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# Administrative measures to prevent and tackle crime

Legal possibilities and practical  
application in EU Member States

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## 7 THE ADMINISTRATIVE APPROACH IN ITALY

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### 7.1 INTRODUCTION

#### 7.1.1 Background

Italy has developed a complex antimafia legal framework in its struggle against mafia-type associations.<sup>1</sup> Antimafia legislation entered into force in the 1950s as an instrument for tackling the dangerous infiltration of the public system – corruption, for example.<sup>2</sup> The first explicitly antimafia law was adopted in 1965. Its main feature was to ban persons either suspected or convicted of being members of organized crime groups from entering into contracts with public administrations.<sup>3</sup>

The **‘mafia-type association’** is the key concept when determining the scope of administrative measures. This is because Italy has been dealing with different types of mafia-type associations, including the Sicilian Cosa Nostra, the Neapolitan Camorra and the Calabrian ‘Ndrangheta, since the 19<sup>th</sup> century.<sup>4</sup> The concept of mafia-type association was eventually defined in 1982, with the introduction of the offence of mafia-type association into the Criminal Code. Article 416*bis* paragraph 3 of the Italian Criminal Code defines a ‘mafia-type association’ as follows:

The association is of a mafia-type when the participants use the power of intimidation of the association, and the condition of subjection and omertà (code of silence) that arises from it, to commit crimes, or to obtain – directly or indirectly – control over economic activities, public contracts or concessions,

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1 Frigerio 2009.

2 This kind of normative strategy started with Law no. 1423 of 27 December 1956.

3 According to Law no. 431 of 13 May 1965 followed by Law no. 152 of 22 May 1975. The first law aimed to address persons linked to organized crime groups that have been shown to pose a risk to society by widening the use of personal prevention measures (Law no.1423 of 27 December 1956). Scholars criticized the law because it did not sufficiently explain the term ‘mafia’. In order to address the loophole, Law no. 152 of 22 May 1975 was enacted.

4 In addition to the definition of a mafia-type association, this report uses the UN definition of ‘organised criminal group’, namely: ‘a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, financial or other material benefits.’ United Nations Convention Against Transnational Organised Crime, Palermo, Italy, December 2000, Article 3.

or to obtain unfair profits for themselves or others, or to impede or jeopardise the free exercise of the right to vote or to gain votes for themselves or others upon elections.<sup>5</sup>

This country report aims to describe the main administrative measures used in the Italian legal system. Section 7.1.2 discusses the historical background of the administrative measures in Italy, highlighting the main events. Section 7.2 discusses the existing screening and/or monitoring of persons regarding their past criminal activities. Section 7.3 discusses instruments to prevent the disruption of public order. Section 7.4 deals with confiscation and seizure, specifically related to criminal organizations. Section 7.5 concerns the dissolution of city councils that have been infiltrated by the mafia.

### 7.1.2 *The history of antimafia measures in Italy*

In Italy, the most relevant antimafia measures were adopted as a result of specific events, such as homicides and mafia attacks on the State.<sup>6</sup> This led scholars to consider antimafia

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5 According to Article 416bis of the Criminal Code:

1. Whoever is part of a mafia-type association consisting of three or more people is punishable with 7 to 12 years of imprisonment.
  2. Whoever promotes or manages or directs such an association is punishable with 9 to 14 years of imprisonment
  3. The association is of a mafia-type when the participants use the power of intimidation of the association, and the condition of subjection and omertà (code of silence) that arises from it, to commit crimes, or to obtain – directly or indirectly – control over economic activities, public contracts or concessions, or to obtain unfair profits for themselves or others, or to impede or jeopardise the free exercise of the right to vote or to gain votes for themselves or others upon elections.
  4. If the association uses weapons the penalty is from 9 to 15 years for the cases provided by the first paragraph and from 12 to 24 years for the cases provided by the second paragraph.
  5. The association is armed whenever the participants have at their disposal, for the achievement of the aims of the association, weapons or explosives, even if hidden or kept in a deposit.
  6. If the economic activities whose control the participants aim to achieve or maintain are financed wholly or in part with the price, the product or the profit of crimes, the penalties provided by the previous paragraphs are increased from one third to the half.
  7. Upon conviction, the confiscation of the assets which served or were allocated to the commission of the crime and the assets which are its price, product, profit or investment is mandatory. 9. These provisions also apply to the camorra and to other associations, whatever their local names, including foreign ones, which, taking advantage of the intimidation power of the association, pursue aims corresponding to those of mafia-type associations.
  8. The previous provisions also apply to the camorra and to other associations, whatever their local names, including foreign ones, which, taking advantage of the intimidation power of the association, pursue aims corresponding to those of mafia-type associations.
- 6 For example, after 1982, the introduction of several antimafia provisions was accelerated by the murders of Member of Parliament Pio La Torre and of General Carlo Alberto Dalla Chiesa, both in Palermo. Moreover, further homicides of judges and policemen – the Capaci and the via D'Amelio assassinations of Giovanni Falcone and Paolo Borsellino – led to other measures such as Legislative Decree no. 306 of 1992 (the 'Falcone

legislation as the product of an ‘ongoing emergency’ which ultimately created its own problems of coordination and consistency in the antimafia legal system.<sup>7</sup>

Law 575/1965, adopted in the early 1960s, expanded the application of personal preventive measures foreseen in the previous Law 1423/1956. **Preventive measures** are measures adopted by administrative authorities (e.g. the local police chief) imposing a number of obligations or prohibitions to people falling under specific categories prescribed by law (e.g. dangerous subjects). A number of loopholes became clear in the system in the 70s and 80s, and particularly that the term ‘mafia’ had not been sufficiently explained. Several innovations were introduced in the 1980s and 1990s as a reaction to the mafia attacks against politicians, members of the judiciary and of the law enforcement agencies. These innovations concerning new criminal offences, investigatory powers and preventive measures ordered by administrative authorities, e.g. the prohibition against residing in a certain area of a city, and the seizure and the confiscation of property independent of a final criminal conviction.<sup>8</sup> Law 646/1982 was a cornerstone in this process, with two innovations that changed the strategy against mafia-type associations:

- A new provision criminalizing participation in mafia-type association (Article 416-bis of the Italian Criminal Code);
- Introduction of patrimonial prevention measures in addition to personal ones.<sup>9</sup>

In addition, Legislative Decree no. 163 of 12 April 2006 – containing the Code of public contracts for works, services and supplies – reshaped the regulation of public procurement to improve control over this field.<sup>10</sup> More recently, in 2008 and 2009, two laws were enacted to further implement the antimafia legal framework. Firstly, Legislative Decree no. 92/2008, which:

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Act’, dealing with trials and police action in the fight against the mafia) (Fijnaut & Paoli 2004, see also Van de Bunt & Van der Schoot 2003).

7 Moccia 1995.

8 Fulvetti 2008.

9 Law no. 646 of 13 September 1982 added patrimonial preventive measures to personal preventive ones, in particular seizure and confiscation. Seizure, a temporary measure, is used when there is a discrepancy between the suspect’s income and his/her lifestyle. Confiscation, a final measure, is applied when a suspect fails to prove that an asset has been derived from a legal source. Moreover, this normative disposition permits financial investigations at every lending institution and in every public administrative office in order to collect useful information. See the definition (p. 3) explaining when an association is considered a mafia-type organization, according to Article 416bis, paragraph 3, of the Criminal Code (See also Fijnaut & Paoli 2004; Savona et al. 1998; UNICRI & BASCAP 2013 and Van de Bunt & Van der Schoot 2003).

