PREFACE

The influence of organised crime in the Balkan area, as is well known, has reached levels that have required a considerable acceleration in efforts to combat this phenomenon.

Albania is involved in many initiatives set up by the international community, which are matched by efforts at national level. In 2005, the Democratic Party achieved a decisive victory in the political elections with the support of its allies, making a commitment to reduce crime and corruption in the country. This victory, and more importantly the ordered transition of power which followed it, has been regarded at international level as an important step forward towards the confirmation of democracy.

Despite the active presence of organised criminal groups over the territorial area and the influence exercised by them in the country's already critical social and economic situation, Albania, recognising the need to bring its legislation up to date and to strengthen the institutions responsible for fighting crime, has moved with determination in the direction of reform.

With regard to bringing the legislation into line with international standards, we should remember that in 2002 Albania ratified the United Nations Convention against Trans National Organised Crime (UNTOC) and the relative additional protocols preventing the smuggling of migrants and trafficking of human beings. In February 2008 it also ratified the third and final protocol on arms trafficking. Since 1995, Albania has been a member country of the Council of Europe; in 2001 it became a member of the Group of States Against Corruption (GRECO) and in 2006 it also ratified the United Nations Convention Against Corruption (UNCAC).

The European Council Convention on Action against Trafficking in Human Beings and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime came into force in early 2008, both of which had been signed in 2007.

Against this background of important legislative changes, but also of rapid growth and continual transformation of transnational organised crime, the training activity carried out by UNICRI has responded to the need expressed by Albania to be able to benefit directly from the best international and Italian experience, posing as a first objective the need to respond more effectively, and in a coordinated manner, to the threat posed by organised crime.

This publication describes a training programme devised on the basis of the specific situation in Albania. The innovative approach adopted has made it possible to establish a close and effective

dialogue on each aspect, promoting the exchange of technical and practical experiences and encouraging constructive debate.

We believe that the distinguishing feature of our work is also to bring about effective and tangible results, not only in the training sector but also in other areas falling within our mandate. This feature is the capacity to act as interlocutors who are attentive and receptive towards the priority needs of a country in the sphere of justice reform, without ever putting forward pre-established models or adopting methods that are not solidly based on prior research and study in the areas in which our involvement has been requested.

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UNICRI – Seminar in Tirana, 15 March 2007

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1.1. International judicial cooperation and the creation of a common legal jurisdiction of security and justice. EU Charter of Fundamental Rights. European Charter of Human Rights

§ 1. *Community Law*

The subject that I have been given (legal jurisdiction and European justice) relates to one of the highest and most ambitious objectives of the European Union and of such a nature as to profoundly effect the constitutional arrangement of the Member States as well as the relationships currently existing between them and the European Union.

Common legal jurisdiction in fact means that one and the same civil or criminal law is brought into force in Europe, and not simply similar regulations introduced by individual countries.

Common legal jurisdiction means recognising immediately and automatically the value throughout Europe of a judgement or a judicial ruling issued by a judge in any Member Country whatsoever.

The real value of these propositions is revolutionary in comparison with the traditional system of international judicial collaboration: they overcome the traditional concepts and principles of collaboration that are still founded on relationships between states and therefore on the willingness of states to give reciprocal assistance in criminal matters.

This traditional system of assistance provides that two states, even with different legal, social and political traditions, decide to collaborate on particular subjects and for that purpose they enter into bi- or multi-lateral treaties which indicate the methods by which the collaboration is to be carried out, and without prejudice to all of the state prerogatives of sovereignty and sole jurisdiction. In criminal law, the two main methods of collaboration are the letter of request and extradition.

With the European treaties, there is now a firmly established sharing of principles of freedom, justice, security, human rights and the knowledge that these principles are truly guaranteed to all citizens in the geo-political area of Europe (Treaty of Maastricht – art. 6);

The European countries forming part of this new Union can therefore begin to overcome the traditional methods of collaboration between different States, being able to form the view that judicial collaboration now takes place within a new entity and therefore with procedures that take accout of the different political reality.

This objective, which has not yet been completely achieved, has gradually been identified as the new European Community was able to achieve further goals and to become aware of new requirements and needs in order to tackle new challenges. One of these was, and is, that of transnational organised crime.

