'accoglimento della prospettazione accusatoria»*), in the wake of the evaluation criteria outlined by Art. 3, establishing, only in the event of positive assessment, the transition to the trial

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[35] See Constitutional Court, 20 May 2019, no. 132, in *Arch. pen.*, 2/2019, *Confronto di idee su: La post immediatezza nella nuova giurisprudenza costituzionale*, with comments of P. FERRUA, *Il sacrificio dell'oralità nel nome della ragionevole durata: i gratuiti suggerimenti della Corte costituzionale al legislatore*, O. MAZZA, *Il sarto costituzionale e la veste stracciata del codice di procedura penale*, D. NEGRI, *La Corte costituzionale mira a squilibrare il "giusto processo" sulla giostra dei bilanciamenti*, L. ZILLETTI, *La linea del Piave e il duca di Mantova.*

[36] See Court of Cassation, Plenary Session, 30 May 3019, no. 41736, in *Proc. Pen. e Giust.*, 1/2020, with comment of A. MANGIARACINA, *Mutamento della persona fisica del giudice e rinnovazione del dibattimento. (Immutabilità del giudice versus efficienza del sistema: il dictum delle Sezioni Unite)*, p. 136.

[37] The case-law of the European Court of Human Rights also endorses derogations to the "principle of immediacy", considering them fully compatible with Art. 6 of the Convention provided that they guarantee adequate "compensative measures". See in this sense, *ex plurimis*: ECtHR 27 September 2007, no. 1505/02, *Reiner and others v. Romania*, § 74; ECtHR 30 November 2006, no. 75101/01, *Grecu v. Romania*, § 72; ECtHR 2 December 2014, no. 53150/12, *Cutean v. Romania*, § 61; ECtHR 6 December 2016, no. 6962/13, *Škaro v. Croatia*, § 24; ECtHR 10 February 2005, no. 10075/02, *Graviano v. Italy*, §§ 39-40; ECtHR (dec.) 9 July 2002, no. 37442/97, *P. K. v. Finland* ; all in *www.hudoc.echr.coe.int*.

[38] See Art. 3 letters a) and i) of the draft Reform, *supra* analyzed in paragraph 2.

otherwise being the judge obliged to deliver immediately a judgment of termination of the proceedings (*«non luogo a procedere»*)[39].

The chances of success of that innovation seem to be decidedly dependent on the number of cases that will have to be handled by the judge during this particular hearing and, above all, on the cultural approach of all the actors of the proceedings not to reduce this procedural requirement to a mere simulacrum, as has hitherto been the case for "preliminary hearings"[40].

That should be the case, the reform, *in parte qua*, would only provoke a further procedural aggravation, with a consequent multiplication of the Registrar administrative requirements, including the further notification to the parties of the summons for the first hearing.

In any case, since the proceedings listed in Art. 550 c.c.p., as a rule and provided that procedural obstacles do not prevent so, tend to be closed in just one or, at most, in a few hearings and with relatively scanty evidence gathering activities, perhaps there really was no need for such burdensome of the procedure, since proceedings *ex* Art. 550 c.c.p., if well managed and organized by judges, can physiologically come to a conclusion in a reasonable time.

Rather, accountability systems of the prosecutor's office in the evaluation and selection of cases worthy of being brought to trial could be devised and introduced[41].

5. *Deadlines for the proceedings: lack of procedural sanctions and inflation of disciplinary liability*

The part of the draft Reform most animated by the intention to reduce the length of criminal proceedings, in response of the last decision adopted by the Committee of Ministers in the framework of the supervision process on the execution of the general measures involved in the "Ledonne group" of cases[42], concerning the issue of excessive length of criminal proceedings in violation of Art. 6 of the Convention, is certainly set out in Articles 12 and 13.

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[39] Unless the judge considers that the acquittal must result in the application of a security measure other than confiscation: see Art. 6 lett. b) of the draft Reform.

[40] See, in doctrine, F. GIUNCHEDI, *L'insostenibile conciliabilità tra* "smart" process *e* due process of law *(riflessioni minime sul d.d.l. per la riforma del processo penale)*, cited above, p. 7; F. DINACCI, *Regole di giudizio (dir. proc. pen.)*, in *Digesto pen.*, VIII, Aggiornamento, Torino, 2014, pp. 656 ff.; F. CASSIBBA, *Udienza preliminare e controlli sull'enunciato d'accusa a trent'anni dal codice di procedura penale*, cited above.

[41] The reference is, in particular, to systems of appreciation, in the context of the professional career of public prosecutors, of the favorable or unfavorable outcome of the trials they activated, along the lines of what has already been prescribed for judges, with regard to the outcome (confirmation, modification or quashing) of their findings and judgments in the event of their challenge or appeal by the parties.