10 According to Legislative Decree no. 163 of 12 April 2006, *Codice dei contratti pubblici relativi a lavori, servizi and forniture*, also known as the Code of public contracts for works, services and supplies. As under Directive 2004/17/EC and Directive 2004/18/EC.

- extended patrimonial prevention measures to crimes listed in Article 51, paragraph 3*bis* of the Code of Criminal Procedure;<sup>11</sup>
- made it possible to apply preventive measures for persons suspected of kidnapping for ransom, drug trafficking and human trafficking;
- made it possible to adopt personal and patrimonial prevention measures separately and independently. This ensures that the confiscation system can be applied even against heirs in the event of the relevant person's death;
- introduced equivalent confiscation for persons convicted of being a member of a mafia-type association.

Second, Law no. 94 of 15 July 2009:

- made it possible to apply preventive measures for persons suspected of the unjustified possession of assets;
- made it possible to apply personal and patrimonial prevention measures separately, regardless of the risk the person concerned poses to society;
- updated provisions concerning the dissolution of city councils that have been infiltrated by the mafia. This implemented a rule barring local administrators of a council dissolved owing to mafia infiltration from re-election (Article 143, paragraph 11 of Legislative Decree 267/2000).

Last, in 2011 Legislative Decree no. 159/2011 introduced the 'Code of antimafia laws, relevant preventive measures and new antimafia provisions' (hereafter Antimafia Code). The Antimafia Code combined all the previous legislation into a unique normative corpus<sup>12</sup> and is currently the main reference point for antimafia measures.<sup>13</sup>

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11 The offences listed in Article 51, paragraph 3*bis* of the Code of Criminal Procedure are: Article 416, paragraph 6 and 7, Article 416 for offences indicated in Articles 473, 474, 600, 601, 602, 416*bis* and 630 of the Criminal Code, Article 74 of the Consolidated Law adopted with Decree of the President of the Republic 309/1990, Article 291*quater* of the Consolidated Law adopted with Decree of the President of the Republic no. 43 of 23 January 1973, Article 260 of Legislative Decree no. 152 of 3 April 2006.

12 The promulgation of the Antimafia Code made it possible to apply personal and patrimonial measures separately, i.e. independent of the risk to society posed by the subject (Article 2*bis*, paragraph 6*bis* of Law no. 575 of 1965, introduced by Law no.125 of 2008 and Law no. 94 of 2009). Furthermore, Law no.190 of 6 November 2012 dealt with 'Measures to prevent and suppress corruption and illegality inside public administration.' The Prime Minister's Decree of 18 April 2013 envisaged the setting up and continuous updating of the 'white lists'. Finally, the Stability Law of 2013 (Law no. 228 of 24 December 2012) has updated the confiscation system included in the Antimafia Code.

13 Legislative Decree no. 218 of 15 November 2012 updated the Antimafia Code. It introduced new targets for the antimafia documentation system (Article 85 of the Antimafia Code, further discussed in detail in section 7.2.1). In particular this included European economic interest groupings (EEIGs), members of company audit committees (even companies without legal personality), persons who manage and represent foreign companies (those without a second Italian home office), and gambling operators (organized into capital-based companies).

## 7.2 SCREENING AND MONITORING

This section focuses on existing Italian measures governing the screening and/or monitoring of businesses for the criminal past of natural persons involved in them. Section 7.2.1 deals with the measures on the *documentazione antimafia* (antimafia documentation) Section 7.2.2 discusses other screening and/or monitoring procedures. Section 7.2.3 focuses on the protection extended to the natural and legal persons who are screened and/or monitored.

### 7.2.1 *Documentazione antimafia*

#### 7.2.1.1 History of the legislation

Italy was the first country in the European Union to conduct ‘criminal audits’, i.e. to regulate by law and conduct systematic investigations of the antecedents of companies.<sup>14</sup> In 1994, Legislative Decree 490/1994 introduced the antimafia documentation system. Enterprises or individuals applying for public aid or bidding on public procurement contracts were requested to exhibit an ‘antimafia certificate’, attesting that they had not been involved in mafia-type associations. This not only meant that relevant subjects in the enterprise (e.g. owners, shareholders, administrators) were not convicted of mafia-related offences, but also that no preventive measures had been imposed on them. In 1998, Decree of the President of the Republic no. 252/1998 repealed part of Legislative Decree 490/1994 and updated the system. It distinguished between the antimafia communication and antimafia information and introduced a simplified certification system through the Chambers of Commerce.

In 2010-2011, after more than fifteen years from the introduction of the antimafia documentation, the debate on the effectiveness of the system generated a further reform. The Parliament delegated the Government to reform the antimafia legislation.<sup>15</sup> The guiding principles were to revise and simplify it, in particular regarding antimafia documentation. The Government regulated the system in the second book of the Antimafia Code. Since 2012, this legislation is the new reference point for the antimafia documentation system.<sup>16</sup> The Code has compiled most of the antimafia provisions into a unique legislative corpus that abrogates most of the previous regulations.<sup>17</sup>

14 Van de Bunt & Van der Schoot 2003; White 2000.

15 Article 2, paragraph 1 of Law 136/2010; according to Law 575/1965 and Article 4 of Legislative Decree no. 490 of 1994.

16 Legislative Decree no. 218 of 15 November 2012 introduced corrective dispositions to the antimafia documentation system, foreseen into Antimafia Code, entering into force on 12 February 2013.

17 The Antimafia Code abrogated Law no. 1423 of 27 December 1956 and Law no. 575 of 31 May 1965. Legislative Decree no. 218 of 15 November 2012 introduced corrective dispositions to the antimafia documentation system, foreseen into the Antimafia Code, entering into force of 12 February 2013.

### 7.2.1.2 The Antimafia Code in force

The antimafia documentation system focuses on screening tenderers and licence applicants for mafia infiltration. The aim is to verify whether any of the conditions initially provided for in the 1965 law are present. In specific cases, screening also verifies whether other specific conditions suggest mafia infiltration.

Article 67 of the Antimafia Code provides that an individual who has a preventive measure imposed on him<sup>18</sup> or is convicted of offences listed under Article 51 paragraph 3*bis* of the Italian Criminal Procedure Code cannot be issued any kind of licence or authorization.<sup>19</sup> This includes licences or police authorizations, public concessions, concessions for public works, registration in public registers (i.e. the Chamber of Commerce), attestations to carry out public works, public funding and firearms licences.

According to Article 83 paragraph 1 and 2 of the Antimafia Code, before contracting or issuing concessions or grants, contracting authorities must obtain the required type of antimafia documentation from the Prefecture.<sup>20</sup>

The prefect is a high-level administrative civil servant who has general competence to act on behalf of government at the provincial level.<sup>21</sup> The prefect operates under the authority of the Italian Ministry of the Interior and is in charge of the Prefecture-Territorial Government Office (UTG).<sup>22</sup> It has competence on public order and security at the provincial level; guarantees the security and safety of citizens, the protection of properties, and compliance with national and regional laws and local ordinances. The prefect has access to police forces to enforce these tasks.<sup>23</sup> If the public interest so requires, he may

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18 These are special preventive personal or patrimonial measures of a quasi-criminal nature. The proceedings must be final.