§ 2. *Transnational organised crime*

Organised crime has been radically modified over recent years. Alongside what we can call traditional organised crime, because it is rooted in a certain area with branches and contacts with other organisations (the Sicilian mafia, the Colombian cartels and other similar organisations) there is what is now called Transnational Organised Crime. This is formed by groups of people from various different countries, of different ethnic backgrounds, brought together no longer by common origin but rather by a common interest and who operate in several countries at the same time.

Such groups operate in the vast area that spreads from Albania and the Balkans, throughout Central Eastern Europe and to Russia. All illegal traffic managed by organised crime passes in this way – drugs, weapons, human trafficking, illegal immigration, stolen cars, laundering of money of illegal origin, strategic assets such as energy resources and still more. In the same area there is also crime of oriental origin, which finds support that I will describe below. Drug smuggling, human trafficking and illegal immigration are, as is well known, at the top of the list of profits earned by organised crime.

So far as drugs is concerned, Albania is today one of the major terminals in the routes for heroin and cocaine; Poland is among the main world producers of synthetic drugs, and in particular methamphetamine; the Balkan route, after the end of the war in that region, has been reactivated in three subdivisions: the north (which passes through Ukraine, Romania and Hungary); the classic central area (which from Turkey passes through Bulgaria, Serbia, Croatia and Slovenia) and the south (which through Turkey and Greece reaches Italy by sea).

Europol estimates that each year 250 tons of cocaine are transported from countries along the Andes towards Europe by sea or air, and the main arrival points are in Western Europe (Spain, Holland,

Italy, Great Britain) as well as Central-Eastern Europe and Albania, awaiting distribution among the various EU countries.[1]

With regard to human trafficking, surveys show that this is similar to drug trafficking in a certain way; the criminal activity begins in the country of origin of the victim, (usually in an Eastern country), it proceeds into other Countries where the woman is sold to other criminal organisations and subjected to physical and psychological violence (country of transit); it is completed in the country of destination (Western European country) where she is forced into prostitution or other labour.

Thus it had become apparent that the phenomenon of organised crime had reached alarming dimensions and that it had become so well integrated into the organisational structures of many countries that it had become a serious risk for the very security of these countries; this meant that the risk concerned society in general and therefore that the campaign against such a risk was no longer the responsibility of individual countries but of the EU itself.

The fight against organised crime therefore became a political as well as a technical and legal problem to the extent in which the Union placed it among the objectives to be pursued through its own organs.

§ 3. *Constitutive treaties and community documents in relation to crime*

The beginning of this new policy can be found in the Treaty of Maastricht (7 February 1992). Article K 1 establishes, for the first time, that for the purposes of achieving the objectives of the Union, the members states shall consider as questions of common interest, among others, judicial cooperation in civil and criminal matters, police cooperation against terrorism, illegal drug smuggling and other serious forms of organised crime.

Many subsequent documents, and in particular with its Recommendations and Resolutions, the EU encourages member countries to harmonise their national legislations in order to achieve the joint objective.

The Action Plan against organised crime of 28 April 1997, after recalling the urgency and political importance that Heads of State and Heads of Government have placed upon the question of the fight against organised crime, indicates various areas in which harmonisation must be carried out and

[1] *Overview of the cocaine problem in the E.U. Report presented by Europol to the meeting of the Horizontal Working Party on Drugs, in Brussels on 16/01/2006.*

invites countries to take account of the work carried out on this matter by the EU itself and of various international gatherings (ONU, Interpol, GAFI), and to work in collaboration with countries which are candidates for entry into the Union, or with others such as Russia and the Ukraine.

In these statements the European intention is clearly to widened the area in which decisions on judicial policy are made, involving new countries and other international organisations in order to achieve regulations that are planned internationally.

The Treaty of Amsterdam (2 October 1997) states above all that a general objective of the Union is that of providing its citizens with an area of freedom, security and justice, developing between member states a joint action in the sector of police and judicial cooperation in criminal matters.

The treaty therefore indicates the programming lines for overcoming the concept of harmonisation of national legislations for the purpose of creating a common legal and judicial jurisdiction, and sets an objective which will subsequently be achieved by the European Council of Tampere (the creation of Eurojust) and by the European Convention on Mutual Assistance in Criminal Matters (joint investigation teams).

