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Cooperative Compliance Measures to Prevent Organised Crime Infiltrations and the Protection of the EU's Financial Interests[*]

A New Gold Standard in the Implementation of the Italian Recovery and Resilience Plan?

Protezione degli interessi finanziari dell'UE e strumenti perprevenire le infiltrazioni della criminalità organizzata

Protección de los intereses financieros de la UE y instrumentos para prevenir la infiltración del crimen organizado

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Organized Crime, EU Law

Criminalità organizzata, Diritto UE

Criminalidad organizada, Derecho UE

Abstracts

The EU legal framework identifies crime prevention and repression as one of its objectives in particular with respect to the fight against crimes affecting the EU's financial interests (Artt. 83-86, 325 TFEU). These goals, however, should be pursued safeguarding fundamental rights, also when economic activities are involved. This paper discusses whether and how the Italian anti-mafia legislation (Anti-mafia Code - AC) has struck a balance by strengthening certain special (non-criminal) enforcement instruments against corporations. Our contention is that there is a serious tension between many of these (non-criminal) measures issued against legal persons in the AC – with particular reference to preventive confiscation and anti-mafia interdiction – and some fundamental rights established by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Therefore, we argue that the Italian legislator made the right choice to narrow the scope of application of these controversial measures by betting rather on the implementation of the AC cooperative compliance tools to combat organised crime, including the judicial control of companies and the new measure of collaborative prevention, introduced in 2021 – together with the provision of the 'right to be heard' in the procedure for the adoption of anti-mafia interdictions – in the context of the National Recovery and Resilience Plan. With these cooperative compliance provisions, indeed, a company is not directly confiscated or excluded from the public sphere with an interdiction, but simply subject to forms of public monitoring and called upon to introduce organisational measures to combat criminal infiltrations in place and prevent new ones.

In presenting to a wider audience these new Italian measures, the paper aims at offering an interesting benchmark also for other Member States on how to ensure efficiency of public controls and an effective fight against crimes affecting also EU financial interests, while ensuring fair procedural safeguards to protect the fundamental rights of companies from a punitive/criminal law perspective.

[*] Although the article is the result of a common research of the two authors, Emanuele Birritteri wrote paragraph 2 and Elisabetta Tatì wrote paragraph 3 (the introduction – Par. 1 – and the conclusions – Par. 4 – were written jointly by the two authors). This paper – published here with amendments – was presented at the International Conference of the Jean Monnet Network on EU Law Enforcement (EULEN): "EPPO ONE YEAR IN ACTION: Towards resolving complexity and bringing added value" – held at the University of Luxembourg, 30 May 2022 – and was published in a first version (as a conference working paper) in the Jean Monnet Network on EU Law Enforcement Working Paper Series (no. 02/22).

La prevenzione e la repressione della criminalità sono obiettivi di centrale importanza per quanto riguarda l'ordinamento giuridico europeo, in particolare con riferimento alla lotta contro i crimini che ledono gli interessi finanziari dell'Unione (artt. 83-86, 325 TFUE). Questi obiettivi, tuttavia, devono essere perseguiti nel rispetto dei diritti fondamentali, anche quando vengono in gioco attività economiche. L'interrogativo attorno a cui ruota l'indagine è se la normativa antimafia italiana del Codice Antimafia abbia o meno raggiunto questo equilibrio rafforzando alcuni speciali strumenti non penali di *enforcement* nei confronti delle imprese. Il contributo, in particolare, evidenzia come vi sia una forte tensione tra molti degli istituti del Codice Antimafia che possono finire per intercettare le *corporation* – con particolare riferimento alla confisca di prevenzione e all'interdittiva antimafia – e alcuni diritti fondamentali sanciti dalla Convenzione europea dei diritti dell'uomo e dalla Carta dei diritti fondamentali dell'Unione europea. Pertanto, si pone in luce come il legislatore italiano abbia fatto una scelta condivisibile nel restringere l'ambito di applicazione delle controverse misure da ultimo menzionate, promuovendo piuttosto un maggiore ricorso agli strumenti ispirati al modello della *cooperative compliance*, tra cui il controllo giudiziario delle imprese e la più recente previsione della prevenzione collaborativa, introdotta nel 2021 – unitamente alle modifiche in punto di diritto al contradditorio nel procedimento per l'adozione dell'interdittiva antimafia – nell'ambito del Piano Nazionale di Ripresa e Resilienza. Con tali disposizioni ispirate ai meccanismi di *compliance* cooperativa, infatti, un'impresa non viene direttamente confiscata o esclusa dalla sfera pubblica con una interdittiva, ma semplicemente sottoposta a forme di vigilanza pubblica e chiamata ad introdurre misure organizzative per contrastare le infiltrazioni criminali in atto e prevenirne di nuove. Nel presentare a un pubblico più ampio queste nuove misure italiane, l'articolo mira ad offrire anche ad altri Stati membri europei alcuni spunti di riflessione in merito all'adozione di moderne strategie per garantire l'efficienza dei controlli pubblici e un'efficace lotta alle frodi e ai reati che ledono anche gli interessi finanziari dell'UE, senza però rinunciare al contempo alla protezione delle garanzie fondamentali delle imprese dal punto di vista del diritto punitivo.

La prevención y la represión de la delincuencia son objetivos centrales del ordenamiento jurídico europeo, en particular en lo que se refiere a la lucha contra los delitos que perjudican los intereses financieros de la Unión (artículos 83-86, 325 TFUE). Sin embargo, estos objetivos deben perseguirse con respeto a los derechos fundamentales, incluso si se trata de actividades económicas. La cuestión en torno a la cual se articula la presente investigación es si la legislación antimafia italiana del Código Antimafia ha conseguido o no este equilibrio, reforzando algunos instrumentos especiales de *enforcement* en contra de las empresas. En particular, el artículo señala cómo existe una fuerte tensión entre muchas de las disposiciones del Código Antimafia – con especial referencia a la confiscación preventiva y a la interdicción antimafia – y algunos de los derechos fundamentales consagrados en el Convenio Europeo de Derechos Humanos y en la Carta de Derechos Fundamentales de la Unión Europea. Por lo tanto, se evidencia cómo el legislador italiano ha correctamente optado por la reducción del ámbito de aplicación de las controvertidas disposiciones antes mencionadas, promoviendo, en cambio, un mayor recurso a instrumentos inspirados en el modelo de *cooperative compliance*, incluyendo el control judicial de las empresas y, más recientemente en 2021, la prevención colaborativa – junto con las modificaciones en cuanto al 'derecho a audiencia' en los procedimientos para la adopción de la interdicción antimafia – en el ámbito del Plan Nacional de Recuperación y Resiliencia. En efecto, con estas previsiones inspiradas en los mecanismos de *cooperative compliance*, no se confisca directamente a una empresa ni se la excluye de la esfera pública con una orden de interdicción, sino que simplemente se la somete a formas de supervisión pública y se la llama a introducir medidas organizativas para contrarrestar las infiltraciones criminales existentes y prevenir otras nuevas. Al presentar estas nuevas normas italianas a un público más amplio, el artículo se propone ofrecer a otros Estados miembros europeos elementos de reflexión sobre la adopción de estrategias modernas para garantizar la eficacia de los controles públicos y una lucha eficaz contra el fraude y los delitos que perjudican también a los intereses financieros de la UE, sin renunciar por ello a la protección de las garantías fundamentales de las empresas desde el punto de vista del derecho punitivo.

Sommario

1. Introduction: Using Non-Criminal Tools to Fight Organised Crime and Protecting the EU's Financial Interests, as well as Fundamental Rights, also in the context of the Italian Recovery and Resilience Plan. – 2. Cooperative Compliance Tools to Tackle Organised Crime Infiltrations: Overview, Strengths and Weaknesses of an Enforcement Model from a Punitive Law Perspective. – 3. A Focus from an Administrative Law Perspective: Antimafia Interdictions to Tackle Organised Crime Infiltrations and the National Recovery and Resilience Plan. – 4. Brief Final Remarks.

