



# Preventing and Fighting Organized Crime and Mafia-Type Infiltration: The Italian Anti-Mafia Information Model Compared with US Civil RICO

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### Abstract

The article critically analyses legislative instruments of both the Italian anti-Mafia legislation and the US Code, notably the Italian 'anti-Mafia information' (informazione interdittiva anti-Mafia) and the US civil remedies under the Racketeer Influenced and Corrupt Organization Act (RICO). By comparing these specific tools, which share investigative activities in the fight against organized crime, the purpose of this article is to find similarities between the two models. The article also highlights the main differences between the Italian and American remedies and provides indications to be able to fight organized crime in a more coordinated and efficient way.

### I. Introduction

In 2022, Italy celebrated the memory of Judges Giovanni Falcone and Paolo Borsellino thirty years after their murders, which took place, respectively, on 23 May 1992 and on 19 July of the same year. Together with them, their escort agents: Agostino Catalano, Walter Eddie Cosina, Rocco Dicillo, Vincenzo Li Muli, Emanuela Loi, Antonino Montinaro, Vito Schifani, Claudio Traina, and Francesca Morvillo, Giovanni Falcone's wife, were murdered as a result of Mafia attacks.

Judges Falcone and Borsellino played an important role in the implementation of Italy's legislative system and in cultivating important investigative collaborations between Italy and United States of America. Some of these collaborations are still ongoing.

The FBI's relationship with Judge Falcone was forged in the case known as 'Pizza Connection' (1984), in which the FBI, the New York Police Department,

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and federal prosecutors teamed up with Judge Falcone and Italian authorities to bust an international heroin smuggling ring that laundered drug money through pizzerias and extortion. The legacy of Judge Falcone still leaves on today through the bronze monument at the FBI Academy in Quantico, Virginia, that welcomes thousands of visitors from all over the world and celebrates the so called 'Falcone method' of investigation as a useful model for untangling criminal affairs.

In 2022, Italy also celebrated the 40<sup>th</sup> anniversary of the enactment of the legge 13 September 1982 no 646, also known as the Rognoni-La Torre Law, which followed the murder of the Member of Parliament Pio La Torre – shortly before the murder of the General Carlo Alberto Dalla Chiesa – while Virginio Rognoni was the Minister of the Interior. Such law introduced Article 416-*bis* into the Italian Penal Code (1930) to punish Mafia-type association, individuated as an organisation of three or more persons whose members use the power of intimidation deriving from the bonds of membership, the state of subjugation and conspiracy of silence that it engenders to commit offences, to acquire direct or indirect control of economic activities, licences, authorisations, public procurement contracts and services or to obtain unjust profits or advantages for themselves or others, or to prevent or obstruct the free exercise of vote, or to procure votes for themselves or others at elections.

In these years, the Italian fight against Mafias has witnessed the intensification of State action through the activities of Italian law enforcement agencies and the role played by the judiciary in arresting, indicting, and convicting many bosses, underbosses or white-collar criminals belonging to Italian organized crime families, including members of the most famous and dangerous groups like *Cosa Nostra* in Sicily, the *Camorra* in Campania, the *Ndrangheta* in Calabria, and the *Sacra Corona Unita* and the *Società Foggiana* in Puglia.

The results achieved by Italy are impressive, amounting not only at fighting but also at preventing what today represents an evolution of the 'criminal Mafia' into an 'economic Mafia'.

In particular they are important the results against the powerful of the organized crime spreading through Italy and especially in the North – the richest part of the nation – where there are many occasions to take control, through the infiltration into corporates and public administration, of public aid and public procurement contracts.

For many years, the fight against organized crime has also seen a greater awareness on the part of some citizens, who prefer freedom and trust in the State to the abuse and oppression of the Mafia and have accordingly denounced mobster by cooperating with the judiciary. Also was implemented the Italian education system (from the schools up to the universities) through specific dissemination activities (like telling the stories of people killed by the Mafia or

explaining and commenting – even using practical cases – the laws adopted by the Parliament) with the main aim to spread the values of legality and civic education.

Within this preliminary information, this article analyses two legislative instruments of these nations, which share investigative activities in the fight against organized crime: the Italian anti-Mafia information and the US civil remedies under the Racketeer Influenced and Corrupt Organization Act (RICO).

Section II describes the administrative model adopted by Italy within the broader anti-Mafia legislation,<sup>1</sup> focusing on specific reliefs aimed at preventing the dangerous infiltration of organized crime inside Italy's administrative authorities (ie, *pubblica amministrazione*), and within companies that have direct relations with these authorities, following the general need to protect the community's ability to use public funds and resources according to Art 97 of the Italian Constitution.<sup>2</sup> More specifically, this section describes the specific instrument of the 'anti-Mafia information' as provided by the Anti-Mafia Code enacted in 2011 following a precedent Act of 1994.<sup>3</sup>

Section III focuses on the specific civil remedies available under the US Code and related to the Racketeer Influenced and Corrupt Organization Act (RICO).<sup>4</sup> These remedies are part of the Organized Crime Control Act adopted in 1970 and are based on the important works of several investigative

<sup>1</sup> References are to the decretollegislativo 6 September 2011 no 159 that introduced in the Italian legislation the 'Code of anti-Mafia laws, relevant preventive measures and new anti-Mafia provisions' (hereafter Anti-Mafia Code). The Anti-Mafia Code is still now the main source of law for Italian anti-Mafia measures combined into a unique normative corpus the laws adopted since in the early 1960s. For a better understanding of the system of sources of law of the Italian system it is important to clarify right now the difference in the use of words like law (*legge*), legislative decree (*decretollegislativo*) and law-decree (*decreto legge*). The legislative power to adopt laws is assigned by the Italian Constitution (1946) to the Italian Parliament and to the Regional legislative assemblies (Arts 55, 117 of the Italian Constitution) and judicial opinions are not a source of law in Italy, like for all civil law legal systems. However, there are cases in which the Government (the executive power, ie, the Council of Ministers) can also issue acts having force of law: while the (a) legislative decrees is an act adopted by the executive power after the approval of a law by the Parliament that delegates the Government to regulate a matter within principles and criteria established by the enabling law and only for a limited time and for specified purposes (Art 76 Italian Constitution), (b) a law-decree is an act adopted by the executive power in case of necessity and urgency, under its own responsibility. Such a measure shall lose effect from the beginning if it is not converted into law by the Parliament within sixty days of its publication (Art 77 Italian Constitution).

<sup>2</sup> Art 97 para 1 of the Italian Constitution sets off: 'Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration'.

<sup>3</sup> Decretollegislativo 8 August 1994 no 490 introduced for the first time the systems of the anti-Mafia communications and certifications (*comunicazioni e certificazioni anti-Mafia*) which required that each enterprise or individual that would have applied for public aid or bidding on public procurement contracts, had to show an anti-Mafia certificate attesting that there was no involvement in Mafia-type associations/organized crime. These dispositions then became part of the subsequent Anti-Mafia Code (n 2 above).

<sup>4</sup> 18 USC § 1964.

commissions established by the US government like the Kefauver Committee (1951), the McClellan Committee (1963), and the Presidential Task Force on Organized Crime (1967).<sup>5</sup>

It is central to our analysis the important definition of enterprise and how its meaning it's wider than the Italian one. Specifically, this section also analyses the application of RICO to tackle organized crime with respect to regulating labour unions.

The article also generally examines other tools of the Italian civil and criminal legislation that are the same way useful to prevent and fight organized crime<sup>6</sup> and that, in some way, share similarities with the US RICO model. By relating the analysed instruments to the notion of *matière pénale* as defined by the European Court of Human Rights (ECHR), the article ends by recommending a more purpose-oriented use of such tools.

The main reflection is to fight organized crime avoiding an abuse of lawsuit between corporates that little or nothing have to share with criminal affairs. Furthermore, the generalization that sees the involvement of people that even if linked by the bloodshed do not necessarily represent a continuation of the criminal organization, should be avoided and further elements should be need to prove the risk of a concrete, Mafia infiltration.