19 The offences listed in Article 51, paragraph 3*bis* of the Code of Criminal Procedure are: Article 416, paragraph 6 and 7, Article 416 for offences indicated in Articles 473, 474, 600, 601, 602, 416*bis* and 630 of the Criminal Code, Article 74 of the Consolidated Law adopted with Decree of the President of the Republic 309/1990, Article 291*quater* of the Consolidated Law adopted with Decree of the President of the Republic no. 43 of 23 January 1973, Article 260 of Legislative Decree no. 152 of 3 April 2006.

20 Article 84 of the Antimafia Code.

21 According to Article 11 of Legislative Decree number 300 of 1999. Functions of the Ministry of Foreign Affairs, Justice, Treasury, Finances, Public Instruction, Cultural Activities and Assets are not part of the prefect's general competence (Legislative Decree no. 300 of 1999). As in most civil-law countries, the Italian legal system is inspired by the French system, established in 1800 by Napoleon. As in other such countries, Italy considers administrative law a distinct branch of the law, aimed at regulating the relationship between citizens and public administration.

22 According to Article 1 of Legislative Decree no. 29 of 2004. Legislative Decrees no. 300 of 1999 and no. 29 of 2004 have changed the Prefecture into the Prefecture-Territorial Government Office (UTG). Currently there are 106 Prefectures in Italy.

23 The prefect is in charge of a provincial committee set up to defend public order and security. See also Section 7.3.1 for a more detailed explanation. Another government body is the Permanent Conference, established by Legislative Decree no. 300/1999 Article 11, updated by Legislative Decree no. 29/2004. Its function is to cooperate with the prefect to coordinate the activities of the local public offices and to guarantee collaboration with local government's representatives. The Permanent Conference is composed of four sections: administration, economic development, environment, and community services. The purpose of this body is to

adopt essential measures, called ‘ordinances’ or ‘decrees’.<sup>24</sup> Furthermore, in the relationship between State and local administrators, he assumes the role of guarantor of administrative activities. This includes monitoring correct procedure during local elections and supervising the suspension of city council administrators.

The competent prefect issues the antimafia documentation, i.e. the *comunicazioni* or the *informazioni*, after consulting the national antimafia database.<sup>25</sup> The prefect’s competence depends on the place of residence of the relevant natural person or the head office of the relevant legal person.<sup>26</sup> The prefect, in cooperation with other law enforcement agencies, must conduct a background check on all the individuals identified in the Antimafia Code prior to awarding licences, permits, concessions, financial allowances and authorizations, before admitting tenders, and before concluding, approving or allowing various contracts.<sup>27</sup> In particular, enterprises or individuals who conclude contracts with administrative authorities must include the antimafia documentation in their bid/application dossier.<sup>28</sup>

According to Article 85, the antimafia checks apply to the following individuals: owners and technical managers of individual enterprises, legal representatives of associations, cooperatives and consortiums, the majority partners in capital companies, all the members of general partnerships, all the general partners in limited partnerships and all local representatives of companies. Moreover, according to Article 2508 of the Italian Civil Code, the legal representative of a foreign company (without a second home office in Italy) must also be screened.<sup>29</sup> Article 85 of the Antimafia Code was updated in 2012 to include new categories, more specifically European economic interest groupings (EEIGs), members of company audit committees (even if the company lacks legal personality), persons who manage and represent foreign companies (without a second Italian home office) and

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mediate in social conflicts. The prefect is the president of the Permanent Conference, whose members are other local authorities.

24 Article 1 and 2 of Royal Decree no. 773 of 1931.

25 Article 83, paragraph 1 and 2; Article 84ss; Article 87 and Article 90 of the Antimafia Code. The Italian Ministry of the Interior manages a national database of antimafia documentation in order to check for ‘impediments’ to the issuing of antimafia documentation (Article 96 of the Antimafia Code; Article 5, paragraph 4, of the Ministry of the Interior Decree of 14 March 2003). The database, which is connected to the computer system of the Antimafia Investigative Directorate (hereafter: DIA), allows users to consult data acquired from the prefect during checks, even information gathered when accessing the construction sites of the companies concerned (Article 102 of the Antimafia Code). In order to verify impediments or mafia infiltration, the data is linked to the Data Elaboration Centre (CED) (Law no. 121 of 1 April 1981 Article 8; Article 99, paragraph 2*bis* of the Antimafia Code, inserted by Article 6, paragraph 1, of the Legislative Decree no. 218 of 15 November 2012).

26 Article 87, paragraph 1 and Article 90, paragraph 1 of the Antimafia Code.

27 Mastrodomenico 2013. The prefect and the *Guardia di Finanza* (Financial Police) have the power to undertake patrimonial, financial and fiscal investigations in order to check the economic lifestyle, assets and financial means of people subject to the antimafia screening (Article 19 of the Antimafia Code).

28 Article 87, paragraph 1 of the Antimafia Code.

29 Royal Decree no. 262 of 16 March 1942.

gambling dealers (organized into capital-based companies).<sup>30</sup> Also, before issuing the *informazioni*, the Prefecture also checks the applicant's cohabiting family members.

Antimafia documentation consists of two types of checks: *comunicazione antimafia* (antimafia communication), and *informazione antimafia* (antimafia information). Both are defined in Article 84 of the Antimafia Code.

1. *Comunicazione antimafia* certifies the absence of any impediment, i.e. grounds for disqualification, banishment or suspension based on a final preventive judgment, a preventive measure or a criminal conviction for offences listed in Article 51, paragraph 3bis of the Italian Criminal. *Comunicazione antimafia* concerns all aforementioned natural or legal persons covered under Article 85 of the Antimafia Code. Procedure Code.<sup>31</sup>
2. *Informazione antimafia* has a wider scope, allowing investigation of any attempt at mafia infiltration into a company.<sup>32</sup> *Informazione antimafia* gives the prefect and law enforcement agencies greater flexibility. Apart from a check on a natural or legal person's criminal records and pending proceedings, the competent authorities can undertake investigations (similar to criminal investigations) to prove the presence of mafia infiltration. In addition, the prefect has the option of further monitoring and the right to make on-site checks at the construction sites of any company awarded public works contracts.<sup>33</sup>

The type of documentation required depends on the size of the contract or funding. Article 83 of the Antimafia Code regulates the financial threshold for issuing antimafia documentation.<sup>34</sup> Whether antimafia documentation must be requested depends on the value of the contract in question in accordance with a three-tier system:

- when the contract value is below €150,000, no antimafia documentation is required;<sup>35</sup>
- when the contract value is above €150,000 but below the EU threshold for public procurement, the *comunicazione antimafia* is required;<sup>36</sup>

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30 Legislative Decree no. 218 of 15 November 2012.

31 Article 84, paragraph 2 of the Antimafia Code.

32 Article 84, paragraph 3 of the Antimafia Code.

33 Article 93 of the Antimafia Code.

34 Malagnino 2011.

35 According to Article 83 paragraph 3 under e of the Antimafia Code.

36 Article 87 of the Antimafia Code. EU regulation no. 1336/2013 entered into force on 1 January 2014, updating previous EU thresholds for public contracts (Directive 2004/17/EC, Directive 2004/18/EC and Directive 2009/81/EC). For services and supply contracts, the EU thresholds are: for ordinary sectors, €134,000 and €207,000 depending on the type of contract and awarding body. For certain special sectors, the threshold is €414,000. These leave little room to apply antimafia communication in the case of services and supply contracts. For public work contracts, the EU threshold, both for the ordinary and special sectors, is €5,186,000. Consequently, antimafia communication is required for any contract between €150,000 and €5,186,000.

- when the contract value exceeds the EU threshold, or in specifically defined cases,<sup>37</sup> *informazione antimafia* is required.