[42] See the decision adopted at the 1324th meeting, 18-20 September 2018 (DH), Human rights, Ledonne No. 1 group v. Italy (Application No. 35742/97), in *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168808d04f6*. The text of the operative part is verbatim reported as follows:

«As regards individual measures

1.noting that the individual measures have been settled in all the cases in this group, decided to close their supervision of 162 repetitive cases and adopted Final Resolution CM/ResDH(2018)353;

As regards general measures

A series of precise and methodical precepts is introduced with the theoretical aim of guarantee a mechanism for defining proceedings in a reasonable time, through a specific system that enhances the organizational accountability of judges and Presidents of the Courts.

However, it is *ictu oculi* evident that the absolute absence of procedural sanctions in the event of infringement of the aforesaid rules is destined to make the entire new regulatory apparatus mostly unsuitable, in practice, for achieving the desired result[43].

2.noted the overall promising trends over recent years in terms of the average length of criminal proceedings and clearance of the backlog of criminal cases pending before the courts of first instance, juvenile courts and the Court of Cassation;

3.welcomed the recent criminal justice reform aimed at resolving the long-standing problem of excessive length of criminal proceedings and noted in particular the measures adopted to streamline proceedings before the courts of appeal, where the situation remains problematic;

4.strongly encouraged the authorities to deploy all efforts to ensure that the reform yields the expected results; invited them to monitor it closely and provide the Committee, in good time, with precise and comprehensive data and a detailed assessment of the impact of the reform on the length of criminal proceedings and the clearance of the backlog of criminal cases, in particular those pending before the courts of appeal».

[43] Regarding the renewed enhancement of procedural rather than disciplinary or administrative sanctions in the event of procedural violations, in acceptance of the "poisoned fruits of the poisonous tree" doctrine in the context of the case-law of the European Court of Human Rights, see in doctrine S. MAFFEI, *Il mantello della legge.* Male captum bene retentum *e dottrina del «ritrovamento inevitabile in una recente pronuncia della Corte europea dei diritti dell'uomo»*, in *Studi in onore di M. Pisani*, II, *Diritto processuale penale e profili internazionali*, P. Corso-E. Zanetti (eds.), Milano, pp. 365 ff.; M.A. LOIODICE, *L'utilizzabilità dei mezzi di prova nel processo penale secondo la giurisprudenza della Corte europea dei diritti dell'uomo*, in *Riv. it. dir. priv. e proc.*, 2009, p. 50; A. TAMIETTI, *L'utilizzazione di prove assunte in violazione di un diritto garantito della Convenzione non viola l'equo processo: riflessioni sul ruolo della Corte europea e sulla natura del sindacato da essa operato in margine alla sentenza P.G. e J.H. c. Regno Unito*, in *Cass. pen.*, 2002, p. 1826 ff.; A. ASHWORTH, *Human Rights, serious crime and criminal procedure*, London, 2002, pp. 1-49, 93-134; F. CORDERO, *Tre studi sulle prove penali*, Milano, 1963; IDEM, *Nullità, sanatorie, vizi innocui,* in *Riv. it. dir. e proc. pen.*, 1966, p. 680; L. P. COMOGLIO, *Perquisizione illegittima ed inutilizzabilità derivata delle prove acquisite con il susseguente sequestro*, in *Cass. pen.*, 1996, p. 1547; M. MONTAGNA, *Il "male captum bene retentum" è davvero applicabile ai rapporti tra perquisizione e sequestro?*, in *Dir. pen. proc.*, 1997, p. 1125; G. SPANGHER, «*E pur si muove*»*: dal* male captum bene retentum *alle* exclusionary rules, in *Giur. cost.,* 2001, p. 2827; A. SCAGLIONE, *Le perquisizioni nel codice di procedura penale e nelle leggi speciali*, Padova, 1987, pp. 112 ff.; IDEM, *L'attività ad iniziativa della polizia giudiziaria*, Ristampa aggiornata, Torino, 2001, pp. 136 ff.; G.L. VERRINA, *Approccio riduttivo della Corte di cassazione alla categoria della inutilizzabilità derivata*, in *Giur. it.*, 1998, p. 3; M. VESSICHELLI, *Sui limiti alla utilizzabilità del sequestro conseguente a una perquisizione illegittima*, in *Cass. pen.*, 1996, p. 3275; A. FURGIUELE, *La prova per il giudizio nel processo penale*, cited above; N. GALANTINI, *L'inutilizzabilità della prova nel processo penale*, Padova, 1992; P. NUVOLONE, *Le prove vietate nel processo penale nei paesi di diritto latino*, in *Riv. dir. proc.*, 1966, p. 442; G. RICCIO, *Le perquisizioni nel codice di procedura penale*, Napoli, 1974; R. CASIRAGHI, *Prove vietate e processo penale*, in *Riv. it. dir. proc. pen.*, 2009, p. 1769. May it also be allowed to refer to: A. TARALLO, *La disciplina interna del decreto di perquisizione domiciliare tra indipendenza della magistratura requirente ed esigenza di un controllo efficace: nota alla sentenza della Corte Europea dei Diritti dell'Uomo resa nel caso Brazzi contro Italia*, cited above; IDEM, *Il destino dei "frutti dell'albero avvelenato" alla luce del criterio di equità complessiva del processo: nota alla sentenza della Corte Europea dei Diritti dell'Uomo resa nel caso Knox contro Italia*, in *Giust. Pen.*, VIII-IX/2020, pp. 228-253.