## II. Anti-Mafia Information and its Consequences

According to Art 91 of the Anti-Mafia Code, before entering into a contract or before undertaking any administrative acts,<sup>7</sup> the Italian administrative

<sup>5</sup> B. Scotti, 'Rico vs. 416-bis: A Comparison of U.S. and Italian Anti-Organized Crime Legislation'<sup>25</sup> *Loyola of Los Angeles International and Comparative Law Review*, 143, 146-147 (2002).

<sup>6</sup> Note that in this article, especially into a comparative approach, the definition of organized crime (ie, organized criminal group) is the one provided by the United Nations Convention Against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000 and signed in Palermo, Italy, on 12-15 December 2000 and that means 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 the Convention, in order to obtain, directly or indirectly, a financial or other material benefit, as provided for in Art 2, letter a) of the Convention available at <https://tinyurl.com/mkackuc9> (last visited 31 December 2022).

<sup>7</sup> Administrative acts are described into Art 67 of the Anti-Mafia Code. They refer to: a) police and commercial licences or authorisations; b) concessions of public waters and rights attaching thereto, as well as concessions of state property when required for the exercise of entrepreneurial activities; c) concessions for the construction and operation of works relating to the public administration and public service concessions; d) entries in the lists of contractors or suppliers of works, goods and services relating to the public administration, in the registers of the Chamber of Commerce for the exercise of wholesale trade and in the registers of commission auctioneers at wholesale annual markets; e) certificates of qualification to carry out public works; f) other registrations or measures with an authorizing, granting, or enabling content for the performance of business activities, however called; g) contributions, loans or

agencies (ie, the Public Administration or contracting authorities) must request the ‘anti-Mafia information’ to the Prefecture.<sup>8</sup> This document mainly consists of the attestation of the existence or absence of one of the causes of forfeiture, suspension or prohibition,<sup>9</sup> or in any attempts at Mafia infiltration tending to influence the policies of the enterprise. The contracting authority must request the anti-Mafia information, indicating the name of the company, the object and the value of the contract/administrative act, and the personal details of all the people involved in the enterprise<sup>10</sup> mainly for: I) concessions for public works and public procurement contracts with a value above the EU threshold;<sup>11</sup> II) authorizations of subcontracts or assignments to build public works or to supply public services valued more than one hundred and fifty thousand euros (one hundred and seventy thousand dollars approximately); III) investments that benefit public fund from the European Union for more than twenty-five thousand euros (twenty-eight dollars approximately); IV) specific sectors, regardless of the contract value (eg, services for garbage disposal)<sup>12</sup> and in all the other cases provided for by the anti-Mafia code. It is unlawful both for administrative agencies and for enterprises, under penalty of nullifying their acts, the execution of contracts, concessions and disbursements in order to violate the application of the Art 91.<sup>13</sup>

After the receiving of the request from the contracting authority, the

subsidized loans and other disbursements of the same type, however denominated, granted or disbursed by the State, other public bodies or the European Union, for the performance of business activities; h) licences for the possession and carrying of weapons, the manufacture, storage, sale and transport of explosive materials.

<sup>8</sup> The Prefecture-Territorial Government Office (*Prefettura-Ufficio Territoriale del Governo*) is the local administrative office presents in each Province and representing the Italian Government. It directly depends from the Italian Ministry of the Interior that, differently from the US Department of the Interior, is the executive office of the Government responsible for the management of public order, national public security, immigration, asylum, citizenship, elections and other civil rights. The Prefect (*Prefetto*) is the head of the administrative office in every Prefecture.

<sup>9</sup> See Art 67 of the Anti-Mafia Code with regard to the causes of forfeiture, suspension or prohibition identified as circumstances for which a person has been subjected to the application of a definitive measure of prevention provided by the Italian Penal Code.

<sup>10</sup> Art 83 paras 1 and 2 and Art 91 para 4 of the Anti-Mafia Code. Note that according to Art 83 para 3, the anti-Mafia information is not required in some specific cases (eg, when contracts are stipulated between public authorities, for contracts between public authorities and other private subjects that have specific requirement of good conduct) also, it is not required for contracts with a value below one hundred and fifty thousand euros (one hundred and seventy thousand dollars approximately) (Art 91 para 1 letter a) and c)).

<sup>11</sup> For these aspects see decretolegislativo 18 April 2016 no 150 (Code for Public Contracts) and the European Parliament and Council Directives 2014/23/UE, 2014/24/UE and 2014/25/UE.

<sup>12</sup> These sectors involve sensitive activities to Mafia and organized crime infiltration and they are indicated by the Art 4-bis of the decretolegge 8 April 2020 no 23, as converted into legge 5 June 2020 no 40. Sensitive activities were initially provided by the legge 6 November 2012 no 190 (a law for preventing and repressing corruption and illegality within the public administration).

<sup>13</sup> Art 91 para 2 of the Anti-Mafia Code.

competent Prefect must consult the national anti-Mafia database and extend the investigation to the subjects – internal or external to the corporate entities engaged in negotiation – which appear to be able to determine the policies of the company. In doing so, the Prefect is supported by a special anti-Mafia law enforcement group, which represents all the law enforcement agencies that operate in the province where the Prefecture has its jurisdiction: the investigative anti-Mafia group (*gruppo investigativo anti-Mafia* or *GIA*).

The Prefect can have evidence of the Mafia infiltration from specific elements indicated by the Anti-Mafia Code.<sup>14</sup> Alternatively, the Prefect may obtain that evidence as a result of general investigations ordered by the Prefect making use of the *access powers* delegated by the Minister of the Interior: in fact, the Prefect can undertake investigations similar to criminal ones.

At the end of the procedure, there are two possibilities: (1) the Prefect can issue a ‘positive anti-Mafia information’ (*informazione anti-Mafia liberatoria*) if there are no elements to attest that there are causes of forfeiture, suspension, prohibition and/or attempts at Mafia infiltration,<sup>15</sup> (2) the Prefect can evidence the presence of elements to issue a ‘negative anti-Mafia information’ or ‘anti-Mafia interdiction’ (*informazione anti-Mafia interdittiva*). Prior to November 2021, the Prefect could directly adopt the negative anti-Mafia information; however, as of 6 November 2021, the Government has adopted<sup>16</sup> the decreto legge no 152/2021 relating to ‘Urgent provisions for the implementation of the National Recovery and Resilience Plan (NRRP)<sup>17</sup> and for the prevention of Mafia infiltration’. Arts from 47 to 49 of the decreto legge, which amend the Anti-Mafia Code, aim at solve some critical issues through the development of some judicial opinions in two main ways: (1) by introducing the concept of *due process* into the administrative procedures, and (2) by developing a third

<sup>14</sup> According to Art 84 para 4 and Art 91 para 6, the following elements are considered evidence of Mafia infiltration: a) convictions for offences related to organized crime eventually with the presence also of concrete elements from which it appears that the business activity can, even indirectly, facilitate criminal activities or be in some way conditioned by them (note that it’s not required a final conviction); b) repeated violations (within a five-year period) of the obligation to conduct traceable financial transactions; c) the imposition of pre-trial measures or convictions for some specific offences indicated by the Italian Criminal Code and by the Italian Criminal Procedure Code (eg, extortion, fraud, money laundering etc.); d) proposal or imposition of personal or patrimonial preventive measures; e) replacement of the relevant subjects in an enterprise with family members of person subject to preventive measures or prior convictions; f) failure to report specific serious offences (eg, bribery and extortion in favour of Mafia association), by subjects indicated by the Italian Code of Public Contracts (n 12 above).

<sup>15</sup> Art 92 para 1 of the Anti-Mafia Code.

<sup>16</sup> The decreto legge was converted into law by the Italian Parliament with the *legge* 29 December 2021 no 233. About the distinction between legge and decreto legge, n 2 above.

<sup>17</sup> The National Recovery and Resilience Plan (*Piano Nazionale di Ripresa e Resilienza*, PNRR) is part of the Next Generation EU (NGEU) programme, namely the seven hundred and fifty billion package that the European Union negotiated in response to the *Covid-19* pandemic crisis. More information about the European Union programme are available at [https://europa.eu/next-generation-eu/index\\_en](https://europa.eu/next-generation-eu/index_en) (last visited 31 December 2022).

‘pathway’ between a positive and a negative anti-Mafia information.