1. Introduction: Using Non-Criminal Tools to Fight Organised Crime and Protecting the EU's Financial Interests, as well as Fundamental Rights, also in the context of the Italian Recovery and Resilience Plan.

The EU legal framework identifies crime prevention and repression as one of its objectives in particular with respect to the fight against crimes affecting the EU's financial interests (Artt. 83-86, 325 TFEU).

These goals, however, should be pursued in the respect of fundamental rights, also when economic activities are involved, as wells as when it comes to fraud and other serious crimes affecting EU's financial interests that are commonly committed by organised criminal groups, which often try to illegally obtain public funds and take economic control of territory through mafia intimidation.

This paper will therefore investigate whether and how the Italian anti-mafia legislation has struck this balance in strengthening certain special (non-criminal) enforcement instruments against corporations to combat organised crime, as to even ensure a more effective protection of the EU's financial interests.

The Italian legislator, indeed, has long been aware that an effective fight against such illegal activities cannot be entrusted only to traditional criminal law instruments, which step in when the crime has already occurred and the State has already failed in ensuring an effective and legal use of (nationals and European) public funds. Instead, it is necessary to build 'barriers' and preventive regulatory tools that, by operating at an *earlier* stage, could stop organised crime infiltration of the legal economy, especially in public procurement and public financing[1].

For this reason, Italy has built enforcement mechanisms using administrative/hybrid tools that do not replace those of the Criminal Code in the fight against Mafia and other serious crimes, but, based on an integrated approach, operate in an autonomous manner with respect to traditional criminal investigations and proceedings, thus being applied irrespective of the existence of any criminal proceedings for the same facts and on the basis of a less rigid standard of proof than that required by criminal law[2].

These "non-criminal crime-fighting provisions" are mostly contained in the Italian Antimafia Code[3] and range from the more "severe" instruments of the anti-mafia preventive confiscation and the anti-mafia interdiction/ban – which *de facto* exclude companies from the public procurement and public financing sectors – to the more 'flexible' ones inspired by the cooperative compliance model – the judicial administration and the judicial control of companies, as well as the new measure of "collaborative prevention".

Our contention is that there is a serious tension between the first group of measures mentioned above and issued against legal persons – i.e. the anti-mafia preventive confiscation and the anti-mafia interdiction – and the fundamental rights protected by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union: with regard to, *inter alia*, the right to a fair trial (art. 6 ECHR), the freedom to conduct a business (art. 16 of the Charter of fundamental rights), the protection of property (art. 1 of the ECHR's Additional Protocol).

Against this background, we argue that the Italian legislator made the right choice to

[1] See Visconti (2014b), pp. 708 ss.

[2] See, for a complete overview of these tools, Mezzetti and Luparia Donati (2020). See also La Spina (2014), pp. 593 ss. For a comparative overview with respect to the use of administrative tools to fight crime see Spapens *et al.* (2015).

[3] Legislative decree no. 159 of 2011.

narrow the scope of application of these controversial measures by betting rather on the implementation of the second group of measures (cooperative compliance preventive tools to combat organised crime).

The latter measures aim at fighting criminal infiltration of companies following a different approach: i.e., a cooperative procedure between the public authority and the company concerned which will be allowed – unlike the cases of confiscation or interdiction – to keep operating, also within the procurement and public financing sectors[4], although under public supervision.

Therefore, this research will focus on these cooperative compliance instruments, that will be analysed in detail in the context of the broader regulatory framework concerning their application, especially with respect to the connections with the so called 'anti-mafia interdictions'.

Indeed, we will explain that, in our view, such measures make it possible to find a reasonable balance between two opposing needs: on the one hand, to counter and prevent (also) through non-criminal preventive instruments mafia infiltration of the legal economy, fraud and other serious crimes, often affecting EU's financial interests; on the other hand, to ensure fair procedural guarantees to protect the fundamental rights of companies from a punitive/criminal law perspective, as well as to "keep them alive", where possible, as they often represent an important asset for the national economy. This is especially true in the Next Generation EU era, where countries need economic operators to be able to acquire and effectively use the huge flow of public funding generated by the Plan.

To this end, the paper will be divided into two parts: the first provides an overview of these cooperative compliance instruments, analysing, also in a *de iure condendo* perspective, strengths and weaknesses of this enforcement model, also with the objective of assessing their compliance with the aforementioned EU fundamental rights; the second focuses on the connections between this system and the administrative law of public controls, with particular reference to anti-mafia interdictions.

In analysing these new Italian measures, the paper aims at offering an interesting benchmark also for other Member States, in terms of enhancing the efficiency of public controls and the effectiveness of the fight against crimes also affecting EU's financial interests, while ensuring fair procedural guarantees to protect the fundamental rights of companies from a punitive/criminal law perspective.

2. Cooperative Compliance Tools to Tackle Organised Crime Infiltrations: Overview, Strengths and Weaknesses of an Enforcement Model from a Punitive Law Perspective.

The aims of these non-criminal cooperative compliance instruments targeting corporations cannot be understood without a focus on the relevant regulatory framework.

In this section, we will provide a brief overview of this regulatory system and then focus on the most interesting aspects for our research, especially when it comes to assessing the compliance of these tools with the aforementioned EU fundamental rights.

The non-criminal law enforcement tools against organised crime concerning corporations[5] are mostly regulated by the Antimafia Code (AC).

With respect to these measures, it is necessary to distinguish between the instruments that are adopted by the judicial authority[6] and those that, instead, are ordered by the administrative authority: in particular, the "Prefetto" (Prefect), who represents a local public authority.

The first group of instruments (adopted by the Court) can be split into two types of measures: on the one hand, the provisions concerning the enterprise directly controlled or managed by "dangerous persons" and in particular those suspected of belonging to the Mafia (these are the measures of seizure and preventive confiscation[7]); on the other hand, the tools (which

[4] On these issues, also for a broader literature review, see Birritteri (2019), pp. 837 ss.

[5] We will not discuss in this paper the preventive measures of the Anti-mafia Code issued against individuals. For a complete analysis of these tools see, also for a literature review, Consulich (2020), pp. 589 ss.

[6] Court responsible for the application of preventive measures.

[7] Seizure and confiscation of economic assets whose legitimate origin cannot be justified by the suspected perpetrator of serious offences,

are inspired by the cooperative compliance model) that concern companies that – while not belonging to individuals who are suspected of being members of organised crime or having committed other serious crimes – "facilitate" the activities of such dangerous individuals, who attempt to infiltrate such corporations in order to enter the legal economic market[8].

In particular, where such "facilitation" is stable and continuous – i.e., where there is a high degree/stage of criminal infiltration of the business – the judicial administration of the company applies (Art. 34 AC), whereby the directors of that business are removed and replaced for a maximum period of two years by a judicial administrator appointed by the Court who manages all current affairs to ensure the business's continuity and adopts all compliance measures necessary to fight ongoing mafia or criminal infiltration and prevent new ones[9].

When, on the other hand, the "facilitation" is only sporadic – i.e., where there is not a high degree/stage of criminal infiltration of the company – the judicial control applies (Art. 34-*bis* AC), whereby, unlike Art. 34 AC, the directors of the organisation are not removed, but the company is simply subjected to a temporary period of public monitoring and the obligation to comply with certain duties (e.g., from the obligation to notify the Court all payments made for a value above a certain amount, to the obligation to adopt a compliance program under the supervision of a "judicial tutor" appointed by the Court, who verifies also the company's compliance with all the imposed obligations)[10].

