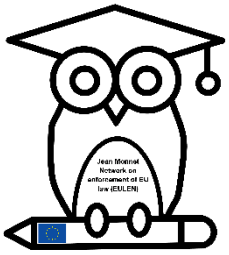

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Jean Monnet Network on EU Law Enforcement

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?

Emanuele Birritteri and Elisabetta Tatì[1]

Abstract

Strengthening the enforcement instruments to combat organised crime means ensuring a more effective protection of the EU's financial interests, which are affected by the illegal activities of these criminal groups. In Italy, there is a growing awareness that the fight against such trafficking cannot be entrusted only to traditional criminal law enforcement tools. Rather, with the perspective of an integrated approach, criminal justice system should be supported by purely preventive measures, including at the administrative level.
The Italian legislator has therefore bet on the implementation of cooperative compliance (preventive) tools to combat organised crime, including the judicial control of companies and the recent measure of "collaborative prevention", introduced in 2021 precisely in the context of the National Recovery and Resilience Plan (Decree Law No. 152/2021). The main goal of this Plan is to make good use of every resource of the NGEU in a time-effective manner, ensuring that all necessary checks are performed quickly but without jeopardising the quality of preventative monitoring. These provisions are examples of the tension between quality and sustainability of public controls. Indeed, the reform aims at a public-private partnership whereby, for instance, the company is not directly confiscated or excluded from the public sphere, but simply subjected to forms of public monitoring and called upon to introduce organisational measures in order to combat the infiltrations in place and prevent new ones.
The objective of this paper is, therefore, to analyse these new measures and to verify – also in a European *de iure condendo* approach – whether they are able to ensure efficiency of administrative public controls and fair procedural guarantees to protect the fundamental rights of companies from a punitive/criminal law perspective.

Keywords:

Criminal Law; Administrative Law; Antimafia Code; Cooperative compliance; Italian Recovery and Resilience Plan; EU's financial interests.

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

Fraud and other serious crimes affecting EU financial interests are commonly committed by organised crime, which often tries to illegally obtain public funds and take economic control of various territories using mafia intimidation.

Italy has long been fully aware that an effective fight against such illegal activities cannot be entrusted only to the traditional instruments of criminal law, which step in only when the crime has already occurred, and the State has already failed in ensuring an effective and legal use of public funds.

Instead, it is necessary to build 'barriers' and preventive regulatory tools that, operating at an earlier stage, could stop organised crime infiltration of the legal economy (especially in public procurement and public financing)[2].

For this reason, the Italian legislator has built enforcement mechanisms using administrative/hybrid tools that do not replace those of the Criminal Code in the fight against the Mafia and other serious crimes, but, following an integrated approach, operate in an autonomous manner with respect to traditional criminal investigations and proceedings, being able to be applied irrespective of the existence of any criminal proceedings for the same facts and, moreover, on the basis of a particularly 'flexible' and less rigid standard of proof than that required by criminal law[3].

These "non-criminal crime-fighting provisions" are mostly contained in the Italian Antimafia Code[4] and range from the more "severe" instruments of the antimafia preventive confiscation and the antimafia interdiction/ban with which the company is *de facto* excluded from the public procurement and public financing sector, to the more 'flexible' ones inspired by the model of cooperative compliance (judicial administration and control of companies and the new "collaborative prevention"). The latter aim at fighting criminal infiltration of the corporation following a different approach from that of the other instruments mentioned above. In particular, the idea is to do so through a cooperative procedure between the public authority and the legal person, allowing the company – unlike confiscation or interdiction – to keep operating, although under the supervision of the authorities, also with the public administration and in the public procurement and public financing sectors[5].

This research will focus on the latter instruments (those of cooperative compliance), that will however also be examined with detailed references to the broader regulatory framework in which these measures are applied, especially with respect to the connections between them and the antimafia interdictions.

It is easy to understand, moreover, why in implementing the National Recovery and Resilience Plan (NRRP), the Italian legislator has focused, as we shall see, on some of these instruments[6]. Preventing the Mafia from entering the legal economy, in fact, means preventing and fighting fraud against European and national public funds.

The use of such instruments, however, poses several issues that this research aims at addressing with particular regard to two key questions.

The first is that of the sustainability of these forms of public "intrusion" into the life of businesses, insofar as it is necessary 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 financial interests; on the other hand, to "keep alive" where possible enterprises that often represent an important asset for the national economy, especially in the Next Generation EU era in which the country needs operators to be able to acquire and use effectively the huge flow of public funding generated by the plan.

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[2] See also Costantino Visconti, 'Strategie di contrasto dell'inquinamento criminale dell'economia: il nodo dei rapporti tra mafie e imprese' (2014) 2 Rivista Italiana di Diritto e Procedura Penale 708ff.

[3] See, for a complete overview of these tools, in Enrico Mezzetti and Luca Luparia Donati (eds.), 'La legislazione antimafia' (Zanichelli 2020). See also Antonio La Spina, 'The Fight Against the Italian Mafia', in Letizia Paoli (ed.), 'The Oxford Handbook of Organized Crime' (Oxford University Press 2014). For a comparative overview with respect to the use of administrative tools to fight crime see Antonius Spapens, Maaike Peters and Dirk Van Daele (eds.), 'Administrative measures to prevent and tackle crime. Legal possibilities and pratical application in EU Member States' (Eleven International Publishing 2015).