On the contrary, the sanctioning system envisaged, all focused on the disciplinary responsibility of judges and Presidents of the Courts, gives rise to complaints and perplexities already pointed out at a national[44] as well as an international[45] level.

In detail, exclusive of major social alarm crimes[46] - the only ones kept outside the new legislation - a general time-limit of four, five or six years in total, inclusive of all instances of the proceedings (first instance, appeal and Court of cassation), is set out in art. 12 lett. a) of the draft Reform.

More precisely, the deadline is four years for criminal proceedings under the jurisdiction of the single-judge[47] (split as follows: one year for the first instance proceedings, two years for the appeal, one year for the Court of cassation), five years for those under the jurisdiction of the panel[48] (split as follows: two years for the first instance proceedings, two years for the appeal, one year for the Supreme court) and six years for those concerning "the most serious crimes against the public administration and the economy"[49] (three years for the first instance proceedings, two years for the appeal[50], one year for the Court of cassation).

Different deadlines can be biyearly fixed in relation to each Court by the High Council for the Judiciary, after having heard the Minister of Justice, pursuant to Art. 12 lett. b) of the draft Reform, depending on the backlog, the new files flow, the nature of the proceedings as well as their complexity, the available resources and the further data of the management programs issued by the Presidents of the Courts[51].

Once this "reassuring" framework of objectives has been outlined (which, if actually implemented, would represent the solution to the long-standing problem of the unreasonable length of criminal proceedings), the Reform charges the judges with the specific task of adopting the "organizational measures" aimed at ensuring compliance with these deadlines.

It is therefore possible to understand that we are faced with an obligation "of means" rather than "of result".

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[44] High criticism has been expressed by the National Magistrates Association (*"Associazione Nazionale Magistrati"*) in the press releases issued in the days immediately following the adoption of the draft Reform: see press release *"Su sanzioni impossibile confronto"* issued on 21 February 2020, in *https://www.associazionemagistrati.it/doc/3294/su-sanzioni-impossibile-confronto.htm*, as well as press release *"Il disciplinare per i magistrati preoccupa l'Europa"* issued on 28 February 2020, in *https://www.associazionemagistrati.it/doc/3296/il-disciplinare-per-i-magistrati-preoccupa-leuropa.htm*.

[45] See the European Commission *Country Report Italy 2020*, *European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011*, in *https://ec.europa.eu/info/sites/info/files/2020-european_semester_country-report-italy_en.pdf*, in the part concerning measures to increase efficiency of the judicial system, where it is stated verbatim that «[…] the possible introduction of new cases of judges' disciplinary liability should be carefully monitored as regards their impact on the functioning of the judiciary» (p. 55).

[46] Namely, the ones listed in Art. 407 par. 2 lett. a) nos. 1), 3) and 4) par. 2) lett. b) of the Code of Criminal Procedure.

[47] Listed in Art. 33 *ter* c.c.p.

[48] Listed in Art. 33 *bis* c.c.p.

[49] See Art. 12 lett. a) no. 1) of the draft Reform.

[50] The *ratio* of such rule fixing a longer term for the proceedings before the Court of appeal (two years) than that before the first instance Tribunal (one year), appears really hard to comprehend, since, as a rule, the most expensive evidence gathering activity is carried out in the course of the first instance trial and, only exceptionally, before the Court of appeal, only in the event a renewal in the evidence gathering is necessary.

[51] See Art. 12 lett. b) of the draft Reform.

The confirmation of that conclusion can be found in Art. 13 lett. c), which prescribes the duty charged to the Presidents of the Courts of reporting to the body entitled to initiate disciplinary proceedings (the General Prosecutor or the Minister of Justice) only the "failure to adopt organizational measures" when caused by "inexcusable negligence" of judges, rather than the mere material breach of the afore-said deadlines for the conclusion of the proceedings.

In brief, the Lawmaker aims at guaranteeing the new system of deadlines for closing criminal proceedings by envisaging only a disciplinary sanction against judges, without introducing any *stricto sensu* procedural sanction.

Furthermore, it is worth noting that not the mere expiration of the deadline is sanctioned, but the expiration insofar it is due to the "inexcusable negligence" of the judge in failing to adopt organizational measures.

That is the general regulatory framework set out in Art. 12 of the draft Reform.