In both cases (Arts. 34 and 34-*bis* AC), the common objective is to "rehabilitate" the company infiltrated by the mafia or other dangerous subjects, starting a period of public-private cooperation to allow the entity to return to fully legal operations, without confiscating the organisation and without even excluding it from the public procurement and financing sectors[11]. Judicially administered or controlled companies, indeed, can even continue to work with the public administration[12].

The case law, then, has also clarified what is, in both cases (Arts. 34 and 34-*bis* AC), the most important evaluation criterion to decide whether or not to apply these cooperative compliance measures: the judicial authority, in fact, will order the application of these tools when it considers that they are likely to be successful and to eliminate the ongoing criminal infiltration, making a sort of positive "prognosis" of the measures' success[13].

Moving to the second group of instruments (those adopted by the administrative authority, i.e., the Prefect), there are two different types of provisions: on the one hand, the more "rigid" and "intrusive" measure of the anti-mafia interdiction, on which we will focus in the next paragraph[14] and that entails the exclusion of the company infiltrated by organised crime from the public procurement and financing sectors; on the other hand, the regulations (also in this case based on the "rationale" of cooperative compliance) that aim at allowing the infiltrated company to keep operating, although under a regime, as the case may be, of public administration or control in order to eliminate ongoing criminal infiltration.

In this latter case, the relevant provisions are: *a)* Article 32 of decree law no. 90/2014, according to which the Prefect may adopt a series of measures of increasing severity (ranging from the simple monitoring of the company to the appointment of a temporary public

including those related to organised crime – model of non-conviction-based confiscation – Artt. 20 and 24 AC. On these measures see, among others: Balsamo (2020), p. 5 ss.; Cardamone, (2020). In the Italian literature see: Bartoli (2015) pp. 971 ss.; Basile (2021); Finocchiaro (2019); Fondaroli (2007); Maiello V. (2015), pp. 323 ss.; Maugeri (2001); Mazzacuva (2017); Menditto (2015), pp. 1528 ss.; Mongillo (2015), pp. 421 ss.; Padovani (2014); Severino (2016), pp. 1 ss.; Trinchera (2020); Viganò (2018), pp. 885 ss.

[8] Birritteri (2019), pp. 837 ss.

[9] With respect to this measure see, among others: Bene (2018), pp. 383 ss.; Bontempelli (2018); Buzio (2018), pp. 334 ss.; Chiaraviglio (2017), pp. 135 ss.; Chionna (2018), pp. 615 ss.; Fondaroli (2017), p. 610; Mangione (2003), p. 1209; Mangione (1996), p. 714; Maugeri (2018), p. 368; Nanula (2016); Palazzolo (2021), p. 109 ss.; Pansini (2020), p. 666 ss.; Russo (2012), p. 861 ss.; Visconti (2018), p. 149.

[10] See, with respect to the judicial control tool, the literature under footnote no. 12 and also, among others: Alesci (2018), pp. 1518 ss.; Arbotti (2021), pp. 2886 ss.; Balato (2019), p. 65; Bartolini (2020), pp. 1466 ss.; Brancia (2018), pp. 1383 ss.; Cantone and Coccagna, (2018), p. 162; De Flammineis (2015); Di Florio (2021), pp. 1 ss.; Francolini (2019); Finocchiaro (2017), pp. 251 ss.; Griffo (2020), pp. 783 ss.; Lorusso (2020), pp. 5 ss.; Losappio (2021), pp. 542 ss.; Maglione (2021), pp. 94 ss.; Mazzamuto (2016); Menna (2019), pp. 252 ss.; Merlo (2020), pp. 135 ss.; Mezzetti (2019), p. 11; Visconti (2019). It is interesting to underline that here we do have a rare example, in the Italian legal order, of mandatory criminal compliance with respect to the obligation to build a compliance program: on this issue see the recent analysis of Colacurci (2022), pp. 341 ss.

[11] Unlike the anti-mafia interdiction. See also Pignatone (2015), p. 261.

[12] Due to the fact that the application of judicial administration or control suspends the effects of any antimafia interdiction measures issued against the corporation. See also Losappio (2021), p. 544.

[13] Italian Court of "Cassazione" (Sec. U), judgement no. 46898 of 26 September 2019. For an analysis of this judgement see Albanese, (2019).

[14] See par. 3 of this paper.

administrator) against the company that is involved in situations which are "symptomatic" of unlawful conduct[15]. These are measures with a more limited scope of application, as they only concern companies that have been awarded public contracts and are normally only aimed at enabling the public work to be completed[16]; *b)* the second of these flexible measures is that of "collaborative prevention" provided for in the new Article 94-*bis* of the Anti-Mafia Code and introduced specifically in the context of the implementation of the Italian NRRP (decree law no. 152/2021)[17].

Collaborative prevention, in particular, was enacted to provide the Prefect with a more flexible and alternative tool to the anti-mafia interdiction. Indeed, if the Prefect, when carrying out the checks for the purpose of issuing the anti-mafia "documentation", determines that the criminal infiltration into the organisation is only sporadic (i.e. not at a high stage), instead of adopting the anti-mafia interdiction and excluding the company from the public procurement and financing sectors, he/she can apply the measure of collaborative prevention, allowing the company to keep working with the public administration, but under a public monitoring period that has basically the same contents as art. 34-*bis* AC (judicial control)[18].

During the period of collaborative prevention, therefore, the company – as it happens under judicial administration or control – is allowed to keep working with the public administration with respect to public contracts and funding. If, at the end of the period of collaborative prevention, the Prefect establishes that the attempt of infiltration has terminated, he/she issues a notice that ascertains the "rehabilitation" of the corporation and "stabilises" the possibility for it to work normally with the public administration[19].

The system of these non-criminal provisions to combat organised crime, therefore, is constructed as a sort of "pyramidal" structure in which the various authorities have at their disposal a range of instruments that have an increasing degree of intensity that is proportional to the level of criminal infiltration of the company.

To sum up, at the lowest rung of the "pyramid" there are measures of mere public control, without removal of managers in the case of infiltration of a low level; at the intermediate rung, then, there is the judicial administration, with the removal of managers in the case of criminal infiltration of a "stable" nature; at the top of the pyramid, finally, there are the more severe measures of the anti-mafia interdiction and preventive confiscation. The first (anti-mafia interdiction) is now basically applied when the infiltration cannot be overcome by relying upon the aforementioned cooperative compliance tools; the second (preventive confiscation), on the other hand, is applied when the company is totally under the control of organised crime and no longer merely infiltrated by such dangerous subjects.

Now, also in the light of assessing their compliance with EU fundamental rights, it is necessary to highlight strengths and weaknesses of this enforcement system, which – it is worth recalling – works alongside (and autonomously from) the traditional criminal justice system.

One of the main strengths of the above measures is certainly the fact that these instruments are able to build a sort of first "barrier" against the introduction of organised crime into the public procurement and financing sectors[20]. In fact, these provisions have a highly preventive nature, as they normally apply at an early stage, i.e., well before the occurrence of fraud against European and national public funds or other serious crimes, preventing criminals from entering the legal economy and thus greatly reducing the chances that they may commit crimes affecting the interests of the State or the European Union.

With regard, then, to the cooperative compliance instruments on which we have focused most, it must be recognised that they ensure a fair balance between the two opposing needs that we have in this area: fighting criminal infiltration of businesses *vs* protecting fundamental rights and economic activities that can still operate legally and represent an important asset for the national economy. These measures, in fact, rather than having punitive purposes, have instead a distinctive preventive and "therapeutic" function[21], insofar as, through cooperation

[15] Guerini and Sgubbi (2014). See also Maiello N.M. (2018), pp. 4424 ss.
[16] Cantone and Coccagna (2018), p. 156.
[17] Albanese (2022).
[18] Namely, from the obligation to notify the Prefect certain payments, to the obligation to adopt a compliance program under the supervision of a "tutor" appointed by the Prefect, etc. On this new measure see: Bene (2022), pp. 162 ss.; Centonze (2022), p. 3. With respect to these type of cooperative compliance tools see also: Aprile (2015); Roberti and De Simone (2016).
[19] See also Vulcano (2021), p. 1.
[20] Pignatone (2015), p. 261.
[21] See the literature under footnotes no. 9 and 10. See also the recent work of Maugeri (2022), pp. 106 ss., also with respect to the issue of

with the public authorities that help the legal person, the company is supported in eliminating ongoing criminal infiltration and in equipping itself with the most modern compliance and internal control tools to prevent the possibility of recurrence.