Since the European Parliament Resolution of 15 November 1997 had, among other things, expressed regret that there was still no definition of organised crime, the Joint Action of 12 December 1998 sought to make up for this gap by introducing for the first time, if not a definition, at least a criteria for identifying when there is the presence of an organised criminal group.

The document also seeks to find common ground between the legislations of the Roman Law countries which recognise crime by association (Italy, France and Spain) and that of the Anglo-Saxon countries which recognise the offence of conspiracy – I think it is better to distinguish between countries with civil and common law traditions.

It is important to observe that a considerable contribution in the drafting of this text has been made by the Italian system which, in its penal code, has recognised for some time criminal association (article 416) and mafia-style criminal association (article 416-*bis*).

At international level, the most complete statement for identifying the organised criminal group is to be found at article 2 of the United Nations Convention against Transnational Organised Crime (Palermo Convention of 2000).

As indicated, the European Council at Tampere (15 October 1999) carried out various indications set out in the Amsterdam Treaty for a better access to justice in Europe, for the mutual recognition of judicial decisions, and established Eurojust, the new body for judicial cooperation, which was created with the Council decision of 28 February 2002. This also confirmed that the formal extradition procedure in Europe must be abolished.

The following year, at Tampere, the European Convention on mutual assistance in criminal matters was signed (Brussels 29 May 2000). It is highly innovative in many aspects and therefore gives rise to the need for various modifications in the internal legislation of the individual countries.

It is sufficient here to refer to the new formalities for letters of request, the spontaneous and direct sending of information, the temporary transfer of persons arrested, the creation of joint investigation teams, and telephone surveillance.

The joint investigation teams, already suggested by the treaty of Amsterdam, are certainly the most innovative instrument in simplifying investigations which have to be carried out in more than one European country.

It is clear how much this new operational instrument modifies the traditional collaboration between states. To some extent, it might be capable of overcoming the formal procedures of the letters of request to the extent that the authorities operate together, in both countries, in order to gather the necessary evidence in the proceedings started in one of the countries. But this means that one country has to allow an authority from another country to act at the same time in its own country, with the result, which I will refer to again below, that the very principle of sovereignty is weakened.

Thus we arrive at the last two community acts: the Council decision that sets up Eurojust, and the Framework decision of 13 June 2002 regarding the European arrest warrant.

Eurojust is the judicial body that coordinates all of the investigations against serious forms of organised crime. It is a new and highly important body which makes it possible to achieve real coordination between investigations being carried out in more than one member state, with immediate and informal exchange of documents and information.

European Prosecutors and Judges could previously transmit formal documents directly amongst themselves, but the creation of Euro just achieves another step forward: there is the clear understanding that the fight against organised crime, being a prime EU objective, must ensure that investigations between member countries is carried out from a community viewpoint.

The European arrest warrant is the consecration of the principle established in Amsterdam and confirmed at Tampere of mutual recognition of judicial decisions.

From the statement that this recognition is an ultimate EU objective, there follows the subsequent programme commitment that the formal extradition procedure must be abolished in Europe.

This has always been supported by various principles, and subject to the requested State carrying out checks to ensure the existence of elements that prove – to a greater or lesser extent – the responsibility of the person to be transferred. The procedure has always been fairly long and complex; there was therefore a considerable distance from immediate recognition of the judge of the requesting state.

The European arrest warrant in fact refers to the transfer of the person and simplifies considerably the procedures so that one of the greatest results of judicial collaboration can be achieved rapidly.

This is the effect of immediate mutual recognition of foreign judicial decisions, the possibility of operation by Eurojust, the possibility of creating joint investigation teams and the possibility of extradition of citizens. Europe is seeking in this way to remove the only remaining frontiers: those of a legal and judicial nature.

§ 4. *Human rights*

Another fundamental aspect in the construction of the European Union is human rights. The European Convention on Human Rights was signed in Rome in 1950.

It is the oldest and most important European convention and constitutes, together with the additional Protocols, a sort of Magna Carta of human rights and fundamental liberties at European level.