The antimafia communication and antimafia information are both considered binding acts. They do not leave discretionary power to the contracting authorities,<sup>38</sup> implying that the natural or legal person may not negotiate with public administrators about the outcome of the check.

### The antimafia communication

Natural or legal persons are required to obtain the antimafia communication document when applying or bidding for:<sup>39</sup>

- licences, police or commercial authorizations;
- public concessions;
- concessions for public works (with a value below the EU threshold, and above €150,000);
- entry into public registers (e.g. the Chamber of Commerce);
- certification of qualification to conduct public works;
- entry into public registers or authorization proceedings to conduct entrepreneurial activities;
- public funding awarded by the State, public bodies and the European Communities in order to conduct entrepreneurial activities;
- licences to possess firearms;
- public works contracts valued below €5,186,000 (i.e. the EU threshold);
- services and supply contracts above €150,000 but below €207,000 (ordinary sectors) or €414,000 (special sectors).

The check involving the communication also applies for the relatives of persons subject to preventive measures. Consequently, a preliminary family check must be carried out before the antimafia documentation can be issued. In addition, an antimafia check must be carried out on corporate decision-makers, such as managing directors.<sup>40</sup>

The antimafia communication is not required in some cases, specifically:<sup>41</sup>

37 See Article 91 of the Antimafia Code. antimafia information is mandatory for public concessions for public waters or state property, or for the assignment of public financial contributions aimed at conducting entrepreneurial activities valued at more than €150,000 (Article 91, paragraph 1 under b). The authorization of subcontracts with a value in excess of €150,000 is evaluated on a case-by-case basis.

38 The contracting authorities are the State, local governments, public authorities, associations consisting of local governments or public authorities which serve the public interest (Article 3 paragraphs 25, 32 and 33 of the Code on Public Contracts and Article 1 paragraph 9 of Directive 2004/18/EC).

39 Article 67 paragraph 1 and 2 of the Antimafia Code.

40 Article 67 paragraph 4 of the Antimafia Code.

41 Article 83 paragraph 3 of the Antimafia Code.

- contracts between public subjects: public administrators, public authorities, even when constituted in single contracting authorities, companies controlled by the State (or by another public authority), public works authorities and general contractors;<sup>42</sup>
- contracts between public and other private entities;
- issuing or renewing public security authorizations or licences;
- contracts and grants for self-employed people;
- contracts with a value below €150,000.<sup>43</sup>

The antimafia communication verifies the absence of any ‘impediment’.<sup>44</sup> An impediment exists when a person is subject to a preventive measure and/or a conviction for offences indicated in Article 51, paragraph 3*bis* of the Italian Criminal Procedure Code. The presence of an impediment prevents the person from concluding a contract with the administrative authorities.<sup>45</sup>

The competent prefecture issues the antimafia communication after consulting the national antimafia database. The prefect is competent to perform the checks if he has territorial competence over the place of residence of a natural person or the home office of a legal person. When the subjects of the check reside abroad, the competent prefect has territorial competence over the place where the contract is being executed.<sup>46</sup> If no impediments are detected in the database, the prefect can issue the antimafia communication at once.<sup>47</sup> This communication *enables* the subject of the check to access grants, subsidies or contracts awarded by administrative authorities. The antimafia communication expires six months after it is issued. If an impediment emerges from the database, the prefect conducts further checks.<sup>48</sup> If the impediments are confirmed, the prefect issues a prohibitive antimafia communication.<sup>49</sup> This prohibitive communication *prevents* access to grants, subsidies and contracts awarded by administrative authorities.

The prefect must issue the communication within 45 days, with an option to extend the deadline a further thirty days in the case of complex checks.

If the prefect does not issue the antimafia documentation before the deadline, the subjects can participate in the procurement or be granted licenses and authorizations. However, if impediments are detected after the deadline passes, the grant, funding, concession etc. is revoked, even if the contract has been concluded. Revocation excludes any

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42 Article 176 of Code of Public Contracts.

43 Article 83 paragraph 3 of the Antimafia Code.

44 Article 84, paragraph 2 of the Antimafia Code.

45 Article 84 paragraph 2 of the Antimafia Code.

46 Article 83 paragraph 1 and 2; Articles 87 and 90 of the Antimafia Code and Article 88 paragraph 4 of the Antimafia Code.

47 Article 88 of the Antimafia Code.

48 Article 88 paragraph 2 of the Antimafia Code.

49 Article 88 paragraph 3 of the Antimafia Code.

activities already carried out, with the contractor being reimbursed for costs already incurred in preparing the remaining activities, in line with the contract.

### **Antimafia-information**

The antimafia information supplements the antimafia communication because it enables verification not only of impediments but also of any attempt at mafia infiltration into an enterprise.<sup>50</sup> According to Article 91 of the Antimafia Code, before contracting or issuing administrative acts, contracting authorities<sup>51</sup> must request the antimafia information from the Prefecture.<sup>52</sup> The contracting authority must indicate the name of the company, the object and the value of the contract, and the personal details of people concerned.<sup>53</sup> The antimafia information is required for:<sup>54</sup>

- concessions for public works with a value above the EU threshold;<sup>55</sup>
- public concessions (or subsidies) for entrepreneurial activities valued at more than €150.000;<sup>56</sup>
- authorizations of subcontracts or assignments to build public works or to supply public services valued at more than €150.000;
- public procurement contracts above the EU threshold;
- specific sectors, regardless of the contract value (for example concrete supply and garbage disposal);<sup>57</sup>
- any contract stipulated by a city council within five years of its dissolution for mafia infiltration, regardless of the contract value.<sup>58</sup>

In some specific cases, antimafia information is not required for:<sup>59</sup>

- contracts between public subjects: public administrators, public authorities, even constituted in single contracting authorities, companies controlled by the State (or by

50 Article 84 paragraph 3 and 4 and Article 91 paragraph 6 of the Antimafia Code.

51 I.e. public administrators, public authorities, even constituted in single contracting authorities, companies controlled by the State (or another public authority), public works authorities and general contractors in accordance with Article 176 of the Code of Public Contracts.

52 Article 84, paragraph 3 of the Antimafia Code.

53 According to Article 83 paragraph 1 and 2 and Article 91 paragraph 4 of the Antimafia Code.

54 Article 91 of the Antimafia Code.

55 According to Legislative Decree no. 163/2006, Directive 2004/17/EC and Directive 2004/18/EC, updated by Commission Regulation (EC) 1177/2009.

56 According to Article 91 of the Antimafia Code.

57 According to the last paragraph of Article 91 of Legislative Decree no. 159 of 2011 and the Circular of the Ministry of the Interior no. 4610/2010, these sectors are at risk. Such contractors must therefore adhere to the antimafia information system, regardless of the contract value.

58 Article 143 of Legislative Decree 267/2000 and Article 100 of the Antimafia code. See Section 7.5 for further information.