Before the decreto legge no 152/2021, the Anti-Mafia Code only contained the possibility for the CEO of the enterprise to participate in the anti-Mafia procedure,<sup>18</sup> while now, according to Art 48 of the law-decree, the Prefect, must give timely communication to the enterprise indicating the symptomatic elements about the infiltration every time the Prefect believes the presence of elements to issuing a negative anti-Mafia information.<sup>19</sup> To the enterprise it is then given a period of twenty days to produce written observations or to request a hearing. At the end of the procedure, the Prefect can (1) release the positive anti-Mafia information if the Prefect considers that the critical issues have been overcome by the documents or during the hearing, (2) release the negative anti-Mafia information, (3) arrange the application of the new ‘collaborative prevention’ (*prevenzione collaborativa*) which is the new pathway introduced by the law-decree no 152/2021.

If a negative anti-Mafia information is released, according to Article 94 of the Anti-Mafia Code, contracting authorities cannot stipulate, approve or authorize contracts or subcontracts or authorize, issue or otherwise allow concessions and disbursements with the recipient company to which the information is addressed. In fact, the company is excluded from the possibility of having contractual relations with Italian administrative agencies due to the legal incapacity determined by the negative anti-Mafia information.

Otherwise, as alternatives introduced by the decreto legge no 152/2021, the Prefect can arrange the application of the collaborative prevention if the attempt

<sup>18</sup> Personal hearings of the subject interested were provided only if the Prefect had deemed them useful. Even if for years administrative judges reiterated that the preventive purpose underlying the release of the negative anti-Mafia information ‘may lead to a mitigation - if not an elimination - of the procedural contradictory’ (ie, *procedural due process*) (Consiglio di Stato 31 January 2020 no 820, [www.giustiziamministrativa.it](http://www.giustiziamministrativa.it); Consiglio di Stato 6 May 2020 no 2854, [www.giustiziamministrativa.it](http://www.giustiziamministrativa.it)), lately, the Consiglio di Stato itself has called, for a partial recovery of the procedural guarantees and in a *de jure condendo* perspective, in the participation of the private individual in the procedure leading to the adoption of the measure in question (Consiglio di Stato 10 August 2020 no 4979, [www.giustiziamministrativa.it](http://www.giustiziamministrativa.it)). See also, on this last aspect, the annual report on the activity of administrative justice of the President of the Council of State, (2 February 2021), available at <https://tinyurl.com/bdcst9s2> (last visited 31 December 2022). This *turning point* of the administrative judge also incorporates what was highlighted by the Italian Constitutional Court with a view to enhancing the centrality of participation in the procedure understood as an instrumental principle to the knowability and transparency of administrative action (Corte Costituzionale 19 May 2020 no 116). The explained roots of the new collaborative prevention are highlighted in the Parliamentary report about the *decreto-legge* 6 November 2021 no 152, available at <https://tinyurl.com/yr23ytdj> (last visited 31 December 2022), at 273-275.

<sup>19</sup> According to Art 48 para 1 of the decreto legge 6 November 2021 no 152 that amends Art 92 of the Anti-Mafia Code, the Prefect can override the *due process* in the procedure only (1) if there are particular requirements of speed of the procedure, or (2) if there are information elements whose disclosure is capable of prejudicing administrative proceedings or ongoing procedural activities, or the outcome of other investigations aimed at preventing Mafia infiltration.



at Mafia infiltration is attributable to situations of occasional facilitation.<sup>20</sup> In this case, the Prefect can adopt one or more of the following measures: the Prefect can require the enterprise to adopt organizational measures that can remove or prevent the causes of Mafia-type infiltration;<sup>21</sup> the company can report obligation to the Prefecture's law enforcement group all the transactions with a value above seven thousand euros (eight thousand dollars approximately) or above other value, as determined by the Prefect and communicate every form of financing to the company from its members or from third parties and every contract of association in participation; or the Prefect can require the company to use for all the payments a bank account dedicated only to these financial operations, as provided by the rules for traceability of financial transactions.<sup>22</sup> During the period of the collaborative prevention, which can last from six to twelve months, the Prefect can also appoint up to three experts to carry out support functions aimed at implementing the collaborative prevention measures adopted. At the end of the period, if the Prefect agrees that the danger of Mafia infiltration has disappeared, the Prefect can release a positive anti-Mafia information. Otherwise, the Prefect will issue a negative anti-Mafia information, as described above.

### 1. Judicial Control: A Test for the Enterprise

If a company receives a negative anti-Mafia information, it can sue the Prefecture before a court and start an administrative trial.<sup>23</sup> Such an

<sup>20</sup> The 'occasionality' of the infiltration – which is different from a 'permanent' one – indicates episodic conduct, left without follow-up, which cannot integrate the concept of participation and that therefore would not render vain the measure of collaborative prevention of the Prefect or, as will be said later (below section II.1), of judicial control by the court competent for prevention measures. See Corte di Cassazione-Sezioni Unite 26 June 2019 no 46898, available at [www.dejure.it](http://www.dejure.it). For further information in the Italian literature see B. Frattasi and S. Gambacurta, *Il rilascio dell'informazione antimafia e La documentazione antimafia: tipologia e contenuto, Commento al codice antimafia* (Rimini: Maggioli editore, 2011); P. Marotta and P. Marotta, *Natura e limiti del potere amministrativo di prevenzione antimafia* (Milano: Giuffrè, 2021); F. Mazzacuva, 'La natura giuridica delle misure interdittive antimafia', in G. Amarelli and S. Damiani eds, *Le interdittive antimafia e le altre misure di contrasto alle infiltrazioni mafiose negli appalti pubblici* (Torino: Giappichelli, 2019); M. Mazzamuto, 'Profili di documentazione amministrativa antimafia' 3 *giustamm.it*, (2016).

<sup>21</sup> Art 49 of the decretolegge 6 November 2021 no 152 refers to the decretolegislativo 8 June 2001 no 231 relating to corporate liability and to the organizational model there provided. This latter law represents in some way in Italy the corresponding model of the vicarious liability for the US common law system.

<sup>22</sup> See Art 3 of the legge 13 August 2010, no 136 as amended by Art 6 of the legge 17 December 2010 no 271 concerning the traceability of financial flows imposing specific obligations for financial transactions and money movements.

<sup>23</sup> Italian Administrative trial begins before the Regional Administrative Trial (*Tribunali Amministrativi Regionali* or *TAR*) set in every Region and their sentences may be appealed before the Council of State (*Consiglio di Stato*): the judge of last resort for administrative trials in Italy which is set in Rome. As it is codified in Art 100 para 1 of the Italian Constitution 'The Council of State is a legal-administrative consultative body and it oversees the administration

administrative trial is the judicial instrument provided to the enterprise to demonstrate the absence of any kind of Mafia infiltration.

According to Art 34-*bis* para 6<sup>24</sup> of the anti-Mafia Code, companies that have appealed to the measures issued by the Prefect, can request the application of the ‘judicial control’ (*controllo giudiziario*) to the court competent for prevention measures.<sup>25</sup> After hearing the competent district prosecutor, the Prefect who adopted the negative anti-Mafia information and the representatives of the company, the court may accept the request if the Mafia infiltration is attributable to situations of occasional facilitation.<sup>26</sup> In this case, the court appoints a delegated judge and a judicial administrator, the latter with the task to support the administration of the company for a period between one to three years and to refer periodically, at least every month, the results of the control activity to the delegate judge, submitting also a final relation at the end of the judicial control.<sup>27</sup>

If a court establishes the judicial control in this manner, it also establishes the tasks of the judicial administrator and may impose a series of obligations to the company including, for example, particular obligations to not change the headquarters, company name, corporate purpose and the composition of the administrative, management and supervisory bodies; or to constantly inform the judicial administrator about the activities of the company; or to take any other initiative aimed at specifically preventing the risk of attempts at

of justice’ and according to Art 103 para 1 of the Italian Constitution ‘The Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration...’. Note that this administrative jurisdiction is different from the US administrative law judges that usually are internal bodies of the agencies and authorities with para-judicial functions in the context of the related proceedings. The Italian administrative code has been adopted with the decreto legislativo 2 July 2010 no 104.