The Convention opens with a proclamation about the right to life, liberty and security of every individual; it continues by dealing with the various forms of liberty: of expression, of assembly, but also of personal rights such as property, education, fair trial.

The sixth additional Protocol of 1983 is of great importance: this provides for the abolition of the death penalty.

In order to ensure that its provisions are respected, the Convention establishes two specific bodies:

The European Court of human rights;

The European Commission of human rights.

As from 1969, the Court recognises that the fundamental rights, which result from the joint constitutional traditions of the Member States and from the Conventions, form part of the general legal principles whose observance it guarantees. The Court has the task of ensuring respect of fundamental rights in relation to both national laws as well as Community laws.

Article 6 (formerly article F) of the Treaty of Maastricht states that "the Union shall respect fundamental rights, as guaranteed by the European Convention on human rights signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the member states, as general principles of Community law".

The Treaty of Amsterdam subsequently developed the social aspects and individual and collective rights, establishing also non discrimination by reason of sex, race, religion, ethnic origin or handicap.

In 1999 the European Council in Cologne established the "Charter of fundamental rights" with the objective of strengthening their safeguards, and making them more visible in the light of the evolution of society, of social progress and scientific developments.

The Charter lists three categories of rights:

Right of freedom and equality;

Right to vote and freedom of movement in the member states;

Economic and social rights.

The aim of the Charter, on the one hand, is to recognise "classic rights" that are already present in the previous European texts; on the other hand it is innovative with regard to "new rights" such as the protection of personal data, safeguarding the environment, consumer protection, safeguarding children and elderly people, and the right to nursery care.

Many countries, and the European Parliament itself, had hoped that the Charter would have been included within the body of the Union treaties. The European Council of Nice, however, proclaimed the Charter of Fundamental Rights but did not integrate it into the treaties.

Although it therefore has no binding effect, it remains to be seen what role it will play in terms of application.

In any event, the Charter has an importance today, as can be seen from that common European sentiment that embraces rights and important social advances, and as can be seen from the profound character of Europe, which is not just economic.

UNICRI – Seminar in Tirana, 15 March 2007

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1.2. THE "NEW MAFIA": Structure and forms of trans national organised crime: examination of the judicial experience in Italy

§ 1. *The role of the National Antimafia Bureau in combating the "New Mafia"*

Since 1994, the National Antimafia Bureau has been involved in studying and analysing situations involving foreign criminal groups operating in Italy, that are similar to so-called traditional forms of mafia (*Cosa Nostra, Camorra*, etc.), in other words, situations that fall within (or may fall within) the model set out in article 416-bis Penal Code. In particular, such situations relate to organisations of persons involved in carrying out criminal offences and/or acquiring or running economic activities, through control of the territory, intimidation and/or violence, which they carry out under a strict rule of silence (internal conspiracy of silence), requiring, moreover, silence on the part of the victims and witnesses of crimes (external conspiracy of silence).

The National Antimafia Bureau has focussed its attention mainly on the following foreign criminal situations:

- Albanian;
- Romanian;
- Bulgarian;
- North African, in particular Nigerian and Maghreb;
- South American, in particular Colombian;
- Russian;
- Chinese.

Through the study and analysis of large amounts of material collected, from year to year, by the District Antimafia Bureaux and also by various ordinary Public Prosecution departments, relating to

various offences involving organised crime as well as information obtained through the Antimafia Investigation Bureau (D.I.A.) and inter-provincial services, the National Antimafia Bureau has formulated the following outline considerations:

1. Each criminal situation has its own specific characteristics connected with the cultural context of the country of origin;
2. The foreign criminal organisations generally prefer to establish themselves in regions where there is a lower presence of "traditional forms of mafia" (i.e. not in the southern regions, except for Campania);
3. The said organisations tend not to form alliances with the "traditional forms of mafia", except for specific illegal ventures;
4. The members of the said organisations are, generally speaking, illegal immigrants.

In the same way as happens with traditional forms of organised crime in Italy, foreign groups of criminals generally reconvert their capital - the earnings from profitable illegal activities - in part using them for funding further criminal activities and, for the most part, recycling them in the so-called tax havens and/or reusing them in the countries of origin.