[4] Legislative decree no. 159 of 2011.

[5] On these issues, also for a broader literature review, see Emanuele Birritteri, 'I nuovi strumenti di bonifica aziendale nel Codice Antimafia: amministrazione e controllo giudiziario delle aziende' (2019) 3-4 Rivista trimestrale di diritto penale dell'economia 837ff.

[6] See Par. II and III of this paper.

The second question is to understand how the unusual flexibility of these measures with regard, *inter alia*, to the standard of proof – which is one of the reasons for their great success – can be in line with the respect for the fundamental rights of individuals and corporations[7].

The paper will therefore be divided into two parts: the first aims at providing the reader with an overview of these instruments, analysing, also in a *de iure condendo* perspective, strengths and weaknesses of this enforcement model; the second, on the other hand, will focus on the connections between this system and the administrative law of public controls, with particular reference to antimafia interdiction/ban.

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

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

We will therefore provide a brief overview of this regulatory system and then focus on the most interesting aspects for our research.

The non-criminal law enforcement tools against organised crime concerning corporations[8] 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[9] 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[10]); on the other hand, the tools (which 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[11].

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

[7] Which must necessarily be protected with reference to these proceedings that have a serious impact on the life and freedom of economic initiative of such operators

[8] 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, Federico Consulich, 'Le misure di prevenzione personali tra Costituzione e Convenzione', in Enrico Mezzetti and Luca Luparia Donati (eds.), 'La legislazione antimafia' (Zanichelli 2020).

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

[10] Seizure and confiscation of economic assets whose legitimate origin cannot be justified by the suspected perpetrator of serious offences, including those related to organised crime – model of non-conviction-based confiscation – Artt. 20 and 24 AC. On these measures see, among others: Antonio Balsamo, 'Twenty years later: the new perspectives of the Palermo Convention' (2020) 3 Rivista di Studi e Ricerche sulla Criminalità Organizzata 5; Daniela Cardamone, 'Criminal Prevention in Italy. From the ""Pica Act" to the Anti-Mafia Code' (2020) <www.europeanrights.eu > accessed 10 June 2020. In the Italian literature see: Roberto Bartoli, 'La confisca di prevenzione è una sanzione preventiva, applicabile retroattivamente' (2015) 6 Diritto Penale e Processo 707ff.; Fabio Basile, 'Manuale delle misure di prevenzione. Profili sostanziali' (Giappichelli 2021); Stefano Finocchiaro, 'La confisca "civile" dei proventi da reato' (CJN E-books 2019); Dèsirèe Fondaroli, 'Le ipotesi speciali di confisca nel sistema penale. Ablazione patrimoniale, criminalità economica, responsabilità delle persone fisiche e giuridiche' (Bononia University Press 2007); Vincenzo Maiello, 'Le singole misure di prevenzione personali e patrimoniali', in Vincenzo Maiello (ed.), 'La legislazione penale in materia di criminalità organizzata, misure di prevenzione ed armi' (Giappichelli 2015); Anna Maria Maugeri, 'Le moderne sanzioni patrimoniali tra funzionalità e garantismo' (Giuffrè 2001); Francesco Mazzacuva, 'Le pene nascoste' (Giappichelli 2017); Francesco Menditto, 'Le misure di prevenzione patrimoniali: profili generali' (2015) 6 Giurisprudenza Italiana 1532ff.; Vincenzo Mongillo, 'La confisca senza condanna nella travagliata dialettica tra Corte costituzionale e Corte europea dei diritti dell'uomo' (2015) 2 Giurisprudenza Costituzionale 421ff.; Tullio Padovani, 'Misure di sicurezza e misure di prevenzione' (Pisa University Press 2014); Paola Severino, 'Misure patrimoniali nel sistema penale. Effettività e garanzie' (2016) 1 Rassegna dell'Arma dei Carabinieri 35ff.; Tommaso Trinchera, 'Confiscare senza punire? Uno studio sullo statuto di garanzia della confisca illecita' (Giappichelli 2020); Francesco Viganò, 'Riflessioni sullo statuto costituzionale e convenzionale della confisca di "prevenzione" nell'ordinamento italiano', in Carlo Enrico Paliero, Francesco Viganò, Fabio Basile and Gian Luigi Gatta (eds.), 'La pena, ancora: fra attualità e tradizione. Studi in onore di Emilio Dolcini' (Giuffré 2018).

[11] Emanuele Birritteri (n 5) 837ff.

continuity and adopts all compliance measures necessary to fight ongoing mafia or criminal infiltration and prevent new ones[12].

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)[13].