<sup>24</sup> This Article is an amendment following the approval of the legge 17 October 2017 no 161 that modified the Anti-Mafia Code and other criminal and procedural criminal rules. Note that Italian legislation use latin terms such as ‘*bis*’, ‘*ter*’, ‘*quater*’ (ie, ‘second’, ‘third’, ‘fourth’ and so on), when there is an amendment within an existing law. In this way, Art 34-*bis* means that it is an amendment within Art 34 and Art 35 of the Italian anti-Mafia code.

<sup>25</sup> References in this case are to criminal courts different from the administrative ones. Generally, the civil and criminal process in Italy have a three-tiered system of justice: courts of first level and court of appeal in every Regions (where there is one or more Judiciary District) and the Court of Cassation (*Corte di Cassazione*), which is the judge of last resort, in Rome. Note also that according to Art 111 para 8 of the Italian Constitution ‘Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction’. The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law (Art 103 para 2 Italian Constitution).

<sup>26</sup> Note that the lawsuit before the trial court is an interdependent procedure with respect to the administrative one arising from the appeal to the Regional Administrative Trial for the negative anti-Mafia information (in this sense has stated Corte di Cassazione 22 March 2019 no 27856, available at [www.dejure.it](http://www.dejure.it)). For the concept of ‘occasionality’ of the Mafia infiltration see n 21 above.

<sup>27</sup> For an in-depth analysis on judicial control see A. G. Diana, *Il controllo giudiziario delle aziende* (Pisa: Pacini Giuridica, 2019).

infiltration or conditioning of the Mafia.<sup>28</sup>

The most important effect of the judicial control is that, during that period, the administrative trial will be suspended. In addition, the granting of the judicial control suspends all the effects of the negative anti-Mafia information,<sup>29</sup> thus allowing the company to contract with Italian administrative agencies (ie, public administration).

At the end of the period of judicial control, the administrative trial will restart and the company shall demonstrate, also using the final relation of the judicial administrator, that at the time when the negative anti-Mafia information was issued, there were no elements proving the Mafia infiltration obtaining, in this way, a sentence to repeal the negative anti-Mafia information.

As evidenced by the Italian courts, it is important to note that at the end of the period of judicial control, the non-existence of elements that can lead to the attestation of a current infiltrative risk as deduced by the judge, does not allow at the same time the judge to deduce the illegitimacy of the negative anti-Mafia information previously provided.<sup>30</sup>

Furthermore, both during the administrative process and during the judicial control or after its end, the Prefect, himself or on the documented request of the interested party, has to update the outcome of the information to confirm the disappearance of the circumstances relevant for the adoption of the negative anti-Mafia information. Such as affirmed by Italian administrative judges, the updating of a negative anti-Mafia information is possible only in the event of the presence of different and additional facts that confirm the disappearance of the dangerous Mafia-type situation. In practice, the disappearance of the relevant circumstances that had led to the adoption of the measure does not simply depend on the passage of time, in itself, but on the arrival of different or contrary objective elements that make unnecessary its adoption.<sup>31</sup>

<sup>28</sup> All these measures are provided by Art 34-*bis* paras 2 and 3 of the Anti-Mafia Code.

<sup>29</sup> Art 34-*bis* para 7 of the Anti-Mafia Code.

<sup>30</sup> *Ex multis* Consiglio di Stato 11 January 2021 no 319, [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it). About what seems a *probatio diabolica* in the updating of a negative anti-Mafia information by the Prefect and about its hidden economic life imprisonment effect, see G. Amarelli, 'Le interdittive anti-Mafia: generiche tra interpretazione tassativizzante e dubbi di incostituzionalità', in G. Amarelli and S. Damiani eds, *Le interdittive antimafia e le altre misure di contrasto alle infiltrazioni mafiose negli appalti pubblici* (Torino: Giappichelli, 2019), 207. See also M.D. Florio, 'Brevi considerazioni sui rapporti nel diritto vivente tra interdittiva prefettizia e controllo giudiziario volontario nell'impresa in odor di Mafia' *lalegislazionepenale.eu*, 15 March 2021; A. Manna, *Misure di prevenzione e diritto penale: una relazione difficile* (Pisa: Pisa University Press, 2019); C. Visconti, 'Il controllo giudiziario "volontario": una moderna 'messa alla prova' aziendale per una tutela recuperatoria contro le infiltrazioni mafiose' *archiviodpc.dirittopenaleuomo.org* (2019); Id, 'Proposte per recidere il nodo mafie-imprese' *archiviodpc.dirittopenaleuomo.org* (2013).

<sup>31</sup> Art 91 para 5 of the Anti-Mafia Code is about the updating process of a negative anti-Mafia information. See also Consiglio di Stato 30 October 2018 no 4620, Consiglio di Stato 9 April 2019 no 2324, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it). In this way even if according to Art 86 para 2 of the Anti-Mafia Code and anti-Mafia information is it valid for one year, in

## 2. Burden of Proof & Preponderance of Evidence vs Reasonable Doubt

After this overview about these two important instruments that can strongly affect the life of a company, it is now important to reflect upon the burden of proof and how it concretely operates comparing the administrative trial issued by a negative anti-Mafia information and the criminal trial issued by a petition to obtain the judicial control of the corporate.

The measure adopted by the Prefect, which consists of attesting whether any attempts at Mafia infiltration tending to condition the policies of the enterprise, is not based on certain data, but on a probabilistic assessment based on serious, precise and concordant indications. The scope of the measure is not of an afflictive nature, but aims at preventing the Mafia or in general organized crime from penetrating and infiltrating the legal economy.<sup>32</sup> The Prefect's powers to access and discretion must in fact lead to confirm the infiltration of organized crime, since they do not have to provide either proof that Mafia infiltration is taking place, or to what extent infiltration conditions the company's choices. In sum, the predicate acts of the Prefect need not to be established beyond a reasonable doubt and the consequences of a finding of liability are not identical to consequences of a criminal conviction. Thus, the Prefect must only show that the predicate acts are more likely to be true than not true, and that the *preponderance of the evidence* standard of proof (ie, balance of probabilities) is essentially met if there is a greater than fifty percent chance that the Prefect's findings are true.<sup>33</sup>

the case of issuing of a negative anti-Mafia information the expiry of the annual period should not be attributed the effect of automatically determining the loss of effectiveness of the interdiction, but that of legitimizing the person prohibited to submit an application aimed at requesting the review of the measure itself, in the light of elements such as to justify the re-evaluation by the Prefecture of the relative conditions Consiglio di Stato 13 December 2021 no 8309, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), Consiglio di Stato 21 January 2019 no 515, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it)).

<sup>32</sup> Consiglio di Stato 18 April 2018 no 2343, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>33</sup> About the discretion attributing to the the Prefect see F. G. Scoca, 'Le interdittive anti-Mafia e la razionalità, la ragionevolezza e la costituzionalità della lotta 'anticipata' alla criminalità organizzata' 6 *giustamm.it*, (2018). For the author of the contribution, the anti-Mafia information consists of an attestation that is an act of knowledge (or judgment), concerning any attempts at Mafia infiltration in the governance of the company. In this perspective, the preponderance of the evidence standard formulated and supported by established case-law, recalls concepts of evidence, of demonstration, more or less full, of truth that excludes genuinely discretionary assessments that is, of expediency with this implying that the evaluation of the Prefect, although certainly questionable and subjective would not be discretionary as it pertains to the knowledge of the facts, to the determination of their circumstantial value, and to the proof (even if not full and not constituting the rank of criminal evidence) of the possibility that an imprint may be exposed to infiltration by organized crime. Therefore, it is the exercise of a constrained and non-discretionary power. Differently see Consiglio di Stato 31 January 2020 no 820, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), which qualifies anti-Mafia information as a 'measure never bound but by its very nature discretionary' (citing also Consiglio di Stato 29