59 Article 83, paragraph 3 of the Antimafia Code.

another public authority), public works authorities, general contractors (Article 176 of the Code of public contracts);

- contracts between public and other private subjects that have specific requirements of good conduct;
- the issuance or renewal of public security authorizations or licences;
- contracts and grants awarded to self-employed people;
- contracts with a value below €150,000.<sup>60</sup>

The antimafia information verifies the absence of elements showing the infiltration of the mafias in an enterprise. In addition to the impediments concerning the antimafia communication, the following elements are considered evidence of mafia infiltration:<sup>61</sup>

- convictions for offences related to organized crime activities (a final conviction is not required);
- the imposition of pre-trial precautionary measures or convictions for the offences indicated in Articles 353, 353*bis*, 629, 640*bis*, 644, 648*bis*, 648*ter* of the Italian Criminal Code, Article 51 paragraph 3*bis* of the Italian Criminal Procedure Code, and Article 12*quinqüies* of Law no. 356 of 1992;
- proposal or imposition of personal or patrimonial preventive measures;
- failure to report specific serious offences (e.g. bribery and extortion in favour of a mafia association), by subjects indicated in Article 38 under b of the Code of Public Contracts; evidence emerging from on-site checks conducted by the prefect at work sites;<sup>62</sup>
- findings from the investigations conducted by the prefects also including the controls on construction sites.
- replacement of the relevant subjects in an enterprise with family members of persons subject to preventive measures or prior convictions;
- repeated violations (within a five-year period) of the obligation to conduct traceable financial transactions.

The competent prefect issues the antimafia information immediately after consulting the national antimafia database, provided the aforementioned issues are not present. The competent prefect is the one with jurisdiction over the natural person's place of residence or legal person's home office.<sup>63</sup> If circumstances to the contrary arise, the prefect can conduct further checks. The introduction of antimafia information has reinforced the prefect's checks by moving from a more formal procedure, in which the absence of impediments

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60 According to Article 91 paragraph 1 under a and c of the Antimafia Code.

61 Article 84 paragraph 4 of the Antimafia Code. See also article 91 paragraph 6 of the Antimafia Code.

62 Article 84 paragraph 4 of the Antimafia Code.

63 According to Article 83 paragraph 1 and 2, Article 86 paragraph 2, Article 91 paragraph 1 and Article 97 of the Antimafia Code.

was evaluated using the Chamber of Commerce database, to a factual and more effective procedure. In cooperation with law enforcement agencies, the prefect can undertake investigations similar to criminal investigations. Furthermore, he can also conduct further activities, e.g. controls at the construction sites.<sup>64</sup> If any of the above issues is identified, the prefect issues 'negative antimafia information' (*informazione antimafia interdittiva*), which prohibits any further license, authorization and public procurement. This information is shared with the national antimafia prosecutor's office (Direzione Nazionale Antimafia), with the contracting authority, the Chamber of Commerce, to the interforce antimafia law enforcement agency (Direzione Investigativa Antimafia), to the supervisory authority for public contracts, to the Antitrust Authority, to the Ministry of Transport and the Ministry of Economic Development, and to the Income Revenue Authority.<sup>65</sup>

The prefect must issue antimafia information within 45 days but has the option of extending this deadline for a further thirty days if complex checks are necessary.<sup>66</sup> The antimafia information expires after twelve months. Any changes in a company must be communicated within thirty days, however.<sup>67</sup> If the prefect does not issue antimafia information before the deadline, the subjects can participate in the procurement or be granted licenses and authorizations. However, if impediments are detected after the deadline passes, the grant, funding, concession etc. is revoked, even if the contract has already been concluded. Revocation excludes any activities already conducted, with the contractor being reimbursed for any costs already incurred in preparing the remaining activities, in line with the contract.<sup>68</sup>

In some cases, the contracting authority has the option of contracting the company anyway, even if mafia infiltration is suspected.<sup>69</sup> According to the case law of the Italian Council of State, the highest administrative court, this is not up to the contracting authority.<sup>70</sup> The contract can only remain in place if specific conditions apply, namely:<sup>71</sup>

- if the work is still under way;
- if the supply of goods and services is considered essential (in the public interest);
- if the supplier cannot be replaced immediately

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64 Article 93, paragraph 1 of the Antimafia Code.

65 Article 91, paragraph 7bis of the Antimafia Code

66 Article 92, paragraphs 1 and 2 of the Antimafia Code.

67 Article 86, paragraph 3 of the Antimafia Code.

68 According to Article 92, paragraph 3, Article 83 paragraph 1 and 2 of the Antimafia Code.

69 Article 83 paragraph 1 and 2 of the Antimafia Code.

70 See Section 7.2.1 of this chapter.

71 Article 94 paragraph 3 of the Antimafia Code.

This option is therefore subject to particularly strict requirements, including detailed reasons as to why the contracting authority has decided to continue working with the contractor in question.<sup>72</sup>

There used to be a third category of antimafia information: ‘atypical antimafia information’.<sup>73</sup> Again, the prefect issued this type of antimafia documentation. The aim was to identify attempts at mafia infiltration into companies. The contracting authority had the discretionary power to decide whether the contract with the subject involved mafia infiltration.<sup>74</sup> Atypical information was therefore not an administrative act with prescribed consequences. Its aim was to give public administrators information about tenderers. However, this system was criticized because it allowed the contracting authority to make decisions regarding mafia infiltration into companies without having the legal authority to do so.<sup>75</sup> The Antimafia Code does not include atypical antimafia information.<sup>76</sup>

### 7.2.1.3 Self-certification

For contracts requiring an antimafia communication, there is a self-certification system with the purpose of simplifying and streamlining the procedure for the enterprises. For contracts requiring antimafia information, self-certification is not allowed.<sup>77</sup> The self-certification system allows a subject to attest to the absence of impediments as provided for in Article 67 of the Antimafia Code. Article 89 lists the situations in which self-certification is allowed:

- for the conclusion of urgent contracts and their renewal (for service provider contracts);
- for private activities subject to the administrative instrument of self-declaration at the start of the work (by the private subject for the administrative authority);
- for private activities subject to the administrative instrument of tacit approval.<sup>78</sup>

In these cases, the contracting authorities and public authorities can acquire antimafia self-certification from natural and legal persons. At a later stage, this documentation can

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72 Malagnino 2011. See also Cons. di Stato, Section. V, no. 4467 of 9 September 2013.

73 Article 10 paragraph 9 of Decree of the President of the Republic no. 252 of 1998, Article 1 *septies* of Legislative Decree no. 629 of 1982 and Law no. 726/1982.

74 Zamberletti 2008.

75 Malagnino 2011. See also: Cons. di Stato, Section III, no. 5177/2012; Cons. di Stato, Section III, no. 3247/2012; T.A.R. Abruzzo, Section. I, no. 870/2010; Cons. di Stato, Section. V, no. 5247/2005; Cons. di Stato, Section IV, 1 March 2001, no. 1148; Cons. di Stato, Section VI, 17 April 2009, no. 233; Cons. di Stato, Section V, 31 December 2007, no. 6902; T.A.R. Campania Napoli, Section I, 23 January 2007, no. 596; T.A.R. Catania, Section. IV, no. 941/2009; Cons. di Stato, Section. VI, no. 1948/2007; Cons. di Stato, Section. IV, no. 1148/2001; T.A.R. Sicilia Palermo, no. 1479/2009; T.A.R. Calabria, Reggio Calabria, no. 197/2007; Cons. di Stato, Section V, no. 4135/2006; Cons. di Stato, Section. IV, no. 3491/2009; Cons. di Stato, III, 14 September 2011, no. 5130 and Section VI, 28 April 2010, no. 2441.

76 Article 91 of the Antimafia Code.

77 Article 89 of the Antimafia Code.

78 According to Decree of the President of the Republic no. 300 of 26 April 1992.

be sent to the competent Prefecture. The self-certification document has to be signed according to Article 38 of the Decree of the President of the Republic no. 445/2000, as the subject is responsible for what he has declared. The public administrators can check the trustworthiness of the declarations. In case of false information, they can inform the competent authority (such as the Prosecutor's Office).<sup>79</sup>

The introduction of the new Antimafia Code has extended the possibilities for self-certification. In the past, service contracts were excluded from this system. Due to its efficiency, self-certification is widespread in Italy. It is presently required to open new public commercial activities, such as bars, pizzerias and hotels.