In both cases (Art. 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

[12] With respect to this measure see, among others: Teresa Bene, 'Dallo spossessamento gestorio agli obiettivi di stabilità macroeconomica' (2018) Archivio Penale 2; Manfredi Bontempelli, 'L'accertamento penale alla prova della nuova prevenzione antimafia' (2018) <www.archiviodpc.dirittopenaleuomo.org> accessed 11 July 2018; Carolina Buzio, 'L'amministrazione giudiziaria dei beni connessi ad attività economiche e il nuovo controllo giudiziario delle aziende', in Angelo Giarda, Fausto Giunta and Gianluca Varraso (eds.), 'Dai decreti attuativi della legge "Orlando" alle novelle di fine legislatura' (Wolters Kluwer 2018); GianMaria Chiaraviglio, 'La misura di prevenzione dell'amministrazione giudiziaria dei beni connessi ad attività economiche; due recenti pronunce del Tribunale di Milano' (2017) 1 Rivista Dottorti Commercialisti 137; Vincenzo Vito Chionna, 'I rapporti di impresa nella "novella" 2017 al codice antimafia e l'amministratore giudiziario dei beni "aziendali"' (2008) 2-3 Rivista delle Società 615; Dèsirèe Fondaroli, 'La prevenzione patrimoniale: dall'applicazione in ambito penale-tributario all'amministrazione giudiziaria dei beni' (2017) 2 Rivista Italiana di Diritto e Procedura Penale 610; Angelo Mangione, 'Politica del diritto e "retorica dell'antimafia": riflessioni sui recenti progetti di riforma delle misure di prevenzione patrimoniali' (2003) 4 Rivista Italiana di Diritto e Procedura Penale 1209; Angelo Mangione, 'La contiguità alla mafia fra "prevenzione" e "repressione": tecniche normative e scelte dogmatiche' (1996) 2-3 Rivista Italiana di Diritto e Procedura Penale 714; Anna Maria Maugeri, 'La riforma delle misure di prevenzione patrimoniali ad opera della l. 161/2017 tra istanze efficientiste e tentativi incompiuti di giurisdizionalizzazione del procedimento di prevenzione' (2018) 1s Archivio Penale 368; Gaetano Nanula, 'La lotta alla mafia. Strumenti giuridici, strutture di coordinamento, legislazione vigente' (Giuffrè 2016); Andrea Palazzolo, 'Profili interdisciplinari, attualità e prospettive dell'amministrazione giudiziaria di beni e aziende. Sintesi conclusive: i valori e gli interessi protetti nell'amministrazione giudiziaria di aziende' (2021) 1 Il Nuovo Diritto delle Società 109; Carla Pansini, 'I nuovi confini applicativi dell'amministrazione giudiziaria delle aziende' (2020) 3 Diritti, Lavori, Mercati 666; Roberta Russo, 'Le misure patrimoniali antimafia applicabili agli enti' (2012) 1 Il Nuovo Diritto delle Società 109; Costantino Visconti, 'Codice antimafia: luci e ombre della riforma' (2018) 2 Diritto Penale e Processo 149.

[13] See, with respect to the judicial control tool, the literature under footnote no. 12 and also, among others: Teresa Alesci, 'I presupposti ed i limiti del nuovo controllo giudiziario nel codice antimafia' (2018) 6 Giurisprudenza Italiana 1521; Mario Arbotti, 'Il controllo giudiziario volontario, tra valorizzazione ermeneutica del concreto pericolo di infiltrazioni mafiose e rischio di effetti paradossali' (2021) 9 Cassazione Penale 2286; Francesco Balato, 'La nuova fisionomia delle misure di prevenzione patrimoniali: il controllo giudiziario delle aziende e delle attività economiche di cui all'art. 34-*bis* del Codice Antimafia' (2019) 3 Diritto Penale Contemporaneo 65; Francesco Bartolini, 'Un chiarimento sul rapporto tra interdittive antimafia e controllo giudiziario volontario' (2020) 11 Diritto Penale e Processo 1465; Diego Brancia, 'Del controllo giudiziario delle aziende. Un'occasione di bonifica dal tentativo occasionale di condizionamento mafioso' (2018) 9 Il Nuovo Diritto delle Società 1383; Raffaele Cantone and Barbara Coccagna, 'Commissariamenti prefettizi e controllo giudiziario delle imprese interdette per mafia: problemi di coordinamento e prospettive evolutive' (2018) 10 Diritto Penale Contemporaneo 162; Siro De Flammineis, 'La mappatura del rischio da reato nel commissariamento e nell'amministrazione giudiziaria tra attualità e prospettive' (2015) <www.archiviodpc.dirittopenaleuomo.org> accessed 23 June 2015; Mattia Di Florio, 'Brevi considerazioni sui rapporti nel "diritto vivente" tra interdittiva prefettizia e controllo giudiziario volontario dell'impresa in odor di mafia' (2021) 3 La Legislazione Penale 16; Giovanni Francolini, 'Questioni processuali in tema di applicazione del controllo giudiziario delle aziende ex art. 34-bis, comma 6, d.lgs. 159/2001' (2019) <www.archiviodpc.dirittopenaleuomo.org> accessed 25 September 2019; Stefano Finocchiaro, 'La riforma del codice antimafia (e non solo): uno sguardo d'insieme alle modifiche appena introdotte' (2017) 10 Diritto Penale Contemporaneo 256; Mario Griffo, 'Fisionomia e criticità del controllo giudiziario di aziende colpite dal pericolo di infiltrazione mafiosa' (2020) 3 Processo Penale e Giustizia 783; Sergio Lorusso, 'Il controllo giudiziario dell'azienda. Profili sistematici' (2020) 1 Archivio della Nuova Procedura Penale 5; Pietro Stefano Maglione, 'Prevenzione patrimoniale al crocevia tra giudice penale e prefettura: lo strano caso del controllo giudiziario volontario' (2021) 15 Federalismi 94; Marco Mazzamuto, 'Misure giurisdizionali di salvataggio delle imprese versus misure amministrative di completamento dell'appalto: brevi note sulle modifiche in itinere al codice antimafia' (2016) <www.archiviodpc.dirittopenaleuomo.org> accessed 20 April 2016; Mariano Menna, 'La prevenzione tra stabilizzazione del giudizio, esigenza di legittimazione e flessibilità sostanziale' (2019) 2 Diritto Penale e Processo 253; Andrea Merlo, 'Il controllo giudiziario "volontario": fra irrazionalità della disposizione e irrazionalità interpretative' (2020) 2 Il Foro Italiano 135; Enrico Mezzetti, 'Codice antimafia e codice della crisi dell'insolvenza: la regolazione del traffico delle precedenze in cui la spunta sempre la confisca' (2019) 1 Archivio Penale 11; Costantino Visconti, 'Il controllo giudiziario "volontario": una moderna "messa alla prova" aziendale per una tutela recuperatoria contro le infiltrazioni mafiose' (2019) <www.archiviodpc.dirittopenaleuomo.org> accessed 23 September 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 Marco Colacurci, 'From a Voluntary to "Coerced Dimension: The Remedial Function of Compliance from a Criminal Law Perspective', in Stefano Manacorda and Francesco Centonze (eds.), 'Corporate Compliance on a Global Scale' (Springer 2022).