Conversely, the situation is different in the specific case of expiration of the deadlines fixed for the appeal proceedings, following a conviction judgment.

5.1. *The specific rules envisaged for appeal proceedings following a conviction: the escalation of the "reasonable length" of the proceedings from "obligation of means" to "obligation of results" and the direct engagement of the Presidents of the Courts*

The particular attention paid by the Legislator to the issue of appeal proceedings is of course potentially meritorious, as it tends to address the major points of criticism expressed by both the Committee of Ministers of the Council of Europe[52] and the European Commission[53], notably with regard to the excessive length of proceedings pending in appeal instance[54].

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[52] See the decision adopted at the 1324th meeting, 18-20 September 2018 (DH), Human rights, Ledonne No. 1 group v. Italy (Application No. 35742/97), cited above, highlighting, on the one hand, «[…] promising trends in the average length of criminal proceedings and in the backlog clearance of criminal cases before the courts of first instance, juvenile courts and the Court of Cassation […]», whereas stressing, on the other hand, the «[…] less positive trends [which] have been recorded for the courts of appeal […]», and stressing that the impact of the previous so- called "Orlando Reform" had to be monitored in terms of efficiency and appropriateness at solving the problem of excessive length of criminal proceedings.

[53] See the European Commission *Country Report Italy 2020*, *European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011*, cited above, p. 55, where it is pointed out that «[…] Italy's long disposition time for criminal cases continues to raise concerns at the appeal level (860 days) […]» and expressly outlined that «measures to increase efficiency will be needed especially at the appeal level, where still around 25% of cases were declared time-barred in 2018».

[54] The statistics on the trend of the criminal proceedings in the period 2011-third quarter of 2019 show some positive and negative aspects (in *https://www.giustizia.it/giustizia/it/mg_1_14_1.page;jsessionid=ADimQDCYgDdEgwdufuY16NdQ?facetNode_1=1_5_33&facetNode_2=0_10&facetNode_3=0_10_36&contentId=SST1288006&previousPage=mg_1_14*.

On the one hand, in the relevant period, it is certainly possible to underline a significant improvement in the "clearance rate" (obtained when the number of resolved cases is divided by the number of incoming cases), which allows to acknowledge the increased ability of the Italian judicial system to handle the inflow of judicial cases.

Indeed, while the years from 2011 to 2013 are characterized by a "clearance rate" less than 100%, from the year 2014 the trend starts to be inverted (except for the years 2015 and for the first quarter of 2018, which are branded by an index less than 100%), with particularly positive results, especially for the Court of Cassation, for the Ordinary Court and for the Juvenile Court.

Nevertheless, it is worth immediately noting that, even in this case, no sanction of a strictly procedural nature is introduced by the draft Reform in the event of expiration of the deadlines.

Furthermore, even in this case, the sanctioning system is not going to result from the mere overcoming of the deadline set for the closure of the appeal proceedings (namely two years for the appeal, one year for the cassation)[55].

The difference of the regulation described in Art. 13 compared to the general prescription under Art. 12 lies, rather, in the envisaged right, for the parties, once the deadline expired, to present a reminder[56], from which a further (and ultimate) six-month term for the conclusion of the proceedings begins to run[57].

Consequently, as a first result of the reminder, in the event of further exceeding the aforementioned term without the proceedings being defined yet, disciplinary liability is triggered up for the appeal judges who have failed to comply with such second deadline because of "inexcusable negligence"[58].

On reflection, we are faced, in this case, no longer with an obligation "of means", but somewhat with a "best effort" obligation, very close to the borders with that, even, "of result".

On the other hand, it seems that no particular result has been so far achieved in the ground of the "disposition time" (the number of resolved cases during a reporting period compared with the number of unresolved cases at the end of that period), that is an indicator indirectly giving the answer to the question of the length of proceedings. Accordingly, the total number of proceedings risking to be classified as of "excessive length" under the criteria fixed by the Pinto's Act remains almost the same during all the reporting period (on average, about 3% for the Court of Cassation, about the 41% for the Court of appeal, about 18% for the Court of first instance and about 14% for the Juvenile Court), although with some fluctuations especially as regards the ordinary Court of first instance and the Supreme Court.

Therefore, the balance of the results cannot be considered positive in this respect.

On top of that, it should be noted that the overwhelming majority of criminal trials pending against accused not subject to pre-trial detention concern crimes for which the maximum limitation period of seven and a half years is set out.

So, if we take into consideration, for instance, the average length of pending trials with single-judge in the period 2011-2016 (530 days), added to the average length in second instance (912 days), to the average length in the Court of Cassation (222 days) and to the average length of preliminary investigations (299 days), for the same reference period, we arrive at the result of an average length of the entire proceedings of 1963 days, that is to say about 5 years and 4 months.