§ 2. *Albanian organised crime*

Following the opening of the frontiers, as a result of well-known political events, in 1991 there as a strong exodus of Albanian citizens towards European countries, including Italy. This led to the adoption, by the Italian authorities, of measures aimed at limiting the flow of migration. These measures, however, had the effect of developing the traffic in illegal immigrants, above all across the straits of Taranto, who were landed along the coast of Puglia.

The said traffic in illegal immigrants, which is highly profitable, was initially run by a mafia-type organisation, operating in Puglia, called the *Sacra Corona Unita* (“S.C.U.”).

Subsequently, illegal immigration was run directly by Albanian criminal groups according to an agreement with criminal organisations in Puglia. This agreement provided that the latter allowed the activity of ferrying illegal immigrants to be carried out in exchange for considerable quantities of illegal drugs, mainly soft drugs.

Over the course of time, this criminal activity, namely smuggling (aiding and abetting immigration) has seen a notable decrease, due both to the effective policing action carried out on both coasts of the Adriatic as well as due to the fact that the migratory routes have changed.

In the sector of human trafficking there has been a decrease in flow along the sea routes and a tendency to replace this with overland routes, using the support of organisations existing in neighbouring states (Slovenia, Croatia, Romania, Moldavia, etc.) in order to bring women into Italy for prostitution.

In addition to this kind of criminal activity involving illegal migration into Italy, the Albanian mafia has been involved on a massive scale over recent years in the international smuggling of illegal drugs of every kind, assuming, in this sector, a position of absolute pre-eminence. According to official estimates, following the military conflict in the Kosovo region, the number of Albanians present in Italy (legally and illegally) has exceeded 100,000.

It is to be noted that only a tiny number of illegal Albanian immigrants remain in the areas around their initial point of entry into Italy. Instead, they are forcibly transferred, in organised form, mainly into cities in central and northern Italy.

Large numbers of Albanian citizens are to be found in Lombardy (Milan), in Piedmont (Alessandria and Asti), in Liguria (Genoa), in Veneto, in Emilia-Romagna (Rimini), in the Marche (Ascoli Piceno and Pescara), in Abruzzo (Teramo) but also in Campania (Caserta), in Puglia (Brindisi) and, to a lesser extent, on the islands.

During the period under consideration in this document (1.7.2005-30.6.2006), the number of Albanians (including also those persons of various ethnic origins who have obtained Albanian citizenship or who are Albanians with fixed residence in Kosovo, Macedonia, Serbia and Montenegro), who have been arrested in Italy is over 1,000 people, while the number under investigation is a great deal higher.

Albanian criminal groups generally consist of people originating from the same city, from the same district and even from the same family. Their structure is generally horizontal, within which only the head of the group is recognisable. They use the system of terror to spread the message of power, from which it is almost impossible to escape.

The principal criminal activities carried out by Albanian organised criminal groups are:

- Exploitation of prostitution, whose victims are generally women, often young, brought into Italy illegally and, not infrequently, kidnapped in their countries of origin. Several of the most significant investigations set up and carried out in Italy against Albanian citizens have

led to allegations, against the accused, also of offences of human trafficking and reduction to slavery.

Albanian organisations involved in exploitation of prostitution are present across almost the whole of Italy. These have found, sometimes through the mediation of local mafia-type organisations (as in the case of Campania), forms of sharing and dividing the territory and, in this way, it has been possible to avoid disagreements and conflicts between them.

It has been established that the Albanian criminal organisations have almost a monopoly on the exploitation of prostitution in Italy and that, in certain cases, they delegate control and surveillance of women reduced to slavery on the street to Romanian criminal groups.

Particularly alarming is the phenomenon of trafficking in children, who are forced to carry out tiring activities of begging or are used in the illegal adoption market or for paedophile pornography.