it from the public procurement and financing sectors[14]. Judicially administered or controlled companies, indeed, can even continue to work with the public administration[15].

The case law, then, has also clarified what is, in both cases (Artt. 34 and 34-*bis* AC), the most important evaluation criterion when it comes 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[16].

On the other hand, with regard to the second group of instruments (those adopted by the Prefect), here too we have two different types of provisions: on the one hand, the more "rigid" and "intrusive" measure of the antimafia interdiction, on which we will focus in the next paragraph[17] and that entails the exclusion of the company infiltrated by organised crime from the public procurement and financing sectors. On the other hand, we have 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 the latter case, we are dealing with: a) Article 32 of decree law no. 90/2014, under 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 administrator) against the company that is involved in situations which are "symptomatic" of unlawful conduct[18]. This is a measure with a more limited scope of application, as it only concerns companies that have been awarded public contracts and is normally only aimed at enabling the public work to be completed[19]. 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)[20].

The latter measure, in particular, was enacted to provide the Prefect with a more flexible and alternative tool to antimafia interdiction. Indeed, if the Prefect, when carrying out the checks for the purpose of issuing the antimafia "documentation", determines that the criminal infiltration into the organisation is only sporadic (i.e. not at a high stage), instead of adopting the antimafia interdiction and excluding the company from the public procurement and financing sectors, he can apply the institute 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)[21].

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 issues a notice that ascertains the "rehabilitation" of the corporation and "stabilises" the possibility for it to work normally with the public administration[22].

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[14] Unlike the anti-mafia interdiction. See also Giuseppe Pignatone, 'Mafia e corruzione: tra confische, commissariamenti e interdittive' (2015) 4 Diritto Penale Contemporaneo – Rivista Trimestrale 261.

[15] Due to the fact that the application of judicial administration or control suspends the effects of any antimafia interdiction measures issued against the corporation.

[16] Italian Court of "Cassazione" (Sec. U), judgement no. 46898 of 26 September 2019. For an analysis of this judgement see Dario Albanese, 'Le Sezioni unite ridisegnano il volto del controllo giudiziario "volontario" (art. 34-bis, co. 6, d.lgs. 159/2011) e ne disciplinano i mezzi di impugnazione' (2019) <www.sistemapenale.it > accessed 26 September 2019.

[17] See par. III of this paper.

[18] Tommaso Guerini and Filippo Sgubbi, 'L'art. 32 del decreto legge 24 giugno 2014, n. 90. Un primo commento' (2014) <www.archiviodpc.dirittopenaleuomo.org > accessed 24 September 2014. See also Nicola Maria Maiello, 'Traffico di influenze illecite e misure di commissariamento dell'impresa: le ragioni di una relazione problematica' (2018) 12 Cassazione Penale 4424.

[19] Raffaele Cantone and Barbara Coccagna (n 13) 156.

[20] Dario Albanese, 'Le modifiche del d.l. 152/2021 al "codice antimafia": maggiori garanzie nel procedimento di rilascio dell'interdittiva antimafia e nuove misure di "prevenzione collaborativa"' (2022) <www.sistemapenale.it > accessed 12 January 2022.