Therefore, these cooperative compliance tools ensure a reasonable balance between the freedom of conducting business and the State interest in combating crime.

More in detail, this system is constructed in such a way as to use tools of increasing intensity: indeed, the more severe measures of preventive confiscation and the anti-mafia interdiction are now applied only as an *extrema ratio*, when it is not considered possible to otherwise rehabilitate the economic activity (in particular through the aforementioned cooperative compliance measures).

This is a very important aspect, especially because the most severe measures of this regulatory system (anti-mafia interdiction and preventive confiscation) show several critical issues with regard to the protection of the fundamental rights of the targeted economic subjects, especially when it comes to the right to a fair trial (art. 6 ECHR), the freedom to conduct a business (art. 16 of the Charter of fundamental rights), the protection of property (art. 1 of the ECHR's Additional Protocol).

In this respect, the most important point in our view is that through the application of these regulations *against corporations* it is basically possible to obtain the same result that would be achieved by undertaking a traditional criminal proceeding (interdiction of the activity or confiscation), but with no need to start it and, above all, regardless of the existence (and the outcome) of any criminal proceedings for the same facts[22].

For instance, it is not necessary to apply the same rules provided for in the Italian legislative decree no. 231 of 2001 on corporate criminal liability, by demonstrating, *inter alia*, the existence of a criminal offence committed by a corporate representative in the interest or to the benefit of the company, or respecting the same procedural guarantees for suspects, nor the standard of proof (beyond every reasonable doubt) provided for in that legislation[23].

In order to be able to apply all the measures analysed so far, in fact, the authority simply needs to assess the existence of mere circumstantial evidence; namely, mere suspicions that a criminal infiltration is taking place in a certain organisation, making it more difficult for the company to exercise its rights of defence than in corporate criminal liability proceedings and, above all, to predict the negative consequences for the company's right to property and freedom to exercise its business activities that may result from the application of such regulatory provisions[24].

It is not very surprising, then, that empirical observation of Italian case law shows how the corporate criminal liability regulation (pursuant to legislative decree no. 231 of 2001) is largely unenforced in proceedings for organised crime, since prosecutors can essentially achieve the same objectives by following the much simpler path – as seen, especially in terms of proof standards – of applying the measures of the Anti-mafia Code[25].

For all these reasons, the respect of the corporations' guarantees/rights, for the more severe measures of the Anti-mafia Code, is still an open issue that has not yet been directly addressed/deepened by the case law also in the European context, which has so far mainly focused on the impact of these measures on individuals[26].

Therefore, we argue that the Italian legislator, taking a right choice, has in recent years be-

the coordination of the activities carried out by criminal and administrative authorities.

[22] For a complete overview of these issues in the context of the Antimafia Code see in particular Amarelli (2019), pp. 207 ss.. See also the analysis of Mezzetti (2018).

[23] On the interplay between the Antimafia Code and the Italian corporate criminal liability regulation see: Guerini (2019); Gullo A. (2020), pp. 241 ss.; Losappio (2021), pp. 545 ss.; Mongillo (2020), pp. 802 ss.; Mongillo and Parisi (2019), pp. 21 ss.; Piemontese (2021), pp. 127 ss.; Sabia (2020), pp. 393 ss.; Selvaggi (2020), pp. 719 ss.; Siracusano (2021), pp. 1 ss. For a criminological analysis see De Simoni, (2022), pp. 5 ss.

[24] See also par. III of this paper and the literature in the previous footnotes.

[25] Visconti (2014a).

[26] Indeed, with regard to anti-mafia measures issued against individuals, on the other hand, the European Court of Human Rights had already pointed out some critical issues with respect to the Italian anti-mafia regulation in the De Tommaso case (see ECHR, Grand Chamber, De Tommaso Vs Italy, 23 Febraury 2017). The Italian Constitutional Court, while not directly addressing the issue of the impact of such measures on corporations as such and focusing on individuals too, has specified the conditions under which it is possible to apply the anti-mafia preventive confiscation, also referring to the relevant case law of the European Court of Human Rights (see Italian Constitutional Court, Judgement no. 24 of 2019). Also with respect to the anti-mafia interdiction, then, as we shall see in the next paragraph, administrative case law has so far rejected the appeals raised by private parties aimed at highlighting the tensions between this instrument and the aforementioned EU fundamental rights.

gun to increasingly reduce the scope of application of the stricter measures of the Anti-mafia Code, seeking to foster as much as possible the use of the aforementioned cooperative compliance ("therapeutic") tools.

With regard to these latter measures, in fact, the lower standards of proof required for issuing the measures of administration or control of the company are more "acceptable" in terms of respecting fundamental rights, due to the preventive and "therapeutic" nature of such instruments, which do not lead – unlike those of the interdiction and preventive confiscation – to any permanent negative effect on the entity; on the contrary, they aim at safeguarding operational and business continuity, also with regard to activities carried out with the public administration, without, however, foregoing the fight against criminal infiltration of the corporation[27].

Moreover, after the latest amendments to the Anti-mafia Code adopted for the implementation of the NRRP, a further open issue emerges, which is that of the coordination of the activities carried out by the administrative and criminal authorities.

There are several aspects to be considered on this point.

First of all, we believe that there is the risk that the measure of collaborative prevention will considerably reduce the scope of application of judicial control (Art. 34-*bis* AC). In fact, since the two instruments have basically the same content, it is difficult to understand the reasons why the Court should order a judicial control when the company is already following the path of collaborative prevention ordered by the Prefect, nor would it make sense, for reasons that can be easily understood, to order the judicial control when the collaborative prevention procedure has been successfully concluded. Likewise, it would be complicated for the Court to allow a company to be admitted to judicial control when the collaborative prevention has been concluded with a negative outcome. We have seen, indeed, that one of the key elements that Courts take into account when deciding whether or not to apply the judicial control is the assessment of the chance of success of the therapeutic measure, and this assessment would be difficult to carry out with a positive outcome if that enterprise has already failed an initial period of "probation" before the Prefect.

Moreover, our analysis suggests that the Prefect does not have the power to order the application of a tool which is comparable to judicial administration (Art. 34 AC). The Court, in fact, has three instruments of increasing intensity: control, administration and confiscation, depending on the degree of criminal infiltration of the organisation. The Prefect, on the contrary, basically has only two alternatives: anti-mafia interdiction or collaborative prevention, while he/she can order the temporary administration of the company only within the limits allowed by the aforementioned art. 32 of decree law no. 90/2014.

In our view, it would instead be useful to also provide the Prefect with the possibility of ordering the temporary administration of the company with the removal of the managers, as an alternative to the anti-mafia interdiction, in all cases in which (regardless of the existence of a public contract) he/she finds that the level of criminal infiltration of the enterprise is not merely sporadic but stable/of a high degree.

In short, the application of a cooperative compliance measures that even the Prefect should be able to graduate should always be favoured, at least at a first stage. This would entail choosing between administration or control, according to the level of criminal infiltration of the organisation; the anti-mafia interdiction should therefore only be issued – of course in compliance with fundamental rights – at a later stage, i.e., only when cooperative compliance measures have failed in their objective of eliminating the ongoing criminal infiltration.