Among the most significant investigations, carried out during the period under consideration in this report, are:

- an investigation carried out by the prosecution authorities in Turin against members of a criminal organisation involved in assisting illegal immigration and the exploitation of prostitution, which ended in the arrest, in November 2005, of 10 people, including one Albanian and 7 Italians. During the course of the investigations, 4 bank accounts were seized registered in the names of citizens of various nationalities, including an Albanian, as well as 6 apartments in Turin that were used by the said organisation as places for prostitution of women;
- The investigation entitled *Harem*, coordinated by the Catanzaro District Antimafia Bureau, which ended in October 2005 with the issue by the investigating judge of orders for the arrest without bail of 80 people living in Italy, Albania and other European countries, including Ukraine and Germany, most of whom were Albanian citizens, for criminal conspiracy for the purposes of reduction into slavery, incitement and aiding and abetting illegal immigration, as well as criminal conspiracy for the purposes of international trafficking in illegal drugs imported from Albania and of arms, brought into Italy through the same channels as those used for the drugs, and passed also on to organisations forming part of the *'ndrangheta* along the Ionian coast;

From the investigation it emerged that the Ukraine played a crucial role as the point of contact for the exploitation of young girls, often children, originating from former Soviet Union countries.

The investigation entitled *Albanera*, coordinated by the Perugia District Antimafia Bureau, against an Albanian organisation involved in armed organisation crime, aimed at the control of night clubs in the hinterland around Perugia, involving, among other things, the exploitation of prostitution and extortion and ended with the arrest of 3 people, who were accused of being leaders of the said organisation;

The *Galassia* investigation, against a criminal group consisting of 5 Albanian citizens and 2 Russian citizens, who were the subject of a custody order without bail made on 19.01.2006 by the Modena prosecution authorities, because they were held responsible for crimes of illegal immigration, aiding and abetting and exploitation of prostitution, sexual violence and other offences;

The *Free Slave* investigation, carried out by the Ligurian investigation authorities, which culminated in the arrest of 2 Albanians and 2 Romanians who were part of an organisation involved in human trafficking for the purpose of exploitation of prostitution.

The trafficking of large quantities of illegal drugs of every kind, managed, not infrequently, in collaboration with Italian citizens or with other foreign organisations.

From observing the criminal dynamics, it emerged that the Albanian organisations in Italy originally assumed the role of "service organisations", in the sense that, in comparison with the traditional organisations working in Italy, they were capable of providing illegal drugs, so that the groups or organisations were able to avoid the risks of transporting or holding the illegal substances.

These characteristics are fully confirmed in the investigations carried out by various district investigators across the whole of Italy.

The Albanian organisations, over the last few years, have assumed such an importance in drug smuggling that – in certain significant cases – it has led to subordinate groups of Italian citizens working for them and – in almost all cases currently under investigation – a "client" relationship with groups belonging to the large mafia-type organisations operating in this sector (*mafia*,

ndrangheta and *camorra*), these latter having almost entirely abandoned the traditional search for direct lines of importation for such substances.

There is a wide variation in the systems of importation that have been monitored. The methods used for this purpose are, in fact, the same as those used for human trafficking (this appears to be the current trend among Albanian boatmen), transported either by sea ferry, on specially adapted vehicles or, in certain important cases involving the more powerful criminal groups in Albania, on ships used for normal sea trading between Italy and that region.

The investigations have therefore revealed that large organisations operate in Albania which are linked with sources of supply for raw materials and substances that are already ready for sale and that they have the financial, logistical and material means to be able to provide a continual supply to the Italian market, despite the policing activities carried out until now in Italy.

It should be emphasised that the Albanian organisations enjoy support from certain institutional areas: this has emerged from the contents of numerous investigations that have made it possible to confirm collusion with members of certain institutions and police forces.

Worthy of particular note, among the investigations carried out between July 2005 and June 2006, due to their importance, are:

The investigation entitled *Spada*, against members of an organisation involved in the importation from Albania of enormous quantities of illegal drugs, which ended with the arrest of 12 people, mainly of Albanian nationality and the seizure of 33kg of heroin and 1.2 kg of cocaine;

The *Castrista* investigation which made it possible to dismantle a multi-ethnic criminal organisation consisting of Italians, Albanians and South Americans responsible for international drug smuggling, including cocaine and heroin, imported respectively from Peru and from Albania, distributed in small quantities in various cities in Molise and in Puglia, as well as aiding and abetting illegal immigration and inciting and exploiting prostitution, and led to the arrest of 15 people on the 16.06.2006, pursuant to the execution of a custody order without bail, issued by the investigating magistrate in Campobasso, on the application of the local District Antimafia Bureau;