[21] 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 Alessandro Centonze, 'Sistema di prevenzione antimafia: le novità introdotte dal d.l. n. 152/2021' (2022) Il Penalista 3. With respect to these type of cooperative compliance tools see also: Ercole Aprile, 'Gli effetti dell'intervento penale sull'economia delle imprese. Nuovi equilibri tra repressione dei reati e continuità delle attività produttive?' (2015) <www.archiviodpc.dirittopenaleuomo.org> accessed 30 November 2015; Franco Roberti and Maria Vittoria De Simone, 'Osservazioni a margine dei lavori del Senato sull'iter di approvazione dell'A.S. 2134 recante modifiche al Codice delle leggi Antimafia. La posizione della Procura Nazionale' (2016) <www.archiviodpc.dirittopenaleuomo.org> accessed 28 July 2016.

[22] See also Marcella Vulcano, 'Le modifiche del decreto legge n. 152/2021 al codice antimafia: il legislatore punta sulla prevenzione amministrativa e sulla compliance 231 ma non risolve i nodi del controllo giudiziario' (2021) 11 Giurisprudenza Penale 1.

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: at the lowest rung of the "pyramid" we have the mere public control without removal of managers in the case of infiltration of a low level; at the intermediate rung we have, then, 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, we have the more severe measures of the antimafia interdiction and preventive confiscation. The first (antimafia 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, we shall try to understand the strengths and weaknesses of this enforcement system, which – it is worth recalling – operates alongside (and autonomously from) the traditional criminal justice system.

One of the most important strengths 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[23]. In fact, these provisions work in a highly preventive manner, and normally at a stage that is well before the occurrence of fraud against European and national public funds or other serious crimes, preventing these criminals from entering the legal economy, 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 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 more a distinctive preventive and, we could say, "therapeutic" function[24], insofar as, through cooperation 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.

It is, therefore, a reasonable balance between the freedom of conducting business and the State interest in combating crime.

Also worthy of note, then, is the fact that, as we have seen above, this system is constructed in such a way as to use tools of increasing intensity: in fact, the more severe measures of preventive confiscation and the antimafia 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 (antimafia interdiction and preventive confiscation) have several critical issues with regard to the protection of the fundamental rights of the economic subjects that are targeted by these provisions. Through the application of these regulations, indeed, 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 without having to start it and, above all, regardless of the existence (and the outcome) of any criminal proceedings for the same facts[25]. 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 procedural guarantees for suspects nor the standard of proof (beyond every reasonable doubt) provided for in that legislation[26].

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[23] Giuseppe Pignatone (n 14) 261.

[24] See the literature under footnotes no. 12 and 13.

[25] For a complete overview of these issues in the context of the Antimafia Code see in particular Giuseppe Amarelli, 'Le interdittive antimafia "generiche" tra interpretazione tassativizzante e dubbi di incostituzionalità', in Giuseppe Amarelli and Saverio Sticchi Damiani (eds.), 'Le interdittive antimafia e le altre misure di contrasto all'infiltrazione mafiosa negli appalti pubblici' (Giappichelli 2019). See also the analysis of Enrico Mezzetti, 'L'enticidio: una categoria penalistica da ricostruire ed una conseguenza per l'azienda da evitare' (2018) <www.archiviodpc.dirittopenaleuomo.org> accessed 23 Janaury 2018.

[26] On the interplay between Antimafia Code and Corporate Criminal Liability regulation see: Tommaso Guerini, 'L'ente collettivo nell'arcipelago delle misure di contrasto alle infiltrazioni della criminalità organizzata nel sistema economico' (2019) <www.criminaljusticenetwork.eu > accessed 7 October 2019; Antonio Gullo, 'I modelli organizzativi', in Giorgio Lattanzi and Paola Severino (eds.), 'Responsabilità da reato degli enti. Volume I. Diritto sostanziale' (Giappichelli 2020); Vincenzo Mongillo 'Criminalità organizzata e responsabilità dell'ente ex d.lgs. 231/2001', in Enrico Mezzetti and Luca Luparia Donati (eds.), 'La legislazione

In order to be able to apply all the measures we have analysed (including those of cooperative compliance), 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 that organisation[27].

It is not very surprising, then, that empirical observation of Italian case law shows how legislative decree no. 231 of 2001 is largely unenforced in proceedings for organised crime, since prosecutors can of course achieve essentially the same objectives by following the path – as seen much simpler especially in terms of proof standards – of applying the measures of the Antimafia Code[28].

The issue of respecting the defendants' guarantees/rights, especially for the more severe measures of the Antimafia Code, is therefore still an open issue.

The Italian legislator, as we said, being certainly aware of these problems, has in recent years begun to increasingly reduce the scope of application of the stricter measures of the Antimafia Code, seeking to foster as much as possible the use of the aforementioned cooperative compliance ("therapeutic") tools.

With regard to the 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 or punitive effect on the entity but, on the contrary, aim at safeguarding its operational and business continuity, also with the public administration, without, however, foregoing the fight against criminal infiltration of the corporation[29].