At the same time, such a change would also entail reflecting on whether or not it would be appropriate to maintain two "parallel" systems in which administrative and judicial authorities both adopt the same cooperative compliance instruments, or whether it would be better to entrust the application of these tools to only one of the two authorities, providing, if necessary, for the other authority to step in only at a later stage (for example, when reviewing the decisions adopted by the other public institution).

[27] See, also for an overview of the different approaches in the literature, Birritteri (2019), pp. 837 ss.

3. A Focus from an Administrative Law Perspective: Antimafia Interdictions to Tackle Organised Crime Infiltrations and the National Recovery and Resilience Plan.

We have highlighted how the Italian legislature has made the right choice to bet on the aforementioned cooperative compliance instruments, which ensure a better balance between the need to fight crime, especially in the context of the implementation of the NGEU, and to respect the fundamental rights of corporations considering the European framework.

The Italian legislator has recently tried to take this need into account also with regard to the administrative procedure that is implemented to adopt the anti-mafia interdiction.

Let us therefore try to delve into this issue by also providing the reader with a general overview of the link between the instruments analysed so far and the Italian system of administrative controls.

Among the different kinds of administrative controls in Italy[28], indeed, there is the *ad hoc* system set up by the legislator for the fight against organised crime, consisting of two different levels: the first is the control over the enterprise ecosystem for addressing the problem of mafia infiltration of the legal economy; the second addresses Mafia infiltration of local public authorities[29].

In this paper we will only focus on the first level of control, with special regard to the system of "*documentazioni antimafia*" (antimafia documentations) in which Antimafia interdictive measures are applied.

The kind of administrative action involved in the latter can be categorised as an external control over private persons, exercised by the Prefect[30]. However, it is not easy to theoretically frame these quite extreme measures against mafia infiltration into the administrative function of controlling. Indeed, the administrative powers that are here at stake are those for the protection of security and public order, associated with traditional administrative functions. Thus, as it will be clarified below, the measures analysed in this section involves several constitutional principles, among them the freedom of economic activity (Art. 41, of the Italian Constitution).

Hence, following a perspective based on "administrative control" allows us to theoretically "keep all the pieces together" while also highlighting the differences between criminal and administrative approaches[31].

Moreover, adopting this theorical perspective is also useful for taking into consideration

[28] The Italian system of administrative controls is quite complex, being characterised by several layers. It must be taken in mind, for example, its historical evolution from an external to an internal/self-control approach, from a control with respect to political opportunity to a more "legality-based" one, and from a mixture of these developments (i.e., from an *ex ante* external control of the legality of the administrative act to an *in itinere* internal control, and an *ex post* external control over the legality and performance of the administrative action). The are several reasons at the origins of these issues: the continuing existence of a certain number of external controls overlapping with internal ones – with a lack of coordination and sometimes an excess of supervision (i.e., in terms of the detection of administrative responsibility based on the National court of auditors' external control activity); the evolution of the same internal system of controls, with various reforms over the last few years (i.e., towards a system even more based on performances); the specificity of some sectors, both in terms of the kind of administrations involved – i.e., local authorities or independent ones for strategic sectors such as the energy or the financial markets – and activity covered – i.e., the enterprise ecosystem, anti-corruption strategy, public accountability or public procurement rules, the (often chaotic) administrative organization and activity and the associated inefficiency and ineffectiveness of control processes (i.e., in terms of accounting rules). See, among others, in the Italian literature on administrative controls: Severo Giannini (1974), pp. 1263 ss.; Cassese (1993), *passim*; D'Auria (2000), pp. 1217 ss.; Cerulli Irelli and Luciani (2002), pp. 5 ss.; Battini (2004), pp. 1253 ss.; D'Alterio (2015), *passim*; De Benedetto (2015), pp. 479 ss.; De Benedetto (2019), pp. 855 ss.

[29] Garofoli and Ferrari (2019).

[30] Even though the private is often involved in an autonomous administrative procedure with other administrations (such as a contracting authority under the public procurement discipline).

[31] Especially with respect to the controlling function in the anti-mafia information or notice, see Figorilli and Giulietti (2021), pp. 59 ss. The authors underline that the anti-mafia legislation in this field clearly represent a form of control function towards private subjects with a classic "biphasic sequence". The procedure is divided, in fact, into the assessment and the consequent judgment of conformity made with respect to an evaluation parameter in the light of what has been brought to light in the literature by Giannini (1974), pp. 1263 ss. The idea of considering "administrative functions" as the fourth pillar of the punitive system in our legal order, alongside those with restorative, punitive and preventive functions – see Bobbio (1969), pp. 531 ss. –, is criticised by Mazzacuva (2019), pp. 57 ss. with referent to the issue of justifying the exclusion of basic individual guarantees/rights – like those recognised in the criminal justice system – in some procedures (i.e., anti-mafia interdictions), using the distinction between criminal and administrative sanctions – and see on the point Paliero and Travi, (1988), *passim*. As well synthetized by Mazzacuva, the debate on the nature of anti-mafia interdictions should be theoretically framed having regard to the distinction between the preventive and punitive goals of these measures, trying to take into consideration the different meanings of the word "prevention". It's not the aim of this paper to make a clear analysis of this theoretical debate: for a comprehensive analysis see *supra* – Mazzacuva – in this footnote; on these issues see also the recent analysis of Borsari (2022), pp. 733 ff.

in which way the recent reforms of the Italian legal system are trying, on the one hand, to "simplify" the public sector's regulatory framework and controlling functions and, on the other hand, to enhance the protection of State and EU financial interests as well as the fight against mafia infiltration of the economy, without at the same time leaving behind fundamental rights and procedural guarantees.

With respect to these issues, this section will mainly focus on the introduction of the "right to be heard" in the procedure for the adoption of the anti-mafia interdiction to ban enterprises from the public procurement market.

The anti-mafia documentation system for the fight against the criminal infiltration of the economy is based on two types of certifications: *comunicazione antimafia* – anti-mafia communication – and *informativa anti-mafia* – anti-mafia information or notice (Art. 84, AC). While they basically coincide in their contents, they differ in terms of procedure[32]. Anti-mafia communication is a tool for the mere declaration of specific causes of exclusion of an enterprise from the public sphere for preventive purposes. Anti-mafia notice, on the contrary, is an administrative and preventive tool issued against a legal entity on the basis of a discretionary assessment by the Prefect regarding the existence or not of an organised crime attempt to infiltrate the company[33]. The aforementioned evaluation is based on facts and episodes considered "symptomatic" of the existence of the danger of mafia infiltration of the management of the enterprise[34].

The new Decree Law, adopted in 2021 for the NRRP's implementation, introduced the "right to be heard" among the different phases that characterised the administrative procedure for the adoption of an anti-mafia interdiction, the so called *informativa antimafia "interdittiva"*[35].

Indeed, under the previous version of this regulation, the interdiction measure was only notified by the Prefect to the company within five days from its adoption.

Considering the serious effects that such measures can have on economic activities – in terms of their exclusion from the public sphere, which can also lead to their definitive bankruptcy, especially for those companies working only in the public procurement sector – this situation raised strong tensions even with regard to the compliance of such measures with the principles of fair trial guaranteed by the aforementioned provisions of the European fundamental charters.

Therefore, with the introduction of this new phase ("right to be heard") the procedure has been re-designed allowing the company to take part in the procedure before the interdiction is issued. More specifically, if the Prefect, on the basis of his checks, establishes that there is the possibility of issuing an anti-mafia interdiction or applying a collaborative prevention, and there are not "urgent" reasons for speeding up the procedure, he promptly notifies the interested parties (corporation), indicating the "red-flags" of organised crime infiltration[36].

Then, the private party has no more than twenty days to submit written observations as well as to request a hearing. This provision clarifies that information whose disclosure can jeopardise administrative proceedings or ongoing judicial activities, or the outcome of other investigations aimed at preventing mafia infiltration, cannot be disclosed[37]. At the end of this procedure, the Prefect has three alternatives: issuing the "positive" anti-mafia notice, that establishes that there are not ongoing criminal infiltrations; ordering the application of the new collaborative prevention; adopting a "negative" anti-mafia notice (the interdiction)[38].