Such median data, however, must be adequately balanced with the exceptionally rapid length of proceedings against accused who are under pre-trial detention, which exhaust the three instances of proceedings within a few months or years (pursuant to Art. 303 par. 4 c.c.p., the total duration of pre-trial detention, depending on the different gravity of the crime, cannot exceed 2, 4 or 6 years: these limits are basically respected well in advance), following from this that the average specific data for proceedings against accused not subject to pre-trail detention appears to be very critically close (or even exceed) to the limitation period of the offense/crime.

[55] See Art. 12 lett. a) nos. 1), 2) and 3) of the draft Reform.

[56] See Art. 13 lett. a) of the draft Reform.

[57] See Art. 13 lett. b) of the draft Reform.

[58] See Art. 13 lett. e) of the draft Reform; incidentally, it should be noted that letter f) of Art. 13 envisages the entry into force of that disciplinary sanction only from the 1th January 2024, in order to better assess the impact of such regulation in the framework of the consequent decisions to be adopted by the High Council for the Judiciary and the Presidents of the Courts.

As a second consequence of the reminder, the Presidents of the Courts are, for the first time, directly and responsibly engaged in the matter: notably, Presidents of the Courts are required to adopt the appropriate organizational measures to allow the definition of the appeal proceedings in compliance with the six-month deadline[59], under penalty of disciplinary sanction also against them (provided that the omission is due to "inexcusable negligence"), in addition to the judges assigned to the proceedings[60].

In the light of all the above, the new overall structure outlined by the regulation set out in Articles 12 and 13 of the draft Law, beyond the serious critical profiles concerning the inflation of new forms of disciplinary responsibility[61] - whose effective positive impact on the concrete result of the reasonable length of criminal proceedings is well far from being demonstrated and verified - it appears worthy of further doubtful reflections.

Indeed, even assuming that the burden of disciplinary liability could prove really effective for the legitimate and necessary aims targeted by the Lawmaker, in this perspective, the excessive imbalance between the accountability of the judges in charge of the proceedings and that of the Presidents of the Courts - institutionally charged with and entitled to solve organizational issues - is therefore not really consistent and comprehensible.

That is even more evident with regard to the general regulation laid down in Art. 12, whereby, on the one hand, judges are extremely overcharged by the task of adopting organizational measures aimed at guaranteeing the objective of the reasonable length of proceedings (*rectius*: abandoned to their fate in case of huge workloads and unmanageable inherited backlogs) and, on the other hand, Presidents of the Courts (namely, from an institutional point of view, the real responsible for the results of the organizational structure of the Courts) are relegated to the role of mere "notaries", in charge of disciplinary reporting of the failure to adopt the organizational measures by judges of the Courts they direct and manage.

Such it is, *ictu oculi*, a somewhat paradoxical situation, which would have deserved, at the very least, a more balanced approach between the level of accountability expected from the Presidents of the Courts in the appeal and cassation proceedings (Art. 13) and that expected in general (Art. 12).

In fact, as a consequence of the new legislation, unlike the judges in charge of the proceedings, the Presidents of the Courts – "managers" by institutional definition - will be held accountable for the overcoming of the new proceedings deadlines only in appeal and cassation proceedings, and in any case only in the event a reminder has been presented by the parties.

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[59] See Art. 13 lett. d) of the draft Reform.

[60] See Art. 13 lett. e) of the draft Reform.

[61] Already outlined by the European Commission and the Italian National Magistrate Association" (*"A.N.M."*): see the afore-mentioned European Commission *Country Report Italy 2020*, *European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011*, as well as the press releases issued by the *"A.N.M."*, *"Su sanzioni impossibile confronto"* and *"Il disciplinare per i magistrati preoccupa l'Europa"*. Scholars are also clearly sceptical about the functionality of that part of the draft Reform: see E. N. LA ROCCA, *La prima delega del decennio per la riforma del processo penale: una corsa folle contro il tempo che ora scorre senza contrappesi*, p. 17, cited above. For a comparative study on the more general issue of relations between disciplinary proceedings and independence of the judiciary, may it be allowed to refer to A. TARALLO, *Some reflections on independence, irremovability and separation of the branches of State powers, in the light of the recent Ukrainian judicial reform*, in *Ordine Internazionale e Diritti Umani*, I/2020, 15 March 2020, pp. 37-66.

Lastly, some perplexities also arise from the limitation of the special regime under Art. 13 to the sole appeal proceedings concerning "convictions", since the serious need to speed-up the closure of the appeal proceedings regards, *a priori* and without any distinction, both appeals following "conviction", both those resulting from "acquittals".

6. *Other principles as to the execution of judgments of the ECtHR, notifications, restriction of the appeal powers, essential procedural elements and financial investments for reducing the backlog*

Art. 11 of the draft Reform is clearly inspired by the purpose of executing general measures required by the judgment recently delivered by the European Court of Human Rights in the case Brazzi versus Italy[62].