Moreover, after the latest amendments to the Antimafia Code adopted for the implementation of the NRRP, in our view 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 the Court takes into account when deciding whether or not to apply 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 CA). 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: antimafia interdiction or collaborative prevention, while he can order the temporary administration of the company only within the limits allowed by the aforementioned art. 32 of decree law no. 90/2014.

It would instead be useful, in our view, 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 antimafia interdiction, in all cases in which (regardless of the existence of a public contract) he finds that the level of criminal infiltration of the enterprise is not merely sporadic but stable or of a high degree.

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antimafia' (Zanichelli 2020); Vincenzo Mongillo and Nicoletta Parisi, 'L'intervento del giudice penale e dell'autorità amministrativa nella gestione societaria, tra impresa lecita, "socialmente pericolosa" e mafiosa: alla ricerca di un disegno' (2019) Rassegna Economica 21; Felice Piemontese, 'Le sanzioni interdittive tra codice antimafia e modello della responsabilità amministrativa degli enti da reato' (2021) 14 Federalismi 127; Rossella Sabia, 'I reati di criminalità organizzata, con finalità di terrorismo e di eversione dell'ordinamento democratico', in Giorgio Lattanzi and Paola Severino (eds.), 'Responsabilità da reato degli enti. Volume I. Diritto sostanziale' (Giappichelli 2020); Nicola Selvaggi, 'Criminalità organizzata e responsabilità dell'ente' (2020) 3-4 Rivista trimestrale di diritto penale dell'economia 719; Francesco Siracusano, 'L'impresa a "partecipazione mafiosa" tra repressione e prevenzione' (2021) 3 Archivio Penale 1. For a criminological analysis see Marco De Simoni, 'The financial profile of firms infiltrated by organised crime in Italy' (2022) 17 Quaderni dell'antiriciclaggio 5.

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

[28] Costantino Visconti, 'Proposte per recidere il nodo mafie-imprese' (2014) <www.archiviodpc.dirittopenaleuomo.org > 7 January 2014.

[29] See, also for an overview of the different approaches in the literature, Emanuele Birritteri (n 5) 837ff.

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 antimafia interdiction should therefore only be issued 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 (the Prefect would likely be the more natural choice), 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).

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

Among the different kinds of administrative controls in Italy,[30] 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[31].

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[32]. 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[33].

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[30] 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: Massimo Severo Giannini, 'Controllo: nozioni e problemi' (1974) Riv. trim. dir. pubbl. 1263ff.; Sabino Cassese (ed.), 'I controlli nella Pubblica Amministrazione' (il Mulino 1993); Gaetano D'Auria., 'I controlli', in Sabino Cassese (ed.), 'Trattato di diritto amministrativo' (Giuffrè 2000); Vincenzo Cerulli Irelli and Fabrizio Luciani, 'La cultura della legalità e il sistema dei controlli', in Eugenio Francesco Schilitzer (ed.), 'Il sistema dei controlli interni nelle pubbliche amministrazioni' (Giuffrè 2002); Stefano Battini, 'Il nuovo sistema dei controlli pubblici' (2004) 11 Giornale di Diritto Amministrativo 1253ff.; Elisa D'Alterio, 'I controlli sull'uso delle risorse pubbliche' (Giuffrè 2015); Maria De Benedetto, 'Corruption and controls' (2015) 4 European Journal of Law Reform 479ff.; Maria De Benedetto, 'Controlli della Pubblica Amministrazione sui privati: disfunzioni e rimedi' (2019) 3 Rivista Trimestrale di Diritto Pubblico 855ff.

[31] Roberto Garofoli and Giulia Ferrari, 'Sicurezza pubblica e funzioni amministrative di contrasto alla criminalità: le interdittive antimafia' (2019) <www.giustizia-amministrativa.it > accessed 10 May 2022

[32] 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).

[33] Especially with respect to the controlling function in the anti-mafia information or notice, see Fabrizio Figorilli and Walter Giulietti, 'Contributo allo studio della documentazione antimafia: aspetti sostanziali, procedurali e di tutela giurisdizionale' (2021) 14 Federalismi 59ff. 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

Moreover, adopting this theorical perspective is also useful for taking into consideration 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 antimafia interdiction to ban enterprises from the public procurement market.

The antimafia documentation system for the fight against the criminal infiltration of the economy is based on two types of certifications: *comunicazione antimafia* – antimafia communication – and *informativa anti-mafia* – antimafia information or notice (Art. 84, AC). While they basically coincide in their contents, they differ in terms of procedure[34]. Antimafia communication is a tool for the mere declaration of specific causes of exclusion of an enterprise from the public sphere for preventive purposes. Antimafia 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[35]. 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[36].

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 antimafia interdiction, the so called *informativa antimafia "interdittiva"*[37].

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. 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[38].

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[39]. At the end of this procedure, the Prefect has three alternatives: issuing the "positive" antimafia 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)[40].