### 7.2.2 *Other screening and/or monitoring procedures*

Legislation aimed at ensuring the transparency of public contracting prohibits negotiation with subjects targeted by preventive measures. Specifically, this includes:

- The code of public contracts. Article 38 paragraph 1 under b of the Public Contracts Code sets out general requirements for contracting with the administrative authorities. Under b and c, the Code states that persons subject to a preventive measure or convicted of participating in an organized crime group are banned from contracting with administrative authorities; this prohibition is also set out in Article 247 of the Antimafia Code.<sup>80</sup>
- The Antimafia Code states that public authorities<sup>81</sup> cannot award licences, permits, concessions, subsidies, benefits for mafia victims or authorizations, or accept or award tenders, or approve or allow various contracts, including tender contracts, if there are impediments or mafia attempts to infiltrate companies (Article 67 and Article 94, paragraph 1, of the Antimafia Code).<sup>82</sup>

In particular, subjects who have a preventive measure imposed on them or who are convicted of offences listed in Article 51, paragraph *3bis* of the Italian Criminal Procedure Code, cannot obtain:<sup>83</sup>

<sup>79</sup> Article 75 and 76 of Decree of the President of the Republic 445/2000.

<sup>80</sup> According to Article 38 paragraph 1 of Legislative Decree no. 163 of 12 April 2006 and Article 45 paragraph 1 of Directive 2004/18/EC. See also: T.A.R. Campania Napoli, no. 5058/2009; Cons. di Stato, Section. VI, number 4574/2006; Cons. di Stato, no. 5780/2008; Constitutional Court, number 25/2002; Cons. di Stato, Section. V, 27 June 2006, no. 4135; Cons. di Stato, Section V, 29 August 2005, no. 4408; T.A.R. Calabria Catanzaro, Section II, 12 February 2007, no. 38; Cons. di Stato, Section VI, 11 December 2009, no. 7777; T.A.R. Lazio, no. 8434 of 24 September 2013; T.A.R. Calabria Catanzaro, Section I, 2011, no. 1334; Cons. di Stato, Section I, number. 477/2012.

<sup>81</sup> According to Article 83 Antimafia Code.

<sup>82</sup> See Sections 7.2.1 and 7.2.2; according to Article 94 of the Antimafia Code, and Article 11, paragraph 3, of Decree of the President of the Republic no. 252 of 1998.

<sup>83</sup> Article 67 of the Antimafia Code.

- licences or police authorizations;
- public concessions;
- concessions for public works;
- entry into a public register (i.e. the Chamber of Commerce);
- certification of their qualification to conduct public works;
- other entries into public registers or authorization proceedings to conduct entrepreneurial activities;
- public funding awarded by the State, public bodies or the European Communities for entrepreneurial activities;
- firearms licences

The final decision applying a preventive measure implies the refusal of applications for licences, authorizations, concessions, attestations, certification of qualifications, and a prohibition against contracting with the administrative authorities.<sup>84</sup>

### 7.2.3 *Legal protection of natural and legal persons subject to screening and/or monitoring*

The documents relating to the antimafia documentation system are administrative deeds. They can be challenged before an administrative judge. An administrative deed is a legal unilateral act implemented by an administrative authority. The discrepancy between a deed and its normative basis allows the subject of the deed, e.g. a licence applicant, to contest it. The deed may be of 'faulty legitimacy' (*vizio di legittimità*) or merit (*vizio di merito*). The legitimacy of the deed is flawed if it is not consistent with the applicable legislation (e.g. the problem of *detournement de pouvoir* or exceeding the power bestowed by legislation). The deed is of faulty merit if it conflicts with the principles and values of the Italian legal system, specifically principles provided for in the Italian Constitution, such as transparency and efficiency.

Antimafia information, which automatically prevents a natural or legal person from contracting with the administrative authorities, can cause that person direct damage. For this reason, it can be contested directly before the administrative court. If the court annuls the deed, both the measure eliminating the person's contract from the tender and the provisions assigning the tender to another company are invalid. In other words, the decision to award the contract to another company becomes invalid and the tender procedure must be repeated.

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84 Article 67 paragraph 2 of the Antimafia Code.

### 7.3 INSTRUMENTS DIRECTED AT PREVENTING THE DISTURBANCE OF PUBLIC ORDER

This section analyses the administrative measures intended to prevent the disturbance of public order. Section 7.3.1 discusses the revocation, refusal, and withdrawal of permits, licences, subsidies or government or other tenders regulated by various normative sources at the national and regional level. Section 7.3.2 examines the possibility of closing down and/or expropriating premises when public disturbance occurs in or around those premises.

#### 7.3.1 *Revoking or refusing licences, subsidies, or government or other tenders*

The authorities screen enterprises and individuals based on information provided by the applicants themselves, or gathered from financial institutions, Chambers of Commerce and government databases, including law enforcement agencies.<sup>85</sup> If it turns out that a Criminal Court has barred a person suspected or convicted of being linked to organized crime from contracting with the administrative authorities, or that enterprises or corporations bidding on a contract are suspected of having been infiltrated by organized crime groups, the authorities cannot conclude a public contract or grant any kind of licence, or financial contribution to such enterprises or corporations. According to Article 11 of the Consolidated Law of Public Security (also known as TULPS), licences must also be denied to people sentenced to more than three years of imprisonment.<sup>86</sup> This is a general provision which preceded the antimafia legislation and to some extent overlaps with it, although the TULPS is broader.

The provincial head of the State Police (*Questore*) may also suspend a licence for commercial activity if the property concerned is a usual hangout for criminals or people known to pose a risk to society. This measure can also be applied if the location poses a risk to public safety or public order.<sup>87</sup>

As a government official, the mayor of a municipality (*comuni*) supervises public order and security and passes information to the prefect.<sup>88</sup> By issuing motivated deeds and acting in accordance with general principles of the legal system, the mayor may implement urgent measures to prevent serious risks to public safety. He can also order the prefect to intervene

85 See Section 7.2.1 of this chapter.

86 According to Articles 11 to 14 of Royal Decree no. 773 of 18 June 1931, *Testo unico delle Leggi di Pubblica Sicurezza* (Consolidated Public Security Laws, also known as TULPS). This decree focuses on the protection of the public order, while the antimafia documentation system (Section 7.2.1) focuses on prevention in the public administration contracting system.

87 Article 100, paragraph 1 of Royal Decree no. 773/1931. An example is a place that has been the scene of rioting or serious public disorder. See also: T.A.R. Lombardia, sentence no. 69 of 13 February 2008.