[32] See the judgment of the Italian Council of State no. 565/2017 and the judgment of the Italian Constitutional Court no. 4/2018 with respect to the distinction between the two measures.
[33] Nocelli (2022).
[34] TAR (Regional Administrative Court) Toscana, judgment no. 910/2018. See also Art. 84, Antimafia Code.
[35] Art. 48, decree law no. 152/2021.On this reform see: Amovilli (2022), pp. 1 ss.; Durante (2022), pp. 1 ss.; Sandulli M. A. (2022), pp. 1 ss.; Albanese (2022); Cocconi (2022), pp. 45 ss.; Vulcano (2021).
[36] In addition, it must be observed as the Anti-mafia Code already provided the Prefect with the possibility to ask the private parties to submit any useful information during an *ad hoc* hearing. See also Art. 93 AC, according to which the Prefect, in order to prevent mafia infiltration in public procurement, can carry out inspections in the working spaces of the companies that have been awarded public contracts.
[37] This can lead to the suspension of the terms for the adoption of the interdiction – thirty days for ordinary cases, forty five days for complex cases – but the procedure (in which the "right to be heard" has been recognised) must be concluded within sixty days from the date of receipt of the aforementioned communication. See Art. 92, par. 2-bis, Antimafia Code.
[38] Art. 92, par. 2-ter, Antimafia Code. Some elements that may be evaluated for the purpose of adopting the anti-mafia interdiction, in the period between the receipt of the communication and the conclusion of the "confrontation", are finally listed in the Art. 92, par. 2-quater, Antimafia Code: i.e., changes of registered office, company name or purpose, composition of the administrative, management and supervisory bodies, the replacement of the corporate bodies, the legal representation of the company as well as the ownership of company shares; mergers

The new provision on the "right to be heard" was inspired by the national Administrative Procedure Act (APA), especially by the provisions concerning the private participation in administrative procedures[39]. In this anti-mafia provision, however, not all the "participation guarantees" are recognised, with only the Prefect's duty to notify the reasons that justify the adoption of the interdiction measure being enhanced, in a similar way to what APA does with respect to the communication of the reasons that to not allow the adoption of an administrative act in favour of the private parties[40].

Indeed, the procedure we are analysing in this research follows a special discipline. Considering that this communication is provided for procedures other from those *ex officio* in the APA, here we do have more issues or, we may say, a "matrioska" effect. In fact, if it is true that the interdiction is adopted during a procedure that could give the possibility to the enterprise to sign a contract with the public administration – considering it as an *ex parte* procedure – the Prefect's power to adopt an antimafia notice also stems from the administrative function of controlling and verifying over final beneficiaries and, as a consequence, over the administrative action (as a routine control, managed *ex officio*, but at the same time risk-oriented)[41].

Moreover, this special anti-mafia procedure has very similar characteristics to the APA's one: strict deadlines, suspension of procedural terms, written observations and the duty to state reasons. While, on the other hand, the Anti-mafia Code regulates also the discipline of hearings. When it comes to the duty to provide reasons nothing is explicitly said, even though it seems to be a logical consequence that the Prefect will have the duty to mention the outcomes of the "confrontation" in the interdiction's motivation.[42]

Now, some weaknesses of the most recent reform can be highlighted. In fact, the new "right to be heard" may be "restricted" in two cases. First of all, there is the possibility to not to start this procedure when it is necessary to speed up it (Art. 92, par. 2-bis, first period, AC). However, this "urgency" scenario is not well specified. Consequently, the Prefect can exercise here a high discretionary power.

Secondly, the Prefect may not disclose some information if there is the need to not jeopardise ongoing investigations (Art. 92, par. 2-bis, third period, AC). This provision requires a great effort of coordination among different administrations, police forces, Courts, etc., that must not be easy to achieve, notwithstanding the public data interoperability available nowadays[43]. Moreover, the same information omitted in the preventive communication could induce the private party to foresee, indeed, that other checks are ongoing, restricting defence rights and hence frustrating the *ratio* of the new provision.

Notwithstanding these weaknesses[44] and the fact that this special administrative procedure has been in a certain manner slowed down and complexified – while the success obtained until now also depended on the ease and speed of the procedure – the new law can be considered, looking at the whole picture, a "step forward" and an improvement of the previous legislation.

This is because it provides more guarantees to private actors, without jeopardising the efficiency of the measure and notwithstanding that the Council of State supported, also recently, the thesis according to which the anti-mafia interdiction does not require the respect of the principle of administrative procedural participation[45]. In fact, it has been said that interdictions are normally adopted to prevent great danger for the public "economic" order

or other transformations or in any case any change in the organizational, managerial and asset structure of the companies and enterprises affected by the attempts of mafia infiltration.

[39] Law no. 241/1990 (APA), Section III.

[40] Art. 10-*bis*, APA. It is useful to mention here also Art. 7, APA – concerning the communication on the opening of an administrative procedure – according to which, in specific cases, such as the "urgency" of the adoption of the the administrative act, it is possible to overcome the duty of preventive communication.

[41] See Figorilli and Giulietti (2021), p. 61.

[42] With respect to the duty to state reasons see also the quite recent Judgment of the Italian Constitutional Court no. 57/2020.

[43] Artt. 96-99-*bis*, Antimafia Code. See Gullo N. (2015), pp. 476 ss. The author underlines that the decree of the Presidency of the Council of Ministers no. 193/2014, adopted for the implementation of the database for antimafia documentation, can be considered a "red-flag" of the problems in regulating a procedure that could reach a reasonable balance between the effectiveness of administrative prevention and the speediness of administrative procedures in the Antimafia Code.

[44] See also D'Angelo and Varraso (2022).

[45] See, *inter alia*, the judgments of the Italian Council of State no. 820/2020 and no. 2854/2020. On the same issue, the Regional Administrative Court of Puglia (TAR) requested a preliminary ruling to the EU Court of Justice, which, however, dismissed the case: see TAR Puglia, decision of 28 May 2020. See also: Nocelli (2022), p. 2; Bordin (2020), p. 34. With reference to the problem of the interpretation of antimafia interdictions as punitive measures and the lack of procedural guarantees for their adoption see Figorilli and Giulietti (2021), pp. 78 ss. and Giardino (2020), pp. 1104 ss.; Bobbio (1969), pp. 531 ss.

while procedural participation, as well as an excessive assimilation to the criminal approach, could jeopardise their efficiency[46]. However, the anti-mafia parliamentary commission, in the recent 2021 Report, underlined the opportunity to provide for an internal confrontation in the procedure for issuing an interdiction, considering it as a rare case, in the Italian legal order, in which a preventive notice is not provided to the interested parties, so that the principle of administrative procedural guarantee should be sacrificed only in cases of "urgency" in the adoption an interdiction[47]; this then led to the reform we have analysed regarding the introduction of the "right to be heard".

It is now necessary to briefly highlight the elements that the Prefect must assess for the adoption of an anti-mafia interdiction. One of the key questions here is the interpretation of the notion of "attempts of mafia infiltration", in order to decide whether or not, on the basis of the elements gathered by the Prefect, it is possible to establish if the company can facilitate criminal activities or, at least, be conditioned by them[48].

This assessment is regulated also by the *Informativa anti mafia*'s chapter of the Code, that provides the Prefect with the possibility to carry out investigations also with respect to subjects who appear to significantly influence the choices of the company[49]. The Prefect can also gather other useful elements to assess the existence of an attempt of mafia infiltration of the business, hence adopting an interdiction, from judicial decisions or judgements[50], even if not *res judicata*, showing that the company is facilitating or being conditioned by criminal activities, as well as from the verification of repeated violations of the financial flow traceability regulations[51].