(n 30), 1263ff. 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 Norberto Bobbio, 'voce Sanzione' (1969) 16 Novissimo Digesto Italiano 531ff. –, is criticised by Francesco Mazzacuva, 'La natura giuridica delle misure interdittive antimafia', in Giuseppe Amarelli and Saverio Sticchi Damiani (eds), 'Le interdittive antimafia e le altre misure di contrasto all'infiltrazione mafiosa negli appalti pubblici' (Giappichelli 2019), 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 – see Carlo Enrico Paliero and Aldo Travi, 'La sanzione amministrativa. Profili sistemici' (Giuffrè 1988). As well synthetized by this author (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).

[34] 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.

[35] Massimiliano Nocelli, 'I più recenti orientamenti della giurisprudenza sulla legislazione antimafia', (2018) <www.giustizia-amministrativa.it > accessed 10 May 2022.

[36] TAR (Regional Administrative Court) Toscana, judgment no. 910/2018. See also Art. 84, Antimafia Code.

[37] Art. 48, decree law no. 152/2021.

[38] 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.

[39] This procedure suspends 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.

[40] 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-

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[41]. In this antimafia 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[42].

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)[43].

Moreover, this special antimafia 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 Antimafia 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.[44]

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, although we need to consider that interdictions are normally adopted to prevent a great danger for the public order.

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[45]. 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 peculiarities 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 a good reform for at least two reasons.

First of all, 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 antimafia interdiction does not require the respect of the principle of administrative procedural participation[46]. In fact, it has been said that interdictions are normally adopted to prevent great danger for the public "economic" order while procedural participation, as well as an excessive assimilation to the criminal

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 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.

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

[42] 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.

[43] See Figorilli and Giulietti (n 33) 61.

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

[45] Artt. 96-99-*bis*, Antimafia Code. See Nicola Gullo, 'Il regolamento per il funzionamento della Banca dati nazionale unica della documentazione amministrativa' (2015) 4 Giornale di Diritto Amministrativo 476 ff. 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.

[46] 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 (n 35) 2; Luca Bordin, 'Contraddittorio endoprocedimentale e interdittive antimafia: la questione rimessa alla Corte di Giustizia. E se il problema fosse altrove?' (2020) 22 Federalismi 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 (n 33) 78ff and: Edoardo Giardino, 'Le interdittive antimafia tra finalità perseguite e garanzie affievolite' (2020) 4 Archivio Giuridico 1104ff.; Bobbio (n 33) 531ff.

approach, could jeopardise their efficiency[47]. However, the antimafia 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.[48]

It is now necessary to briefly highlight the elements that the Prefect must assess for the adoption of an antimafia 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[49].

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[50]. 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[51], 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[52].

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[53].

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.[54] It is relevant to point out that, in order to allow the Prefect to do this kind of assessment, the Antimafia Code provides for the

[47] 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: Gabriele Trombetta, 'Le interdittive antimafia sotto attacco?' (2021) 2 Democrazia e Sicurezza – Democracy and Security Review 89; Agostino Cariola, 'Che contenuto ha la libertà personale? Interdittive antimafia, sindacato sull'esercizio del potere amministrativo e problemi di giurisdizione' (2021) 1 Diritti Fondamentali 277ff.; Marco Mazzamuto, 'Il salvataggio delle imprese tra controllo giudiziario volontario, interdittive prefettizie e giustizia amministrativa' (2020) 3 Sistema penale 5; Amarelli (n 25) 207; Andrea Longo, 'La «massima anticipazione di tutela». Interdittive antimafia e sofferenze costituzionali' (2017) 19 Federalismi 27; Franco Gaetano Scoca, 'Razionalità e costituzionalità della documentazione antimafia in materia di appalti pubblici' (2013) 6 Giustamm 10.

[48] 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) <https://www.parlamento.it/Parlamento/4301> accessed 10 May 2022.

[49] 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 (n 33) 67.

[50] 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).

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

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

[53] See Garofoli and Ferrari (n 31), 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 (n 35) 17; Amarelli (n 25) 207ff; Giuseppe Amarelli, 'L'onda lunga della sentenza De Tommaso: ore contate per l'interdittiva antimafia "generica" ex art. 84, co. 4, lett. d) ed e) d. lgs. n. 159/2011?' (2017) 4 Diritto penale contemporaneo 11.

[54] See, among others, the judgments of the Council of State no. 2141 /2019 and no. 1743/2016. Cfr. Nocelli (n 35) 6. Cfr. Mazzacuva (n 33) 67.

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[55].

Even though this regulation has never been adopted, other solutions have been tested to fulfil this objective, also before the adoption of the Antimafia Code itself[56]. 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 Antimafia Code in order to simplify, but at the same time controlling, the economic recovery[57]. These protocols can be considered as an alternative manner of private participation in the procedures of the antimafia 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[58].

Secondly, the "right to be heard" has been considered by the legislator a necessary improvement of the antimafia regulation, also following the suggestions of the anti-mafia parliamentary commission mentioned above, 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.[59]

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

[56] 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.