88 According to Article 54 of Legislative Decree no. 267 of 18 August 2000.

with the help of law enforcement agencies.<sup>89</sup> As mentioned in Section 7.2.1, the prefect ensures the coordination of administrative activities. In order to enforce the mayor's actions, the prefect has the power to adopt appropriate measures (on the mayor's behalf). He can perform inspections to check the regular functioning of services placed under major's competence and guarantee law enforcement's activities.<sup>90</sup>

### 7.3.2 *Closure and/or expropriation of premises*

If a commercial activity's licence has been suspended multiple times, the Questore can decide to close down the premises indefinitely.<sup>91</sup> The owner of the premises is not entitled to any kind of compensation or financial contribution from the administrative authorities.<sup>92</sup>

## 7.4 SEIZURE AND CONFISCATION OF ASSETS

Italy has developed a complex system of seizure and confiscation. The legislation aims to tackle the financial resources of organized crime.<sup>93</sup> The Italian system recognizes four types of confiscation:

1. criminal confiscation (Article 240 and Article 41*bis* paragraph 7 of the Italian Criminal Code);
2. extended confiscation (Article 12*sexies* of Legislative Decree 306/92);
3. preventive seizure and confiscation (Article 24 of the Antimafia Code);
4. equivalent confiscation (Article 25 of the Antimafia Code).

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89 Article 54, paragraph 4 of Legislative Decree no. 267/2000.

90 According to Article 54, paragraph 9 of Legislative Decree no. 267 of 18 August 2000, *Testo unico delle leggi sull'ordinamento degli enti locali*, also known as the Consolidated Law on Local Public Bodies, TUEL; updated by Legislative Decree no. 187 of 12 November 2010.

91 Article 100, paragraph 2 of Royal Decree no. 773/1931. See also: T.A.R. Toscana, sentence no. 258 of 31 January 2006.

92 See Section 7.2.2 of this chapter. The rationale behind this procedure is to isolate people under investigation from their economic and territorial contexts.

93 Transcrime 2013. Law no. 55 of 19 March 1990 provides for the confiscation of all the assets deriving from drug trafficking, extortion, usury, money laundering, and smuggling. Moreover, for the first time in Italian law this provision allows these measures (confiscation and seizure) to be applied even against straw men and counsellors.

### 7.4.1 Criminal confiscation

Criminal confiscation is regulated by Article 240 of the Criminal Code. Criminal confiscation is established beyond a reasonable doubt at the end of a criminal trial on the basis of the rule of evidence required in criminal procedures.<sup>94</sup> Specifically:

- following conviction, the court may order the confiscation of means used or intended to be used to commit a crime or make use of the product or profits of that crime;<sup>95</sup>
- profits obtained by the offender by committing the crime are mandatorily confiscated upon conviction.<sup>96</sup> This includes technical equipment used (wholly or in part) to commit cyber-crimes;<sup>97</sup>
- objects whose use, manufacture, possession or transfer is an offence in itself are mandatorily confiscated, even if a conviction has not been pronounced.<sup>98</sup>

The burden of proof for connecting the goods and the crime rests with the prosecution.<sup>99</sup>

New confiscation measures specifically related to criminal organizations have been added to traditional confiscation since the 1980s. In 1982, Law no. 646 added Article 416*bis* to the Italian Criminal Code, which criminalizes participation in a mafia-type organization. Paragraph 7 contains more specific rules on the confiscation of goods owned by members of organized crime groups.<sup>100</sup> In this case, the means used or intended to be used to commit the crime and the price (e.g. the payment for a murder), products and proceeds of the crime are confiscated mandatorily.<sup>101</sup> The procedure requires evidence of a link between the confiscated assets and the offence. All the confiscation measures enacted within criminal proceedings can give rise to seizure. According to Article 321 paragraph 2 of the Code of Criminal Procedure, ‘the court may also order the seizure of items subject to confiscation’.<sup>102</sup>

94 Italian Criminal Code, Article 240.

95 Article 240, paragraph 1 of the Criminal Code.

96 Article 240, paragraph 2 no. 1 of the Criminal Code.

97 Article 240, paragraph 2, no. 1*bis* of the Criminal Code. Listed in Articles 615*ter*, 615*quater*, 615*quinquies*, 617*bis*, 617*ter*, 617*quater*, 617*quinquies*, 617*sexies*, 635*bis*, 635*ter*, 635*quater*, 635*quinquies*, 640*ter* and 640*quinquies* of the Italian Criminal Code Law no. 12 of 15 February 2012, Article 240 paragraph 2 (updated) of the Criminal Code.

98 Article 240 paragraph 2 under 2 of the Criminal Code.

99 Mageri 2008; Menditto 2011.

100 Law no. 646/1982 significantly amended Law no. 575/1965. Article 2 of Law no. 575 extended the precautionary measures of special surveillance for public security and obligatory residence to persons suspected of participating in a criminal organization. These measures already applied to persons who pose a risk to society under Law no. 1423/1956.

101 UNICRI & BASCAP 2013.

102 Article 35 paragraph 5 of the Antimafia Code states that, when ordering the seizure of assets, the court must appoint a judge and an administrator who is chosen from a special registry. The administrator is tasked with the custody, conservation and administration of seized assets, and with increasing their value if possible. Within thirty days of the appointment, the administrator must submit a detailed report to the judge about

#### 7.4.2 *Extended confiscation*

The extended confiscation system was introduced in 1994 by Legislative Decree 399/1994 and Law 501/1994, which added article 12*sexies* to Law 356/1992.<sup>103</sup> The extended confiscation of illegally obtained assets is imposed on persons convicted for offences typically related to the activity of criminal groups. Thanks to the reversal of the prosecutor's burden of proof, assets at the disposal of the convicted person and disproportionate to his income may be confiscated. The extended system makes it possible to confiscate assets whether or not they have criminal origins. The procedure does not require any proof of a connection between criminal behaviour and the assets in question.

In practice, extended confiscation is applied if the person is unable to prove the lawful origin of his assets or property and the court is authorized to confiscate them. The prosecutor is not required to prove that the person has committed a specific offence or to demonstrate a link between the assets and a specific crime.<sup>104</sup>

#### 7.4.3 *Preventive seizure and confiscation*

The Italian legal system provides for a special preventive form of seizure and confiscation that permits seizure and confiscation as administrative and preventive measures. Such measures are non-conviction based, administrative in nature and enforced outside criminal proceedings by law enforcement authorities under judicial supervision and less strict rules of evidence.<sup>105</sup>

According to Article 20 of the Antimafia Code, goods in direct or indirect control of the accused person are seized when there is a disparity between the goods' value and the income of the person concerned, or sufficient evidence that the assets are the proceeds of crime. The accused person loses control of the goods seized, and a judicial administrator, appointed by the court, administrates the assets. Preventive seizure may be applied before the hearing pertaining to the confiscation.<sup>106</sup> This happens when goods are in danger of disappearing, being misappropriated or transferred.<sup>107</sup> Urgent seizure may be used when

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the seized assets, including their listing, conditions, estimated value, any third-party rights and preferred management options.

103 Article 12*sexies* of Legislative Decree no. 306/1992, amended to Law no. 356/1992, has been introduced by Legislative Decree no. 399/1994 (amended to Law no. 501/1994). The Constitutional Court abrogated former article 12*quinquies* paragraph 2 of Law no. 356 of 1992, declaring it unconstitutional in light of Article 27 of the Italian Constitution (principle of non-guilt).

104 Maugeri 2008; Menditto 2011.

105 Menditto 2011.

106 Article 24 of the Antimafia Code.

107 Article 22, paragraph 1 of the Antimafia Code.

assets are in serious danger of disappearing, being misappropriated or transferred.<sup>108</sup> Seizure can be applied after imposing a preventative personal measure.<sup>109</sup> According to Article 24 of the Antimafia Code, preventive confiscation can be ordered:

- if the owner of the goods subject to the preventive proceedings is unable to prove their lawful origin;
- if the subject's declared income is disproportionate to his real economic activities;
- if there is evidence suggesting that the goods are of illegal origin.