The investigation for drug smuggling in relation to members of an organisation comprising Albanian citizens and members of a mafia group from Calabria operating in Umbria;

The *Sabbia* investigation, which made it possible to dismember a multi-ethnic organisation operating in the Marche, involved in drug smuggling, directed by North Africans and including also Albanian and Macedonian citizens;

The *Dead Row* investigation against an organisation involved in smuggling drugs, including cocaine and heroin, consisting of citizens from Albania (10), North Africa (15) and Italy (2), all arrested on the 01.02.2006, by order of the tribunal in Bologna;

The investigation by the authorities in Turin, which ended with the issue of a custody order without bail, against 34 people, mostly Albanian, members of an association involved in international drug smuggling between Italy and the Balkans, with the seizure of 319 kg of heroin, 2 kg of cocaine, three vehicles and 2 articulated lorries;

The *Quo Vadis* investigation in Piedmont, which ended with the arrest of 15 Albanian citizens, who were responsible for international drug smuggling, and with the seizure of 75 kg of heroin, 4 kg of cocaine and 10 vehicles.

The *Aquila* investigation of July 2005, against members of a criminal organisation, mainly Italian and Albanian, operating in Sardinia, involved in smuggling cocaine from Holland which arrived in Sardinia at the port of Olbia, to be sold in the existing market on the Emerald Coast;

Smuggling of weapons and war supplies originating from Albania and from the countries of ex-Yugoslavia;

The theft of high-powered cars in Italy, which are subsequently transported to Albania and to Middle East countries.

Although these cases involve groups who adopt mafia-style methods (rigid codes of behaviour, methods of subjection and punishment of members, "internal and external conspiracy of silence"), only in a few cases was it possible, as with other examples of "new mafia", to make allegations in relation to article 416-bis Penal Code.

However, the promptness with which the defence of members of criminal groups is assured by fellow members who have escaped arrest (generally seeking refuge in Albania), the frequent concern to guarantee the silence of the victims of crimes committed, and the attempts that are immediately carried out to corrupt or influence magistrates involved in the case in Albania –

circumstances which all emerge from telephone interceptions, which are currently the only effective instrument to fight the activities carried out by such organisations – all support the view that the Albanian organisations operating in Italy have mafia characteristics.

One of the criminal phenomena that arouses greatest social alarm is that of the numerous kidnappings carried out by people of Albanian ethnic origin, inside private houses, for the most part isolated villas in northern Italy, but also in regions such as Campania, Sicily and Puglia. It is not infrequent that the perpetrators of robberies, during their crime, under the effect of massive doses of cocaine, use violence, including sexual violence, on the victims. Many investigations, ending with the arrest of members of the aforementioned organised criminal groups, have confirmed the existence of collaborations between people of Albanian origin and those of Romanian and Slav origin.

Relevant in this respect is the *Vesta* investigation, at the end of which, during the execution of a custody order without bail, 112 people of foreign citizenship were arrested, most of whom were of Albanian, Romanian and Slav origin, who were held responsible for dozens of robberies in isolated villas in central and northern Italy. Searches during the arrests led to the seizure of several thousand Euros, jewellery, a high-powered car, vast quantities of drugs (cocaine) and a large number of automatic arms.

It should be noted that, during the period under consideration, thanks also to the collaboration of the Albanian authorities, numerous arrests were carried out throughout the whole of Italy, in particular in central northern Italy, of fugitives who were being sought in Italy as well as in Albania for very serious offences.

The use of false documents by members of the aforesaid organisations, used in order to live illegally and avoid expulsion, makes it very difficult for the magistrates and police authorities to carry out policing.

There has also been an increase in violence (murders and attempted murders) in relation to conflicts between Albanian criminal groups and/or between these and other ethnic groups, caused by power struggles for control of international drug smuggling, human trafficking and exploitation of prostitution. In this respect, it can be stated that the Albanian criminal organisations have now become points of reference for the most important South American drug smuggling cartels.

It should also be emphasised that there is a growing involvement of women in the commission of crimes of every kind (drug smuggling, kidnapping, exploitation of prostitution, extortion etc.)