[57] These practices originated from the field of the so called "Grandi opere" regulatory framework (Great Public Works). Indeed, well before the Antimafia Code and the Anticorruption discipline, the administrative case law had 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 many of "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; Antonello Fiori, 'Rilevanza dei protocolli di legalità nelle procedure di gara ed esclusione del concorrente', (2022) 5 Il Diritto Amministrativo - Rivista giuridica 1. See also: Dario Capotorto, 'Uso e abuso dei protocolli di legalità nella prassi amministrativa e nella regolazione' (2021) 12 GiustAmm 1, Alessandra Scafuri, 'Interdittive antimafia e Protocolli di legalità. La legittimazione alla richiesta di documentazione antimafia deve ritornare al privato', (2020) 1 Il Diritto Amministrativo - Rivista giuridica 1; Giovanna Maria Flavia Nitti, 'Note sui protocolli di legalità, per la promozione di condotte etiche nei pubblici appalti' (2019) 2 Federalismi 1; Massimo Frontoni, 'Contratto e Antimafia, Il percorso dai «Patti di legalità» al rating legalità' (Giappichelli 2016); Stefano Vinti, 'I protocolli di legalità nelle procedure di evidenza pubblica e il giudice amministrativo come nuovo protagonista nelle politiche anticorruzione' (2016) 2 GiustAmm 1; Sara Spartà, 'Protocolli di legalità. Sviluppo dei modelli nel tempo', in Laura Galesi (ed.), 'Appalti pubblici e sindacato. Buone pratiche contro mafia e illegalità' (Futura, 2015); Fabio Saitta, 'Informative antimafia e protocolli di legalità, tra vecchio e nuovo', (2014) 2 Rivista Trimestrale Appalti 425ff.

[58] 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 Daniela Minelli, '"White list" e interdittive antimafia' (2019) 5 Urbanistica e appalti 680ff.

[59] Scoca (n 47) 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 Calogero Miccichè, 'L'azione di contrasto preventivo alla criminalità mafiosa e le informazioni antimafia interdittive: tra legalità ed efficacia' (2019) 1 Jus 34.

Notwithstanding the Prefect's discretionary powers, in fact, the subjective and objective perimeters and the effects of antimafia interdictions on economic operators are quite wide and pervasive[60]. For instance, antimafia documentation applies to almost all public administrations as contracting parties defined by the Public Procurement Code (active actor side)[61]. At the same time, the Code provides for specific economic thresholds above which the antimafia information must be requested[62] and it does not allow the use of sub-contracting in order to prevent the avoidance of the same economic limits[63]. In the case of an interdiction, the contracting authority must "freeze" the relationship with the enterprise (passive actor side)[64]. Even though the measure does not, at least theoretically, have a punitive or precautionary nature, as it aims at safeguarding public order and security with a preventive (administrative) approach, the antimafia 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[65].

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 antimafia 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 a good compromise among different interests[66]. From the traditional interplay between "public order and security" and "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[67], the picture is now complicated by a third European corner, represented by the NRRP and its political economy implications, having also regard to the protection of the EU's financial interest for a new kind of supranational fund.

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[60] 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 or "soft" 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).

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

[62] 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 authority with the possibility to request the same documentation for contracts below this threshold. See on the point the hudgment of the Italian Council of State no. 3300/2016 and Valentina Gastaldo, 'Interdittive antimafia tra esigenze pubbliche di prevenzione e libertà (non solo economica). Alla ricerca di un difficile bilanciamento' (2020) 2 Riv. Giur. Mezz. 548.

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

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

[65] Luca Bordin, 'Contraddittorio endoprocedimentale e interdittive antimafia: la questione rimessa alla Corte di Giustizia. E se il problema fosse altrove? ' (2020) 22 Federalismi 55. See also Scoca (n 47) 8ff. 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 Franco Gaetano Scoca, 'Le interdittive antimafia e la razionalità, la ragionevolezza e la costituzionalità della lotta "anticipata" alla criminalità organizzata' (2018) 6 Giustamm 2ff. 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.

[66] Roberto Di Maria and Alessandra Amore, 'Effetti "inibitori" della interdittiva antimafia e bilanciamento fra principi costituzionali: alcune questioni di legittimità dedotte in una recente ordinanza di rimessione alla Consulta' (2021) 12 Federalismi 101ff. Cfr. Longo (n 47) 26.

[67] Judgment of the Italian Council of State, no. 6465/2014. See also Garofoli and Ferrari (n 31) and Scoca (n 65) 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.

IV. Brief Final Remarks: An Italian Best Practice?

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. At the same time, however, especially in the case of antimafia 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 also seem very promising with respect to their possible application in other European countries, although taking into account the various features of each legal order, and to foster – while operating, as said before, at a different stage from the traditional criminal investigations – the EPPO's enforcement action[68], insofar as they make it possible to reasonably balance the need to respect fundamental rights with the State's need to ensure legality in the economy and in the management of public funds.

Therefore, favouring, where possible, access to 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 of the legal system, but without replacing them and acting within the framework of a modern and integrated enforcement system.

[68] 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 protecting the EU budget see the deliverables of the undergoing BETKOSOL research project (Principal Investigator Prof. Aldo Sandulli) led by Luiss University: https://betkosol.luiss.it/publications/deliverables/.

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