As stated by the Italian Council of State (*Consiglio di Stato*), requiring such a demonstration, analogous to the evidentiary standard required for criminal prosecution, would imply a series of investigations and reasoning clearly incompatible with the effective and immediate operation of the instrument in question. The main scope is to anticipate the threshold of social defence, ensuring in this way advanced protection in the field of combating criminal activities. Any attempts at Mafia infiltration and the tendency of these to influence the management of the company are all notions that outline a case of danger, proper to the Italian law of prevention, aimed, in fact, at preventing an event that, by the same choice of the legislator, is not necessarily current, but also only potential. In this way, the Italian administrative law of anti-Mafia prevention does not sanction facts, criminally relevant, nor represses illicit conduct, but aims at avoiding a threat to public security, Mafia infiltration in business activity, and the probability that such an event will occur.<sup>34</sup>

In fact, the discretion accorded to the Prefect allows him to assess the risk that the business activity may be subject to Mafia infiltration, in a concrete and current way, even on the basis of judgments of acquittal if there are any relevant information about the conduct of the people involved in the company. Also, the Prefect can take into account family relationships, anomalous events in the formal structure of the enterprise or anomalous events in the concrete management of the enterprise. Or they can be relevant corporate co-interests and/or frequentations with criminal subjects that – in their overall assessment and not singularly – are such as to establish a judgment of probability that the business activity is able, even indirectly, to facilitate the commercial activities of crime or to be in some way conditioned by it.<sup>35</sup>

The only limits provided by the Italian State Council are within a balancing operation that the Prefect shall follow between opposing constitutional values. The freedom of enterprise, on the one hand, and the equally indispensable, vital, interest of the State in countering the danger of the Mafia on the other hand.<sup>36</sup>

On the contrary, the proceedings to obtain the judicial control before a trial court are subjected to the general rules of criminal law. The prosecutor must

February 2016 no 868, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it)) and Consiglio di Stato 26 September 2017 no 4483, also available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it). About the discretion of the power of the Prefect see J. Colmaedici, 'Le interdittive anti-Mafia: tra discrezione e arbitrio' *Rassegna dell'Arma dei Carabinieri*, II, 111, 114-115 (2019).

<sup>34</sup> Consiglio di Stato 30 January 2019 no 758 citing Consiglio di Stato 3 May 2016 no 1743, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>35</sup> Consiglio di Stato 13 August 2018 no 4938 and Consiglio di Stato 9 October 2018 no 5784, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>36</sup> About the action of the Prefect that must operate a concrete balance between opposing constitutionally protected values: the freedom of enterprise on the one hand and the indispensable, vital, interest of the State in countering the pitfall of the Mafia on the other, see Consiglio di Stato 5 September 2019 no 6105, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

produce evidence to prove beyond any reasonable doubt (ie, BARD) that the enterprise does not qualify to apply for a judicial control, and thus cannot obtain the law's benefit because the Mafia infiltration does not qualify as occasional but that it is stable.<sup>37</sup>

In sum, although for a negative anti-Mafia information, the Prefect shall prove that the Mafia infiltration is more likely to be true than not true and the burden of proof before the administrative trial is on the company, in the criminal trial, the prosecutor will have the burden of proof to prove, using the BARD standard, that the company request is unfounded.

### III. US Civil RICO

Civil RICO should also be examined in comparison with the remedies provided by the Italian law. The main purpose of the RICO is to eradicate organized crime in the United States by strengthening the legal tools in the evidence-gathering process, establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.<sup>38</sup>

More specifically, RICO seeks to punish (1) a person who commits repeated 'predicate acts' constituting a 'pattern of racketeering activity'<sup>39</sup> when (2) those acts involve an entity known as an enterprise in the manner specified by the statute and how it will be best analysed below section III.2.<sup>40</sup> A conviction under criminal liability may lead to up to twenty years' imprisonment, fines and

<sup>37</sup> Art 533 para 1 of the Italian Criminal Procedure Code provides that the criminal judge pronounces a sentence of conviction if the accused party is proved to be guilty beyond any reasonable doubt. See also Corte di Cassazione 21 April 2010 no 19933, available at [www.dejure.it](http://www.dejure.it).

<sup>38</sup> Congressional statement of finding and purpose. Pub. L. 91-452, §1, Oct. 15, 1970, 84 Stat. 922, available at <https://tinyurl.com/5n9bydbx>.

<sup>39</sup> In sum, the racketeering activity is constituted by some predicate acts that involve both federal and state law. 18 USC § 1961 (1) includes both felonies under state law and federal felonies with a list of federal crimes such as mail and wire fraud, obstruction of justice, forgery or false use of passport, extortion and money laundering and 'any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter... which is chargeable under the State law and punishable by imprisonment for more than one year'.

<sup>40</sup> According to 18 USC § 1962, to state a claim under RICO the government shall prove that (1) the RICO enterprise existed and that (2) the defendant committed two or more predicate acts (18 USC § 1961 (1)). The attorney general must also prove that (3) the commission of the predicate acts constituted a pattern of racketeering activity whose pattern (4) affected interstate commerce, or the enterprise engaged into interstate or foreign commerce and that (5) the defendant committed one of the substantive crimes provided: (i) invested in or operated an enterprise with money obtained through a pattern of racketeering activity (18 USC § 1962 (a)); (ii) acquired an interest or maintained control over an enterprise through the pattern of racketeering activity (18 USC § 1962 (b)); (iii) conducted the affairs of an enterprise through the pattern of racketeering activity (18 USC § 1962 (c)); or (iiii) conspired to violate any of the provisions of (i)–(iii) (18 USC § 1962 (d)).

forfeiture.<sup>41</sup>

The main purpose of this section is to focus on RICO's civil liability under 18 USC §1964, which gives to the Attorney General the general power to institute proceedings before the district courts of the United States in order to prevent and restrain violations of section 1962.<sup>42</sup> Even if the list of the restraining orders or prohibitions that courts may adopt is non-exhaustive, there are some similarities with the dispositions provided into the Italian Anti-Mafia Code.

For example, RICO order of imposing reasonable restrictions on the future activities or investment of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavour as the enterprise engaged in, the activities of which affect interstate or foreign commerce is something comparable with the obligations of the enterprise admitted to the judicial control, as described above section II.1 after the adoption of a negative anti-Mafia information. The order provided by RICO is also similar to the general measures that the Prefect can adopt within the collaborative prevention introduced by the *decreto legge* no 152/2021.

Furthermore, the power attributed by the US legislation to the judge to appoint one or more trustee, is similar to the figure of the judicial administrator according the judicial control to the enterprise or to the experts appointed within the collaborative prevention by the Italian law.

Otherwise, there are more penetrating powers that are able to determine 'the life and the death' of the enterprise when section 1964 provides the possibility to issue decisions to order any person to divest himself of any interest, direct or indirect, in any enterprise and to ordering dissolution or reorganization of any enterprise.<sup>43</sup>

<sup>41</sup> Chapter 96 of the title 18 of the United States Code (paras 1961-1969) is popularly known as the Racketeer Influenced and Corrupt Organizations Act (RICO). Civil remedies are provided within 18 USC para 1964.

<sup>42</sup> According to 18 USC §1964 (a): 'The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavour as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons'. Also, according to 18 USC §1964 (b): 'The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper'.

<sup>43</sup> On the contrary, one of the orders that Italian courts can establish with the admission to the judicial control is not to change the headquarters, company name, the corporate purpose and the composition of the administrative, management and supervisory bodies (Art 34-*bis* para 3 (a) of the Anti-Mafia Code). However, if the Mafia infiltration is not attributable to situations of occasional facilitation but to a stable infiltration where the business and the criminal interests are more stable to converge, the aims of judicial control would be frustrated

The most powerful instrument provided by the American legislation is, however, the RICO treble-damage provision, according to which ‘any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee’.<sup>44</sup> According to US case law, a cause of action does not accrue under civil RICO until the amount of damages, that the plaintiff has sustained in business or property caused by the RICO violation becomes clear and definite.<sup>45</sup> Furthermore, a civil plaintiff must show that the RICO offense was both a ‘but for’ cause and a ‘proximate cause’ of injury: although even if the first requirement is met, proving that the damage would not have occurred without the necessary cause as a negligent act, the proximate cause requires some direct relation between the injury asserted and the injurious conduct alleged, and cannot rest on a link that is too remote, purely contingent, or indirect.<sup>46</sup>

As required by the Italian anti-Mafia information model – yet different from the RICO criminal penalties<sup>47</sup> – predicate acts under civil RICO need not be established beyond a reasonable doubt. The fact that offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of finding liability in a private civil action are identical to the consequences of a criminal conviction.<sup>48</sup> Thus, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be convicted.<sup>49</sup>

Although the Italian Anti-Mafia Code does not have this particular relief

(see Tribunale di Catanzaro, no 14/2018, available at [www.dejure.it](http://www.dejure.it)) and the court, according to Art 34 of the Anti-Mafia Code shall adopt the different measure of the Judicial Administration characterised by a *manager dispossession* with all the corporate governance substituted (and not simply supported as sets for the judicial control) by the judicial administrator. About the concept of occasional facilitation see n 21 above.