In the aforesaid decision, the supranational Court found the violation of Art. 8 of the Convention (right to respect for private life), pointing out the lack, in the current Italian regulatory framework, of a system of jurisdictional control or revision of the search undertaken by the prosecutor's office (or validated by the latter after the urgent intervention of the judicial police), in the event it is not followed by a seizure decree (only the latter being provided with an appropriate revision system) because no relevant evidence has been gathered at the outcome of the search activity.

The rule introduced by the draft Reform states the principle, to be respected by the Government in implementing the legislative delegation, whereby a revision of jurisdictional nature has to be prescribed for the search even if not followed by a seizure.

The tenet, mentioning verbatim the term "challenge" (*«strumento di impugnazione»*), seems to envisage an *ex post* (review or appeal) rather than *ex ante* control system (prior authorization or validation of the search by the pre-trial judge), but it does not point out which specific jurisdictional challenge system should be introduced (review or appeal before the *«tribunale del riesame»* also for merit reasons, rather than appeal in cassation for a review limited to points of law)[63].

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[62] See ECtHR 27 September 2018, no. 57278/11, *Brazzi c. Italia*, in *Giust. pen.*, III/2019, p. 74, with comment of A. TARALLO, *La disciplina interna del decreto di perquisizione domiciliare tra indipendenza della magistratura requirente ed esigenza di un controllo efficace: nota alla sentenza della Corte Europea dei Diritti dell'Uomo resa nel caso Brazzi contro Italia*.

[63] Such choice falls within the margin of appreciation of the Member State, provided that it is suitable for a full and effective implementation of the ECtHR judgment. For a brief literature review of the "margin of appreciation doctrine" and its implications with the "principle of subsidiarity" see, among others: D. SPIELMANN, *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, in *15 Camb. YB. Eur. Leg. St.*, University of Cambridge, CELS Working Paper Series, 29 February 2012; *Ibidem*, *En jouant sur les marges - La Cour européenne des droits de l'homme et la théorie de la marge d'appréciation nationale: abandon ou subsidiarité du contrôle européen?*, in *Journal des tribunaux Luxembourg*, 2010, n°10; R. BERNHARDT, *Thoughts on the Interpretation of Human-Rights Treaties, Protecting Human Rights: The European Dimension*, in F. MATSCHER & H. PETZOLD (eds.), Protecting Human Rights: the European Dimension, 1988; P. GALLAGHER, *The European Convention on Human Rights and the Margin of Appreciation*, in *UCD Working Papers in Law, Criminology & Socio-Legal Studies,* Research Paper No. 52/2011; L. GARLICKI, *The European Court of Human Rights and the "Margin of Appreciation" Doctrine. How Much Discretion is Left to a State in Human Rights Matters?*, in *Administrative Regulation and Judicial Remedies*, Taipe, Taiwan, Institutum Iurisprudentiae Academia Sinica, 2011, p. 53; Y. ARIA-TAKASHI, *The margin of appreciation doctrine and the*

In order to fully appreciate the suitability of the Reform in ensuring effective execution of the general measures implied by the case Brazzi, it will therefore be necessary to wait for the adoption of Legislative Decrees.

Nonetheless, the introduction of a specific prescription in the draft Reform dedicated to the execution of ECtHR judgments is welcome and worthy of being appreciated.

Moving on, Art. 2 of the draft Reform lays down a series of detailed indications aimed at speeding up and enhancing the system of notifications in the criminal proceedings, through the general and wider use of telematics and the empowerment and accountability of the role of