As we saw before, the Prefect's powers are very wide, especially when he is called upon to assess the existence of a criminal infiltration on the basis of elements that are not regulated in a detailed way by the law[52], and this is of course another reason of this serious tension between these tools and the aforementioned EU fundamental rights, as we already underlined in the previous paragraph, since it is very difficult to predict the result of this assessment made by the public authority.

However, over the years, the case-law has clarified that this assessment shouldn't be focused on "judicial evidence" but, on the contrary, on "symptomatic" red-flags/mere suspicions that indicate the high probability of a criminal infiltration of the business that is a real danger for the public order.[53] It is relevant to point out that, in order to allow the Prefect to

[46] Regardless the approach of the administrative case law and the results achieved by these anti-mafia measures in the last years, these tools are strongly criticized by the administrative scholars, especially in terms of respecting constitutional rights. However, anti-mafia information system would not have experienced a total absence of private participation in the procedure, considering what was already provided for by the abovementioned par. 7, Art. 93, of Antimafia Code. See: Trombetta (2021), p. 89; Cariola (2021), pp. 277 ss.; Mazzamuto (2020), p. 5; Amarelli (2019), p. 207; Longo (2019), p. 27; Scoca (2013), p. 10.

[47] See the Italian Parliament doc. XXIII, no. 15, with reference to the analysis of the procedures for the management of seized and confiscated assets (2021), on www.parlamento.it, accessed 10 May 2022.

[48] See Art. 84, Antimafia Code. More specifically, the situations that allow the adoption of the antimafia interdiction are the following: existence of judicial precautionary measures, judgments or even not final decisions with respect to certain crimes – Art. 84, lett. a), AC, that refers to Artt. 353, 353-*bis*, 603-*bis*, 629, 640-*bis*, 644, 648-*bis*, 648-*ter*, of the Italian Penal Code, Artt. 51, paragraph 3-*bis*, of the Italian Criminal Procedure Code, Art. 12-*quinquies*, decree law no. 306/1992; the application (or the request) of any of the other preventve measures regulated by the Antimafia Code – Art. 84, lett. b), Anti-mafia Code; the failure to report to the judicial authorities of specific circumstances listed by Art. 84, lett. c), Antimafia Code); investigations carried-out by the Prefect, as provided for by Art. 84, lett. d), Antimafia Code, in accordance with the the decree law no. 629/1982, or Art. 93 of the Antimafia Code; investigations carried out in another district by another Prefect, Art. 84, lett. e), Anti-mafia Code; various operations that can represent "red-flags" – also because they are made by people that have a stable relationship with individuals targeted by antimafia measures – of the intention to violate the antimafia regulation, because of the time in which those operations are realized, the economic value of the transactions or the professional or individuals involved – Art. 84, lett. f), Antimafia Code. The elements under the lett. a), b), c) and f) are known as "*interdittive specifiche*" (i.e., "specific" interdiction; that means that they are based on detailed elements), while lett. d) and e) are known as "*interdittive generiche*" (i.e., "generic" interdiction; that means that they are not based on not detailed elements). See Mazzacuva (2019), p. 67.

[49] For companies established abroad and without of secondary "office" in the territory of the State, for example, the Prefect carries out investigations with regard to individuals who exercise significant powers in the management of the company (Art. 91, par. 5, Anti-mafia Code).

[50] Especially when these criminal proceedings concern crimes that typically occur in the context of the activity of the organised crime.

[51] Art. 91, par. 6, Antimafia Code, to be read together with Art. 3, law no. 136/2010 on the financial flow's traceability.

[52] See Garofoli and Ferrari (2019), p. 5, and the Judgment of the Italian Council of State no. 758/2019. The Council of State tried in the last years to put the system of anti-mafia administrative measures in line with the case-law of the European Court of Human Rights, considering what the ECHR has ruled in approaching the Italian system of preventive measures against individuals – case *De Tommaso v. Italia* (2017), application no. 43395/09 – underling the lack of a clear legal basis for applying these measures. See: Nocelli (2022), p. 17; Amarelli (2019), pp. 207 ss.; Amarelli (2017), p. 299.

[53] See, among others, the judgments of the Council of State no. 2141 /2019 and no. 1743/2016. Cfr. Nocelli (2022), p. 6, and Mazzacuva (2019), p. 67.

do this kind of assessment, the Anti-mafia Code provides for the possibility of adopting an inter-ministerial regulation aimed at identifying, *inter alia*, the riskiest sector with respect to Mafia infiltration, thus showing the strong preventive approach of such system[54].

Even though this regulation has never been adopted, other solutions have been tested to fulfil this objective, also before the adoption of the Anti-mafia Code itself[55]. The reference here is, first of all, to the system of the so-called "Legality agreements or protocols", only recently regulated by the legislator in the Anti-mafia Code in order to simplify, but at the same time controlling, the economic recovery[56]. These protocols can be considered as an alternative manner of private participation in the procedures of the anti-mafia sector, even though adopted outside the interdiction procedure that we analysed in this section. Then, the anti-corruption regulation has also provided the creation of a "whitelist" of Mafia-free operators[57].

The "right to be heard" has been considered by the legislator a necessary improvement of the anti-mafia regulation especially in the light of the NRRP. The new Plan, in fact, is characterised by a very short time window for its implementation and, moreover, it relies upon the capacity of the enterprise ecosystem to acquire and effectively use the large number of resources managed by public administrations, especially in the public procurement sector. Thus, if in this historical moment policymakers have to guarantee an efficient control over the use of these public resources – especially to protect the European and national financial interests –, they also have to avoid where possible the unnecessary exclusions of economic operators from the market and the associated restrictions of economic freedoms.[58]

Notwithstanding the Prefect's discretionary powers, in fact, the subjective and objective perimeters and the effects of anti-mafia interdictions on economic operators are quite wide and pervasive[59]. For instance, anti-mafia documentation applies to almost all public administrations as contracting parties defined by the Public Procurement Code (active actor side)[60]. At the same time, the Code provides for specific economic thresholds above which the anti-mafia information must be requested[61] and it does not allow the use of sub-contracting in

[54] Art. 91, par. 7, Antimafia Code.

[55] Even though the regulation has not been adopted, the Anti-corruption Law specified the riskiest sectors for Mafia infiltration, recently updated by decree law no. 23/2020 (Art. 1, par. 53, law no. 190/2012). Then, according to Art. 1, par. 54, the Ministry of the Interior can update the list.

[56] These practices originated from the field of the so called "Grandi opere" regulatory framework. Indeed, well before the Antimafia Code and the Anticorruption discipline, the administrative case law had the possibility to face with this issue (judgment of the Italian Council of State no. 1053/2006, no. 343/2005 and no. n. 4789/2004). In a second phase, the failure to adopt the regulation provided for by Art. 91, par. 7, Antimafia Code led to the conclusion of several "legality agreements" between Prefects and contracting authorities. In these agreements, both those with a general content and those relating to specific public works or projects, more strict rules are provided for the acquisition of Anti-mafia documentation, for example, lowering the economic thresholds overcoming which it is necessary to request the antimafia documentation. Moreover, the administrative case law confirmed the mandatory nature of these agreements (for example, see the judgments of the Council of States no. 565/2017, 3009/2016, 3566/2016, and 2040/2014). With respect to the Anti-corruption regulation (Art. 1, par. 17, law. no. 190/2012) provides for the possibility that the contracting authorities may establish in their notices, calls for tenders or invitation letters that the failure to comply with the clauses contained in the legality agreement could led to the exclusion from the tender. Recently, the decree law no. 76/2020 has added the new article 83-*bis* in the Antimafia Code. According to the new provision, the Ministry of the Interior can sign legality agreement for preventing and combating organised crime and also for the purpose of broadening the use of the anti-mafia documentation referred to in Art. 84 of the Antimafia Code. These agreements can also be signed with companies of "strategic importance" for the national economy as well as with national associations and trade unions. Moreover, these agreements can establish procedures for issuing the anti-mafia documentation also following the request of private parties, as well as to determine the economic thresholds above which the anti-mafia measures must be requested (par. 1). See on these issues: Italian Anticorruption Authority, "delibera" no. 1120/2020; Fiori (2022), p. 1. See also: Capotorto (2021), pp. 1 ss.; Scafuri (2020), pp. 1 ss.; Nitti (2019), pp. 1 ss.; Frontoni (2016), *passim*; Vinti (2016), pp. 1 ss.; Spartà (2015), pp. 79 ss.; Saitta (2014), pp. 425 ss.