<sup>44</sup> 18 USC §1964 (c).

<sup>45</sup> See *City of NY v Fedex Ground Package System, Inc.*, 175 F.Supp.3d 351, 369 (SDNY 2016) [citing *Sky Med. Supply Inc. v SCS Support Claims Servs., Inc.* 17 F.Supp.3d 207, 231 (EDNY 2014) and *DLJ Mortgage Capital, Inc. v Kontogiannis*, 726 F.Supp.2d 225, 236 (EDNY 2010)].

<sup>46</sup> *Ibid* 370 citing *Hemi Grp., LLC v City of New York*, 559 US 1, 9, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010). About proximate-causation standards test see *Holmes v Securities Investor Protection Corp.*, 503 US 258, 268 (1992) where the Court defined the test to require ‘some direct relation between the injury asserted and the injurious conduct alleged’.

<sup>47</sup> 18 USC §1963.

<sup>48</sup> *Sedima, SPRL v Imrex Co., Inc.*, 473 US 479, 105 S.Ct. 3275, 3281-3282 (1985) citing *United States v. Ward*, 448 US, at 248-251, 100 S.Ct., at 2641-2642. In *Sedima* the Supreme Court stated that there is ‘no support in the statute’s history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964 (c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indications [of the statute] is that no such requirement exists’.

<sup>49</sup> About RICO preponderance of the evidence standard of proof see also H.S. Simonoff and T.M. Lieverman, ‘The RICO-ization of Federal Labor Law: An Argument for Broad Preemption’, 8 *The Labor Lawyer*, 335, 340 (1992).



within its measures, similar provisions – even if not exactly like a treble-damage – may be found in Article 2043 of the Italian Civil Code. Synthetically: this rule introduces the so called non-contractual liability (or *aquilana*)<sup>50</sup> that arises when a subject suffers damage from the conduct of others and when there is no mandatory relationship between them (ie, contract). According to the Italian law this, (1) any intentional or negligent act (2) which causes an unjust damage to others (3) obliges the person who committed the act to correct the damage caused.

### 1. Rico and Labour Unions

An area that best shows some similarities between the RICO civil remedies and the Italian judicial control (above section II.1) is the labour law and, in particular, the attempt of organized crime to infiltrate business through labour unions. A starting point for this took place in 1986<sup>51</sup> when the Provenzano group, within the broader Genovese Cosa Nostra Family,<sup>52</sup> sought to take control and making use of the Local 560 for both legal and illegal profit. The Provenzano group, whose leader was Anthony Provenzano, is the textbook example of the ‘creation and the use of a climate of fear and intimidation to extort union members’ rights’.<sup>53</sup> According to federal reports, in June 1961, Teamsters Local 560 Secretary-Treasurer Anthony Castellito, then one of the most popular members of Local 560 and considered by Anthony Provenzano to be a serious threat to his control over Local 560,<sup>54</sup> was murdered.

Next, in May 1963, Walter Glockner, who had spoken out at a Local 560 membership meeting in opposition to a Provenzano Group proposal,<sup>55</sup> was murdered the day after his speech. Even if the record did not support the conclusion that the Provenzano group had these union members killed, it was

<sup>50</sup> Non-contractual liability is also called *aquiliana* from the name of the Roman law - *Lex Aquilia de damno* - that first regulated the ex delicto responsibility (286 BC, possibly).

<sup>51</sup> *United States v Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 282 (DNJ 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 US 1140 (1986).

<sup>52</sup> The Genovese crime family is one of the ‘Five families’ that with Bonanno, Colombo, Gambino and Lucchese crime families represents the Italian-American Mafia who controls organized crime activities in New York City after the so called ‘Castellamarese War’ (1930-1931) that saw the mobster Salvatore Maranzano declaring himself as the ‘boss of all bosses’. The Genovese crime family in particular is the organization who directs criminal affairs in New York City and New Jersey. More about the mob organized crime in US is available at <https://tinyurl.com/4rf9jp4f> (last visited 31 December 2022). In *Local 560*, at 285 had been ascertained that Provenzano group had association with the Genovese crime family.

<sup>53</sup> S.T. Ieronimo, ‘RICO: Is it a Panacea or a Bitter Pill for Labor Unions, Union Democracy and Collective Bargaining?’ 11 *Hofstra Labor and Employment Law Journal*, 499, 516 (1994) quoting R. M. Mastro, et al, ‘Private Plaintiffs’ Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions’, 24 *University of Michigan Journal of Law Reform*, 571, 601 (1983).

<sup>54</sup> n 53 above.

<sup>55</sup> *ibid* 312.

found that the Provenzano group had utilized the perception that they had killed Castellito and Glockner to instil fear and to stifle opposition.<sup>56</sup> The government also alleged that Local 560 was an enterprise within the meaning of section 1961(4) and that individual defendants were associated under the leadership of Anthony Provenzano, that they were aided and abetted by past and present members of the Executive Board of Local 560, and that they conspired in violation of section 1962(d)<sup>57</sup> to violate section 1962(b)-(c).<sup>58</sup>

Judge Harold Ackerman ruled that the evidence supported a conclusion that Local 560 would remain a captive labour organization as long as the status quo would remain unchanged and that in order to prevent future racketeering violations by the Provenzano Group and its aiders and abettors, it was necessary to remove the current Executive Board members from their positions, appointing one or more trustees to administer the Local during a curative period of appropriate length in their place.<sup>59</sup>

Thus, under section 1964(a),<sup>60</sup> the government secured the removal of the Executive Board in favour of the appointment of Joel R. Jacobson as RICO trustee of Local 560 to administer the union during a curative period of eighteen months so that no adherent of the Provenzano Group would have been in a position to potentially undermine the efforts of the trustee.

Jacobson served to effectively dispel the atmosphere of intimidation within Local 560, to restore union democracy, and to ensure that racketeers did not obtain positions of trust within the Local 560. He also supervised the general elections of new officers for Local 560 in order to permit the members to express themselves without fear or apprehension.<sup>61</sup> With many difficulties in controlling the Local's organization and after that many shop stewards continued to show their loyalty to the Provenzano group, Jacobson was replaced by Edwin H. Stier, a cop and former Assistant United States Attorney and Director of the New Jersey State Division of Criminal Justice, with the main purpose of avoid for further participation people near the Provenzano group and leaving Local 560 conditions better than before the RICO trusteeship.<sup>62</sup>

<sup>56</sup> *ibid* 312.

<sup>57</sup> n 43 above.

<sup>58</sup> S.T. Ieronimo, 'RICO' n 54 above, 517.

<sup>59</sup> n 53 above 321.

<sup>60</sup> In Local 560 the relief is considered 'equitable and remedial in nature, not punitive', n 52 above, 328.

<sup>61</sup> *ibid* 326.

<sup>62</sup> For a more in-dept analysis about the under-estimation of the problem resulted in the 'Teamster for Liberty' campaign lead by Michael Sciarra and Joseph Sheridan (the latter a former vice-president of Local 560 before the enforcement of the RICO to the Local 560) see S.T. Ieronimo, 'RICO' n 54 above, 519, and M. J. Goldberg, 'Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement' 824 *Duke Law Journal*, 902, 969-970, 974 (1989). Note also that on June 1988 the government filed a civil RICO suit against the Teamsters (*United States v International Bhd. of Teamsters*, 708 F. Supp. 1388 (SDNY 1989)). This case still represents 'the boldest step taken under RICO in the labor arena, and perhaps the boldest

## 2. The Broader US Concept of Enterprise

It is also important to conduct a separate comparative analysis of the Italian AntiMafia Code and RICO Act concerning the subjective areas of application of the standard regarding the nature of the *enterprise*, which has a broader meaning in the United States statute.