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principle of proportionality in the jurisprudence of the ECHR, Antwerp, Intersentia, 2002; S. GREER, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*, 2010, UCL Human Rights Review; C. ROZAKIS, *Through the Looking Glass: An "Insider"'s View of the Margin of Appreciation*, in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa*, Paris, Dalloz, 2011, p. 526; C. ZANGHI, L. PANELLA, *La protezione internazionale dei diritti dell'uomo*, Torino, 2019, pp. 247-257; M. DE SALVIA, *Contrôle européen et principe de subsidiarité: faut-il encore (et toujours) émarger à la marge d'appréciation?*, in *Protection des droits de l'Homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal*, Carl Heymanns Verlag KG, 2000, p. 373; R. ST. J. MACDONALD, *The margin of appreciation in the jurisprudence of the European Court of Human Rights*, in *Coll. Courses Ac. Eur. Rev.*, 1992, p. 103; R. ST. J. MACDONALD, *The margin of appreciation*, in R. ST. J. MACDONALD, F. MATSCHER, H. PETZOLD, *The European system for the protection of human rights*, The Hague, 1996, p. 83; P. MAHONEY, *Marvellous richness of diversity or invidious cultural relativism?*, in *Hum. Rights Law Jour.*, 1998, p. 1; T. O'DONNEL, *The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human rights*, in *Hum. Rights Quart.*, 1982, p. 474; J. CALLEWAERT, *Quel avenir pour la marge d'appréciation?*, in *Mélanges à la mémoire de Rolv Ryssdal, Protection des droits de l'homme: la perspective européenne*, Carl Heymanns Verlag KG, 2000, p. 147-166; M. DELMAS-MARTY, M-L. IZORCHE, *Marge nationale d'appréciation et internationalisation du droit. Réflexions sur la validité formelle d'un droit commun pluraliste*, in *Rev. Int. Dr. Comp.*, 2000, p. 753-780; S. GREER, *La marge d'appréciation: interprétation et pouvoir discrétionnaire dans le cadre de la Convention européenne des droits de l'homme*, Strasbourg, Les éditions du Conseil de l'Europe, Dossier sur les droits de l'homme n°17, 2000; E. KASTANAS, *Unité et diversité: notions autonomes et marge d'appréciation des États dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 1996; A-D. OLINGA, C. PICHERAL, *La théorie de la marge nationale d'appréciation dans la jurisprudence récente de la Cour européenne des droits de l'homme*, in *Rev. Trim. Dr. homme*, 1995, p. 567-604; F. TULKENS, L. DONNAY, *L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?,* in *Rev. Sc. Cr. Dr. Pèn. Comp.*, 2006, p. 3.; P. WACHSMANN, *Une certaine marge d'appréciation- Considérations sur les variations du contrôle européen en matière de liberté d'expression*, in *Mélanges en l'hommage à Pierre LAMBERT: Les droits de l'homme au seuil du troisième millénaire*, Bruylant, 2000, p. 1017-1042; G. VAN DER MEERSCH, *Le caractère autonome des termes et la marge d'appréciation des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme*, in *Protection des droits de l'Homme: dimension européenne. Mélanges en l'honneur de Gérard J. WIARDA*, Carl Heymanns Verlag, 1988, p. 201-220; H. C. YOUROW, *The margin of appreciation doctrine in the dynamics of european human rights jurisprudence*, The Hague, 1996, Kluwer Law International; N. SHUIBHNE, *Margin of appreciation: national values, fundamental rights and EC free movement law,* in *Eur. Law. Rev.*, 2009, p. 230; J. SWEENEY, *A «margin of appreciation» in the internal market: lessons from the European Court of Human Rights*, in *Leg. Iss. Ec. Int. Law*, 2007, p. 27; I. RASILLA DEL MORAL, *The increasingly marginal appreciation of the Margin of appreciation doctrine*, in *Germ. Law jour.*, 2006, p. 611; G. LETSAS, *Two concepts of the margin of appreciation*, in *Oxf. Jour. Legal St.*, 2006, p. 705; W. G. VAN DER MEERSCH, *Le caractère autonome des termes et la marge d'appréciation des gouvernements dans l'interprétation de la Convention européenne des droits de l'homme*, in F. MATSCHER AND H. PETZOLD (eds.), *Protecting Human Rights: The European Dimension Studies in honour of de Gerard J. Wiarda*, Cologne, Heymanns, 1988, p. 201; S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Brussels, Bruylant and Publications des facultés universitaires Saint-Louis, 2001, p. 483; G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, foreword by D. SPIELMANN, Oxford, Oxford University Press, ED. 2010, p. 80. May it also be allowed to refer to A. TARALLO, *Il "fine pena mai" di fronte al controllo CEDU: un "margine di apprezzamento" sempre più fluttuante e aleatorio*, in *Dirittifondamentali.it*, I/2020, 14 January 2020, pp. 91-120.

lawyers in receiving documents on behalf of their client[64], while also providing for extensive guarantees in favour of lawyers in the event of obstructionist attitudes of clients[65].

The widespread use of telematics represents a crucial tool to remove the obstacles - often critical and significant - to the expeditiousness of criminal proceedings, implying that the novelty in question can only be considered with broad favour, as already stressed by the European Commission, in the context of the desirable reforms aimed at strengthening the efficiency of criminal justice in the fight against corruption[66].

Turning to appeal powers and procedures, Art. 7 of the draft Reform provides for some significant prescriptions, with the purpose, on the one hand, of limiting the cases inflow before the Court of appeal and, on the other hand, of making better use of available human and material resources.

From the first point of view, the list of non-appealable judgments (already significantly extended by the previous "Orlando Reform" of 2017[67]) is further expanded[68] and it is stated that, in order to appeal, the lawyer must have a specific mandate to appeal issued by the client after the judgment[69].

From the second point of view, the Lawmaker introduces the rule of the "single-judge of appeal" - instead of the Panel composed by three judges – for all the appeal proceedings concerning crimes listed in Art. 550 of the Code of Criminal Procedure, namely the proceedings

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64 See, in particular, letters l), m), o) and p) of Art. 2 of the draft Reform.