The applicable legislation allows for personal and patrimonial measures to be applied separately. Patrimonial measures can be adopted independently of the risk that the subject poses to society.<sup>110</sup> The current regulation concerning evidence of guilt and proof of disproportionate value of the assets are sufficient to justify preventive confiscation when the persons concerned are suspected of being in contact with organized crime groups.<sup>111</sup>

#### 7.4.4 *Equivalent confiscation*

Last, Article 25 of the Antimafia Code allows for the seizure and confiscation of assets of equivalent value if a person is the subject of a preventative measure and he:

- misappropriates, hides or devalues goods in order to elude seizure or confiscation measures;
- has transferred the assets in good faith to third parties

The rationale behind this provision is to guarantee the confiscation of illicit revenues in any possible way.<sup>112</sup>

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108 Article 22, paragraph 2, of the Antimafia Code.

109 Article 24, paragraph 3, of the Antimafia Code.

110 Article 18 of the Antimafia Code.

111 Originally, confiscation was used to obtain assets at the disposal of subjects deemed a risk to society. The confiscation system was applied if the income a person declared on his tax statement was disproportionate to his legitimate activities. In time, with the introduction of Legislative Decree 92/2008, Law 125/2008 and Law 94/2009, the confiscation system was used even for persons not considered a risk to society. Investigators look not only at the financial assets of suspected criminals themselves, but also at the assets of their spouses, children and domestic partners for a period of five years. Furthermore, any natural or legal persons, companies, or associations at the direct or indirect disposal of the criminal are subject to investigation.

112 According to Legislative Decree no. 92 of 2008, Article 2<sup>ter</sup> paragraph 10. See also: Cass., Section UU, 3 July 1996; Cass., 11 June 2008 no. 25676; Cass., Section UU, 8 January 2007, no 57; Cass., 4 July 2007, number 33479 and Cass., 15 June 2005, number 27433.

## 7.5 THE DISSOLUTION OF LOCAL ADMINISTRATIONS OWING TO MAFIA INFILTRATION

This section addresses another administrative measure meant to combat the mafia. It allows for the dissolution of municipal or provincial councils and its replacement by a panel of three commissioners.<sup>113</sup> The measure aims to eradicate relationships between local politics and the mafias and to ensure the impartiality, efficiency, efficacy, and transparency of the public administration.<sup>114</sup>

Article 143 of Legislative Decree 267/2000 allows for the dissolution of municipal and provincial councils and the suspension or dismissal of the mayor and provincial presidents. Article 146 extends this measure to consortia of municipalities or provinces, local units of the National Health Service, and other publicly owned companies.

The competent prefect initiates the procedure. It appoints a three-member committee to conduct an enquiry if actual, unequivocal, and relevant indicators reveal a relationship between members of the city council and the mafias or when there are influences that compromise the independence of public administration.<sup>115</sup> The committee must assess the coexistence of various elements in order to establish whether a city council should be dissolved. Specifically, it must review all the main aspects of the local administration. The committee delivers a written report to the prefect within the deadline of three months (extendable by a maximum of three further months)<sup>116</sup> The prefect submits a report to the Minister of the Interior regarding the existence of actual, unequivocal, and relevant indicators of mafia infiltration within 45 days and after consultation of local police and prosecution authorities.<sup>117</sup> The Minister of Interior can propose to the Government (the Council of Ministers) the dissolution of the concerned local authority. The dissolution decree is then issued by the President of the Republic within three months of the Council of Ministers' decision.<sup>118</sup>

The dissolution of the city council implies the dismissal of the mayor or the provincial president, of the city's or province's council and government and of any other person connected to the mentioned positions.<sup>119</sup> The local administrators responsible for the conducts leading to the dissolution are barred from re-election at local elections once a

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113 Ramacci & Spangher 2010. The city council represents the local assembly (Article 37 of Legislative Decree no. 267 of the 18 August 2000).

114 Mete 2009. According to Article 97 of the Italian Constitution. Article 114 defines municipalities (*comuni*) as local governments with statutes, financial autonomy, and legislative power with regard to their administrative functions. City councils are elected and serve a five-year term (Article 51 paragraph 1 of Legislative Decree no. 267 of 18 August 2000).

115 Article 143, paragraph 2 of Legislative Decree 267/2000.

116 Commissione parlamentare d'inchiesta sul fenomeno della criminalità organizzata mafiosa o similare 2005.

117 Article 143, paragraph 3 of Legislative Decree 267/2000.

118 Article 143, paragraph 4 of Legislative Decree 267/2000.

119 Article 143, paragraph 4 and 6 of Legislative Decree 267/2000.

definitive provision has been issued against them.<sup>120</sup> The prosecution may be informed of any relevant conduct emerged during the enquiry and this may trigger the application of preventive measures.<sup>121</sup>

A decree of the Minister of Interior, upon the prefect's proposal, may adopt any useful measure to avoid any dangerous situation in relation to the managers, directors and any other employee of the local administration (e.g. suspension, transfer, etc.). This decree can be issued also if the local administration is not dissolved after the prefect's enquiry.<sup>122</sup>

An extraordinary commission of three members (public officials or members of the judiciary) is appointed in the dissolution decree. The dissolution lasts between 12 and 18 months (extendable to a maximum of 24 months). The extraordinary commission manages the local administration during this time until the next elections.<sup>123</sup> To tackle the main risks and carry out public contracts, the extraordinary panel must adopt a priority plan setting out the necessary measures within sixty days of commencing its assignment.<sup>124</sup> For the five years following the dissolution, the local authority must acquire the *informazione Antimafia* for any public procurement contract, subcontract or concession, independently from the size of the contract.

There are a number of indicators of mafia infiltration into a city council, including negative management of its administration, malfunctioning of public services; in particular tenders awarded for waste management, building projects, or concessions, permits and licences representing very sensitive areas<sup>125</sup> The Constitutional Court has ruled that the dissolution of city councils is in line with the Constitution.<sup>126</sup> As an *obiter dictum*, the Court reasoned that this measure has a preventive effect and does not require the same standard of proof as criminal proceedings.<sup>127</sup>

There are currently nine regions in Italy in which this kind of administrative measure has been applied.<sup>128</sup> Although this procedure is only used in extreme cases, it is an indicator for measuring the presence of organized crime groups.<sup>129</sup>

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120 Article 143, paragraph 11 of Legislative Decree 267/2000.

121 Article 143, paragraph 8 of Legislative Decree 267/2000.

122 Article 143, paragraph 5 of Legislative Decree 267/2000.

123 Article 144, paragraph 1 of Legislative Decree 267/2000.

124 Article 145, paragraph 2 of Legislative Decree 267/2000.

125 (For a database of the dissolved administrations, see: Comuni sciolti s.l.n.d.

126 The Italian Constitutional Court, judgment no. 103/1993.

127 See also: T.A.R. Lazio Roma, Section I, 1 July 2013, no. 6492; Cons. di Stato, IV, 6 April 2005, no. 1573; Cons. di Stato, Section V, 22 March 1998, no. 319; Cons. di Stato, Section VI, 24 April 2009, no. 2615; Cons. di Stato, 6 April 2005, no. 1573; Cons. di Stato, Section IV, 10 March 2011, no. 1547. Constitutional Court 19 March 1993, no. 103; Cons. di Stato, Section IV, 10 March 2011, no. 1547.

128 Sicilia, Campania, Calabria, Puglia, Basilicata, Lazio, Liguria, Piemonte and Lombardia.

129 La Spina 2008.

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