The Italian AntiMafia Code provisions about the anti-Mafia information only applies to legal entities legally recognized as companies under Italian law. The definition of the Italian entrepreneur (*imprenditore*) is set by Art 2082 of Civil Code as ‘one who undertakes professionally an economic activity, organized to produce or to exchange goods or services’: the entrepreneur can undertake this activity individually (*libero professionista* or *ditta inviduale*), or within a company, pursuant to Art 2247, which states that a company is formed by an agreement (*contratto di società*) by which ‘two or more persons confer goods or services for the mutual performance of an economic activity with the purpose of sharing the profits’. Italian companies must also register into one of the Italian Chamber of Commerce, Industry, Craft and Agriculture registers utilized in every Italian Province.<sup>63</sup> It is relevant to note that what it is provided by the Italian AntiMafia Code can only apply to private entities and in some cases to public or private entities participating by the public administration within the private rules of the Italian Commercial Law.<sup>64</sup>

In contrast, under section 1961(4), an enterprise includes ‘any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity’. This definition covers two categories of associations. Although the first category is about organizations such as corporations and partnerships, and other ‘legal entities’, the latter category is referred to as an ‘association-in-fact’ enterprise that is not recognized as a legal entity and that is simply a continuing unit that

step taken under RICO in any context’ (the quote is from K.R. Wallentine, ‘A Leash Upon Labor: RICO Trusteeships on Labor Unions’ 7 *Hofstra Labor Law Journal*, 341, 345 (1990). This time – in a way very similar to the Italian judicial control – the court allowed defendants to remain in office until the next election and in return the Teamsters, according to §1964(b), agreed to be supported by three court officers to reorganize the International Brotherhood of Teamsters (IBT) governing structure and election process: an administrator who shared power equally with Teamsters’ president governing the union, an investigative officer to investigate possible corruptive phenomena and an election officer with the full authority to oversee the election process (S.T. Ieronimo, ‘RICO’ n 54 above, 523). In fact, RICO trusteeship would have had the merit to transform the corrupted IBT in one of the most democratic unions all over the country (S.T. Ieronimo, ‘RICO’ n 54 above, citing F. Swoboda, ‘The Teamsters’ New Face: Judge Leads Army of Federal Monitors to Union Convention to Keep Reforms on Track’ *The Washington Post*, 23 June 1991, H1).

<sup>63</sup> The Province is an Italian administrative division (it is something similar to the American division into counties.). They are 107 (such as the Province of Rome, the Province of Florence etc..) and in every Province there is a Prefecture (n 9 above).

<sup>64</sup> The Italian Civil Code of 1942 is the principal source of legislation on companies and partnership. Companies are regulated by Title V of Book V of the Civil Code (Arts 2247-2641).

functions with a common purpose and must to have at least three structural features: (1) a purpose, (2) a relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose.<sup>65</sup> Therefore, as held by the Supreme Court, the term enterprise includes both legitimate and illegitimate enterprises.<sup>66</sup> In addition, according to the requirements to state a claim under civil RICO, the enterprise must be an entity separated and apart from the pattern of activity in which it engages and the existence of an enterprise must at all times remain a separate element, both of which must be proven by the Government.<sup>67</sup>

As evidenced by the present considerations there is no place in the Italian anti-Mafia Code for what it is a *de facto* association within the anti-Mafia information measures. Moreover, the meaning of enterprise can be traced back when Congress passed the RICO act, providing that the purpose of the association-in-fact was probably intended to apply directly to the Mafia due to its illegal organization as family members and group of individuals.<sup>68</sup> So, from a point of view related to tackle crime, the only similar instrument that it is provided by the Italian legislation consistent with an association-in-fact and with the main purpose of fighting Mafia is Art 416-*bis* of the Italian Penal Code, which punishes any person participating in, promoting, directing or organizing a Mafia-type unlawful association including three or more people;<sup>69</sup> however, as discussed above section II.2, the application of a criminal law rule clashes with the greater requirement of the standard of proof and the prosecutor must

<sup>65</sup> About the 'association-in-fact' see *Boyle v United States*, 556 US 938, 129 S.Ct. 2237, 2244-2246 (2019). Thus, an association-in-fact enterprise may be a group of individuals, or a group of corporations, or a group that includes both individuals and legal entities (*United States v Philip Morris USA, Inc.*, 566 F.3d 1095, 1111).

<sup>66</sup> In *Turkette* the US Supreme Court has held that 'there is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate and illegitimate enterprises' (*United States v Turkette*, 452 US 576, 584-585 (1981)). See also *RICO Guideline*, prepared by the Office of General Counsel, U.S. Sentencing Commission 6-7 (2018) available at <https://tinyurl.com/2s4cvaar> (last visited 31 December 2022).

<sup>67</sup> *ibid* 582-583. See also *Cedric Kushner Promotions v King* 533 US 158 (2001) citing *River City Markets, Inc. v Fleming Foods West, Inc.* 960 F.2d 1458, 1461 (9th Cir. 1992) for a more in-dept analysis about the relationship between the enterprise and the 'person' who conducts the enterprise even according to the common-law maxim that a person cannot conspire with himself. Note that to state a civil RICO claim the defendant must have participated 'in the operation or management of the enterprise' *Reves v Ernst & Young* 507, US 170, 185 (1993).

<sup>68</sup> J.E. Grell, *Enterprise*, available at <https://tinyurl.com/4r6k9yzm> (last visited 31 December 2022).

<sup>69</sup> According to Art 416-*bis*, para 3 of the Italian Penal Code, as amended in 1982, Mafia-type unlawful association is said to exist when the participants take advantage of the intimidating power of the association and of the resulting conditions of submission and silence to commit criminal offences, to manage or at all events control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for others, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for others on the occasion of an election. For the use of latin term like *bis*, see n 25 above.

produce evidence to prove criminal liability *beyond any reasonable doubt* (ie, BARD).

Also, the broader concept of enterprise under the RICO Act, without distinguishing between private and public entities has led to the involvement of state and local governmental agencies.<sup>70</sup>

#### IV. Conclusion

As shown by this analysis, the same purpose of undermining organized crime at its roots is very strong both in the Italian administrative model of anti-Mafia information and in the US civil RICO. Accordingly, both legal systems provide several tools to protect the legal economy from illicit influences. While the Italian model exists on an administrative level and the US one is based on civil level RICO, both systems' tools can be broadly entered within the concept of *matière pénale* as defined by the European Court of Human Rights (ECHR) for all those sanctioning reactions, variously named, endowed with an intrinsically punitive content.<sup>71</sup>

Three are the *Engel Criteria*<sup>72</sup> elaborated by the European Court of Human Rights, useful for qualifying an offence as a 'criminal charge': (1) the formal qualification that a State attributes to the violation of a rule, (2) the 'nature of the infringement', understood from the viewpoint of the consequences of the measures, and (3) the 'severity of the sanction that the accused is likely to suffer' to be understood as the severity of the sanction abstractly envisaged and not of the one actually inflicted.

In this way, it turns out to be hard not to put in discussion both what is provided by the Italian law for the anti-Mafia information, and what is provided in the context of civil remedies under the US RICO, in order to include them within the conceptual perimeter outlined by the ECHR jurisprudence.

In the past, the pre-RICO legislation, represented chiefly by the Hobbs Act (1946) that only applied against the person who committed crimes, not offering tools against bosses who commanded their performance, failed.<sup>73</sup>

Now it is undisputed that RICO is 'the most important substantive and

<sup>70</sup> The 5<sup>th</sup> Circuit held that the Macon Georgia Police Department was an enterprise for the purposes of the RICO (*United States v Brown* 555 F.2d 407 (1977)). Into a similar conclusion see also the qualification as an enterprise by the 3<sup>rd</sup> Circuit for Pennsylvania Bureau of Cigarette and Beverage Taxes (*United States v Frumento* 563 F.2d 1083 (1977)).