[57] Art. 1, par. 52, law no. 190/2012 (Anticorruption Law) and the Decree of the President of the Council of ministers of 18th of April 2013 and following amendments, to be read in combination with the abovementioned art. 1, par. 53, law no. 190/2012. See, on the parallelism between the conditions for the adoption of antimafia interdictions and those for the exclusion from the "white lists" the judgment of the Italian Council of State no. 2211/2019. See also Minelli (2019), pp. 680 ss.

[58] Scoca (2013), p. 9. The author argues that, by targeting healthy companies, competition is distorted but the contracting authorities are also more or less seriously affected. See also Miccichè (2019), p. 34.

[59] On the "subjective side", public administrations (active actors) must request the antimafia documentation before stipulating, approving or authorizing contracts and subcontracts relating to public works, services and supplies (Art. 83, par. 1, Antimafia Code), or before issuing or allowing a series of other measures (Art. 67, Antimafia Code, for example licenses, different kind of authorizations, quality certifications, grants, loans and other disbursements) as well as in the hypothesis of concession of state-owned agricultural and livestock land which fall within the scope of the support schemes provided for by Common Agricultural Policy (CAP) and, regardless of their total value, all agricultural lands, acquired for whatever reason, which benefit of EU funds for an amount exceeding 25.000 euro or national funds for an amount exceeding 5.000 euro (Art. 83, par. 3-bis, Antimafia Code).

[60] Art. 83, par. 1-2, Antimafia Code.

[61] Art. 83, par. 3, lett. e), Antimafia Code where it established that the anti-mafia documentation is not necessary for acts (i.e., contracts) above the threshold of 150.000 euro (see also Art. 91, par. 1, Antimafia Code). It must be observed that the Public Procurement Code, while providing for the mandatory request of antimafia information only for contracts exceeding the EU threshold, also provide the contracting

order to prevent the avoidance of the same economic limits[62]. In the case of an interdiction, the contracting authority must "freeze" the relationship with the enterprise (passive actor side)[63]. Even though the measure does not, at least theoretically, have a punitive nature, as it aims at safeguarding public order and security with a preventive (administrative) approach, the anti-mafia interdiction can *de facto* determine the ban of the enterprise and the entrepreneur who cannot longer work into the public legal market or with the public administration (so called "partial legal incapacity"), thus affecting their business with very long-lasting, if not permanent, negative effects on its economic sphere[64].

This is why we argued that the Italian legislator has made the right choice to narrow the scope of application of this provision.

In conclusion, it is difficult to understand which of the two abovementioned factors has mostly influenced the introduction of the "right to be heard" in the procedure for the adoption of anti-mafia interdiction: the implementation of the NRRP or a new "sensibility" with respect to the kind of guarantees to be granted to operators affected by such measures? Pragmatism or rule of law?

Anyway, the "right to be heard" in the Antimafia Code seems to provide an improvement of the previous legislation also in order to balance different interests[65]: from the traditional interplay between "public order and security" to the "freedom of economic initiative", so as to guarantee the efficiency, impartiality and legitimacy of the public administration, as well as – in certain conditions – market competition[66].

4. Brief Final Remarks.

In the previous parts of this research, we brought to the fore lights and shadows and prospects for improvement of the Italian non-criminal tools for combating the infiltration of organised crime into the legal economy, also in the context of the implementation of the NRRP.

The Italian experience clearly shows how such instruments have proved to be very useful and effective in the fight against organised crime and, therefore, also in the prevention of fraud and other crimes affecting the EU's financial interests. However, especially in the case of anti-mafia interdictions, the research has shown how the main reasons behind the success of such measures – namely, their particular operational flexibility and lower strictness in terms of proof standards – is at the same time one of the main problems related to the use of such tools, especially in terms of respecting the fundamental rights of economic operators.

On the other hand, cooperative compliance instruments such as those that are increasingly being tested in Italy can be an interesting benchmark also for other Member States, insofar as they make it possible – for those reasons we have tried to explain in detail – to reasonably balance the respect of fundamental rights when it comes to corporations with the State's need to ensure legality in the economy and in the management of public funds. Moreover, as these measures work in synergy with and alongside traditional criminal justice tools, they could

authority with the possibility to request the same documentation for contracts below this threshold. See on the point the judgment of the Italian Council of State no. 3300/2016 and Gastaldo (2020), p. 548.

[62] Art. 91, par. 2, Antimafia Code.

[63] See, for more details on the list of actors (individuals and legal persons) subjected to Antimafia checks, the Art. 85 of the Antimafia Code.

[64] Bordin (2020), p. 55. See also Scoca (2013), pp. 8 ss. See, in the Italian case law, the decision of the Plenary Assembly of the Italian Council of State No. 3/2018 and other its judgments such as the no. 4938/2018 and no. 1553/2019. See also Scoca (2018), pp. 2 ff. According to these regulations the duration of the antimafia interdiction is generally of twelve months (Art. 86, par. 2, Antimafia Code). Therefore, after this period, companies should, in accordance with the law, regain the "trust" of contracting administrations. The administrative case law, with an interpretation defined by the author (Scoca) as probably *contra legem*, but at the same time reasonable, has established that the effects of the ban last well beyond the year, up to the adoption, by the Prefect, of any subsequent "positive" (*liberatoria*) antimafia notice. See also the judgments of the Italian Council of State no. 4121/2016 and no. 8309/2021, where the Court has pointed out that the twelve months duration period does not produce *ex se* the effect of "stopping" the ban measure, which, once the aforementioned twelve months term has expired, makes it necessary for the Prefect to re-examine the "overall event", i.e., whether there are still or not the elements (criminal infiltration) that justified the application of the antimafia interdiction at that time. Hence, the private party can submit an application aimed at requiring the Prefect to carry out this new assessment.

[65] Di Maria and Amore (2021), pp. 101 ff. Cfr. Longo (2019), p. 26.

[66] Judgment of the Italian Council of State, no. 6465/2014. See also the opinion of Garofoli and Ferrari (2019) and Scoca (2018), in the latter especially p. 5. According to these authors there is not always a link between the fight against the mafia, on the one hand, and the safeguarding of economic order and competition, on the other hand: it may be or may not, depending on the circumstances that from time to time justify the single antimafia interdiction.

potentially foster EPPO's enforcement action[67], by ensuring a stronger response also to crimes affecting the EU's financial interests at a national level.

Therefore, favouring, where possible, access to these types of preventive instruments that rely more on public-private cooperation and on the restorative function of the law seems a reasonable solution to preventing and combat crime, with a view to balancing the various interests at stake, seeking to reduce recourse to the use of the most rigid and "intrusive" repressive instruments and acting within the framework of a modern and integrated enforcement system.

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[67] In fact, the numerous crimes that fall within EPPO's competence (as well as the offences "inextricably linked" to crimes against the EU budget – see art. 22, par. 3, Council Regulation (EU) 2017/1939) can be committed by individuals affiliated to organised crime organisations. For a comprehensive overview of the strengths and weaknesses of the European legislative framework for the protection of the EU's financial interest see the deliverables of the BETKOSOL research project (Principal Investigator Prof. Aldo Sandulli) led by Luiss University.

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