65 See Art. 2 lett. n) of the draft Reform.

66 See the European Commission *Country Report Italy 2020*, *European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011*, cited above, p. 55: «The government has been discussing for some time now a much-needed reform of criminal procedure, including a revision of the notification system; a broader use of simplified procedures; a limitation to the possibility of appealing by requiring a new power of attorney for lawyers; the introduction of a single judge in second instance for direct summons; a broader use of e-tools for filing documents; and simplified rules on evidence. Swift adoption of these measures, coupled with others to tackle the large number of cases at appeal courts, could improve the efficiency of criminal justice and the effectiveness of the fight against corruption».

67 Notably, through the Law no. 103 of 23 June 2017, further limits have been laid down for the appeal in cassation of some judgments (Art. 608 par. 1 *bis* of the Code of Criminal Procedure: the judgment of appeal confirming the acquittal of the first degree may be appealed for cassation only for the defects referred to in Art. 606 par. 1 letters a), b) and c) c.c.p.), the formalities to be followed for ruling the inadmissibility of the appeal in cassation in the cases referred to in Art. 591 par. 1 letter. a), b), c) and d) c.c.p., in cases of inadmissibility of the appeal against the judgment of plea bargaining and against the judgment that accepts the agreement on the grounds on appeal (Art. 610 par. 5 *bis*) have been simplified and accelerated, as well as deterrents of pecuniary nature to the proposition of purely dilatory or specious appeals have been introduced (Art. 616 par. 1 c.c.p. and Art. 48 par. 6 c.c.p.) and the procedure to be followed in case of confirmation of appeals has been simplified and streamlined (Art. 620 par. 1 letter l) c.c.p.: the Supreme Court can proceed quashing the challenged decision without referring the case to the Court of merit if no further factual findings are necessary and, as regards the restatement of the judgment, if it can be carried out on the basis of the decisions of the trial judge), as well as in case of extraordinary appeal for the correction of the material or factual error (Art. 625 *bis* par. 3 c.c.p.: the acknowledgment of the error can be made without formalities, within 90 days from the issue of judgment).

68 See. Art. 7 lett. b), c) and d) of the draft Reform, excluding the appeal for acquittal judgments concerning crimes punished with a pecuniary sanction or with an alternative pecuniary-prison sanction exclusive of the ones listed in Art. 590 par. II and III, Art. 590 *sexies* and 604 *bis* par. 1 of the Criminal Code, as well as for conviction judgments to prison sentence converted into community service.

69 See Art. 7 lett. a) of the draft Reform.

for which the filter of the preliminary hearing is not envisaged (direct summons). Furthermore, new cases of *in camera* proceedings without participation are introduced in appeal proceedings, on demand of the accused or its lawyer[70].

Such changes - to the extent that they will hopefully be implemented when the Legislative Decrees are going to be enacted - can be favorably considered with a view to the reasonable length of the proceedings[71], as they are indirectly aimed at reducing the future workload before the Courts of Appeal and at better allocating the available human and material resources of the judiciary, as well as being fully in line with the indications of the European Commission[72].

Other precepts of the draft Law concern the essential procedural elements *(«condizioni di procedibilità»*), excluding the prosecution *ex officio* for the offence of serious road traffic injuries (Art. 590 *bis* par. I of the Criminal Code)[73] and the tacit waiver of the complaint in the event of unjustified appearance at the hearing of the complainant summoned to testify[74].

Such amendments meet the pragmatic need for simplification, arising from judicial practice, targeted at repealing pan-criminal view of social relations, when it comes to bagatelles or, in any case, when the interest of the victims themselves in persecution appears by *facta concludentia* to have ceased.

Lastly, it is worth mentioning and positively addressing the announced administrative and financial engagement of the Legislator, through extraordinary measures aimed at reducing the backlog pending before the Courts of Appeal, thanks to an additional investment on the so-called "auxiliary judges"[75], coupled with an extraordinary hiring - via expedite public exams for only titles - of 1.000 units of administrative staff to be employed for the reduction of the length of all pending criminal proceedings[76].

[70] See Art. 7 lett. f) and g) of the draft Reform.
[71] Conversely, criticism is expressed in E. N. LA ROCCA, *La prima delega del decennio per la riforma del processo penale: una corsa folle contro il tempo che ora scorre senza contrappesi*, cited above, pp.18-19, where issues concerning right of defense, *favor imputati* and guarantee of collective decisions are raised.
[72] See the afore-mentioned European Commission *Country Report Italy 2020*, *European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011*, p. 55.
[73] See Art. 8 lett. a) of the draft Reform.
[74] See Art. 8 lett. c) of the draft Reform.
[75] See Art. 14 of the draft Reform.
[76] See Art. 15 of the draft Reform.