<sup>71</sup> C.E. Paliero, 'Materia penale' e illecito amministrativo secondo la Corte Europea dei Diritti dell'Uomo: una questione "classica" a una svolta radicale' *Rivista italiana di diritto e procedura penale*, 908 (1985), and Eur. Court H.R., *A e B v Norvegia*, Judgment of 15 November 2016 available at [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

<sup>72</sup> Eur. Court H.R., *Engel and Others v The Netherlands*, Judgment of 8 June 1976 available at [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

<sup>73</sup> B. Scotti, 'Rico vs. 416-bis' n 6 above, 147-149.

procedural tool in the history of organized crime control<sup>74</sup> intending to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.<sup>75</sup>

Likewise, it is also undisputed that, above all with the treble-damage provision,<sup>76</sup> now the mainly civil remedy used within section 1964, it has started to be abused and overused by plaintiffs and their attorneys.<sup>77</sup> This provision, instead of being used against mobsters and organized criminals, has led civil RICO to become a tool for every day fraud cases.<sup>78</sup>

The construction of the predicate acts both with federal and state felonies causes a ‘truly Herculean’<sup>79</sup> effort in its interpretation. In *Sedima*, the Supreme Court acknowledged that private civil actions under the statute were applied under circumstances non-specifically imagined by the Congress rather than against the archetypical, intimidating mobster. The Supreme Court stated that ‘this defect – if defect is – is inherent in the statute as written and its correction must lie with Congress’.<sup>80</sup> In this way, through the important broadest concept of enterprise that allows, also through the association-in-fact, to hit even the most evolved phenomena of organized crime, it would be desirable to use RICO civil actions in order to precisely target organised crime.<sup>81</sup> Nevertheless, the association-in-fact provided by US civil RICO could be a useful concept to incorporate within the Italian Anti-Mafia Code. Using the preponderance of the evidence standard of proof in this way and not by the BARD rule provided for the application of the criminal statutes of the Art 416-*bis* of the Italian Penal Code,<sup>82</sup> it could be a way to punish the most advanced forms of Mafia

<sup>74</sup> J.B. Jacobs et al, *Busting The Mob: United States v. Cosa Nostra* (New York: New York University Press, 1994), 4-5.

<sup>75</sup> *Russello v United States*, 464 US 16, 27 (1983).

<sup>76</sup> 18 USC §1964 (c).

<sup>77</sup> S.T. Ieronimo, ‘RICO’ n 54 above, 538.

<sup>78</sup> n 49 above, 3275.

<sup>79</sup> This is how the problem involving RICO interpretation has been called in S.J. Buffone and T.G. Reed, ‘Defending a CIVIL Rico Case: Motions, Defenses, Strategies & Tactics’ 155 *Practising Law Institute*, 323 (1990), available at <https://tinyurl.com/8v8uzxvz> (last visited 31 December 2022). In *Sedima* the court held that ‘RICO should be liberally construed to effectuate its remedial purposes’ (n 49 above, 3286). Also the New York Court of Appeals stated ‘there is little difference between State Judges interpreting Federal criminal law if the predicate act alleged is Federal law violation and the Federal Judges interpreting State criminal law if the predicate act alleged is a State law violation’ (*Simpson Elec. Corp. v Leucadia, Inc.*, 530 N.E.2d 860, 865 (NY 1988)).

<sup>80</sup> n 49 above, 3286-3287. The Supreme Court cited also the ABA record demonstrating that of at the time 270 known civil RICO cases at the trial court level only the 9% involved allegations of criminal activity of a type generally associated with professional criminals.

<sup>81</sup> Even not sharing the idea that ‘private civil RICO actions in the field of labour relations should be proscribed’ (S.T. Ieronimo, ‘RICO’ n 54 above, 544), dissenting opinion of Justice Powell in *Sedima* certainly should represent an important starting point through which the language of the statute should not be read broadly in every way and that ‘it is the duty of this Court to implement the unequivocal intention of Congress’.

<sup>82</sup> n 70 above.

infiltration within the legal economy.

On the other hand, the anti-Mafia information system of the Italian Anti-Mafia Code poses problems of coordination with similar measures provided for by Legislative Decree no 231/2000. Within the administrative liability for crime of entities there are also interdiction sanctions provided after being sentenced to certain serious crimes (ie, for the crime provided by the Art 416-*bis* of the Italian Penal Code) and similar tools to judicial control represented by the judicial commissioner of the company.<sup>83</sup>

For example, the application of an interdiction for the enterprise is envisaged, lasting from a minimum of three months to a maximum of two years, represented, in order of severity, by the prohibition from exercising the activity, by the suspension or revocation of authorizations, by the ban on contracting with the Italian administrative agencies or by the exclusion from concessions, loans, contributions or subsidies in addition to the revocation of those already granted. Also in this case, an enterprise can obtain a 'judicial commissioner' (*commissariamento giudiziale*) but in this case, the trustee by the judge does not work alongside the company but completely replaces the management bodies. Even in these measures, which are however adopted in criminal proceedings, the application of a criminal law rule clashes with the greater requirement of the standard of proof of the anti-Mafia information and the prosecutor must produce evidence to prove criminal liability beyond any reasonable doubt (ie, BARD).<sup>84</sup>

Moreover, analysing the great discretion granted to the Prefect under Italian law, it would be desirable to provide for more concrete elements, necessary to ascertain the effective permeability of the business system to the illicit interference of organized crime. This could be possible also in the light of recent Italian jurisprudential rulings that have seen the revocation of the measures adopted due to the insufficiency of the evidentiary framework<sup>85</sup> often linked even only, if not exclusively, to the blood relations of corporates administrators or entrepreneurs and on their frequentations that, even if linked by the bloodshed with people involved in the past into criminal affairs, are not univocally probing the criminal Mafia conditioning.<sup>86</sup>

<sup>83</sup> About the interaction between the Anti-Mafia Code (decretolegislativo 6 September 2011 no 159) and the administrative liability of entities dependent on crime (decretolegislativo 8 June 2001 no 231) see L. D. Favero and C. Corsaro, 'L'estensione delle misure di prevenzione patrimoniale ai reati comuni. Amministrazione giudiziaria e controllo giudiziario quali occasione per la predisposizione degli strumenti di organizzazione, gestione e controllo aziendale' 1-*bis* [www.giurisprudenzapenale.com](http://www.giurisprudenzapenale.com), 31 January 2021.

<sup>84</sup> See F. Viganò, 'Artt. 13 e 14', in A. Bernasconi, C. Fiorio and A. Presutti eds, *La responsabilità degli enti. Commento articolo per articolo al D.Legisl. 8 giugno 2001, n. 231* (Padova: CEDAM, 2008).

<sup>85</sup> Consiglio di Stato 2 November 2020 no 6754, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>86</sup> Differently, according to the last judicial opinions, it is legitimate the negative anti-Mafia information that is based on a single figure if a series of elements are concentrated

In this sense, the measure envisaged by the anti-Mafia Code should be adopted by the Prefect in compliance with the principle of proportionality that is a ‘condition of civilization of the administrative action’<sup>87</sup> and that is composed by the three criteria of the suitability, necessity and adequacy of the measure only in cases where any other instrument offered by the law to combat organized crime cannot be adopted.<sup>88</sup>

Finally, it should be noted that these legal tools act exclusively on one of the symptomatic manifestations of the disease, but do not cure the upstream disease represented by the rooting of organized crime in the socio-economic environment. For this treatment, there will continue to be a need for awareness of the important role played by the individual citizen who, in the imaginary football match between State and Anti-State, the latter represented by Mafia and organized crime associations, daily must decide for whom to cheer.

around it, such as the proximity with contraindicated subjects as well as, through these and through the figure of the cohabiting companion, the world of drug dealing, as well as the proximity to a local Mafia association (Consiglio di Stato 3 August 2021 no 5723 citing Consiglio di Stato 2 May 2019 no 2855).

<sup>87</sup> Consiglio di Stato 5 September 2019 no 6105, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>88</sup> The principle of proportionality, which as is well known has assumed importance in the European law and jurisprudence, has certainly acquired greater centrality in national Italian law, above all by virtue of the express reference to the principles of the European Union as disposed by Art 1 para 1 of the legge 7 August 1990 no 241 (Italian Administrative Procedure Act), as amended in 2005.