Worthy of mention among the various investigations is that carried out by the Trieste Public Prosecution Department which led to the arrest on the 13.3.2006 of six people who were responsible for smuggling illegal immigrants from Albania and north-east Italy through ex-Yugoslavia, Croatia and Slovenia. The head of the organisation, comprising Italians, Albanians, Kosovars, Slovenians and Croatians, was an Albanian woman, resident in Pordenone for several years, assisted by her cohabitee, who was also an Albanian citizen.

With regard to the question of laundering and/or reuse of capital from crime, the large number of transactions between Italy and Albania during the period from January 1994 up to today should be highlighted, involving many thousands of billions of the old Italian lira (equivalent to millions of Euros).

The Italian provinces most involved in these transactions are Turin, Milan, Varese, Bari and Rome.

Once again, with reference to any evidence of criminal activity and economic activities run by Albanian citizens in Italy, it has been found that an ever increasing number of tax codes have been issued to the latter and that certain investment companies set up in Albania are managed by Albanian citizens jointly with Italian citizens.

It should be added that most recent investigations have shown that Albanian criminal organisations re-invest massive sums of money from unlawful activities in Kosovo as well as in Albania, for the purchase of real estate and/or business activities.

There are, however, still operational difficulties in achieving a beneficial cooperation between the Albanian State Prosecution Office and the Italian prosecution departments. This is due to a lack of structures and facilities and a not altogether complete professionalism on the part of the Albanian magistrates, as well as to the lack of effective bilateral measures for judicial cooperation (an extradition agreement, an agreement for provisional consignment for the purposes of participation in trials or for participation by means of video-conference in the case of the non-extraditable citizen, a treaty for the transfer of criminal proceedings) which in the current stage of collaboration between Albanian and Italian justice has now become indispensable.

It is, however, appropriate to repeat that, despite such difficulties, cooperation has nevertheless increased, reaching a level of sufficient satisfaction.

The Albanian State Prosecution office set up an international relations office some time ago, which has the task of ensuring efficient assistance to foreign judicial authorities and adequate speed in

carrying out deportation procedures submitted to them. A group of prosecutors and officials with specialist knowledge about organised crime has also been set up in the State Prosecution Department and initiatives have been commenced for the purposes of creating a database that is based on that which already exists at the National Antimafia Bureau, for monitoring criminal organisations and managing criminal proceedings.

With regard to the action of the National Antimafia Bureau, it is worth highlighting the relationships established with the Albanian State Prosecution office and also the signing, on 28.10.1997, of a protocol between the National Antimafia Prosecutor and the Albanian State Prosecutor, aimed at rapid exchange of information, news and data relating to mafia-type crime.

§ 3. *Romanian organised crime*

Romanian criminal groups have been in continual expansion over recent years and have established more adequate organisational structures, being involved not infrequently in collaboration with Albanian and Ukrainian criminal groups, also in human trafficking, in illegal immigration and in the exploitation of prostitution, above all in the areas of central north Italy.

In managing these illegal sectors, Romanian criminal groups have adopted particularly violent methods, resorting to forms of physical and/or psychological coercion in relation to the young women exploited, who are often reduced to slavery and, in some cases, sold to other groups of various ethnic origins[2].

Between October 2005 and June 2006, scores of Romanian citizens have been arrested during police operations in relation to the aforesaid crimes.

The number of Romanian citizens arrested during the period under consideration in this document was 547.

Criminal groups are also involved in carrying out robberies. In this respect, reference should be made to the murder during a robbery that took place on 26.05.2006, where the victim was the proprietor of a jewellers shop in the province of Rome. It was carried out by two Romanian citizens who were immediately identified by police and traced to Vienna and to a town in Romania.

[2] The trade in human beings is very often carried out quite blatantly, and it is quite true that local organisations operating in Romania for the transport of illegal immigrants into Italy, via Croatia and Slovenia, even publish adverts for illegal transportation in the daily newspapers or write phrases on the walls of cities, such as *I take people to Italy, we offer to accompany you to Italy, maximum reliability and experience to accompany you to Italy.*

Romanian groups have specialised in the sector of cloning, forgery and use of electronic payment instruments (credit cards). Some members of these groups are involved, exclusively, in obtaining information from the magnetic strips and PIN codes of payment cards, others in reproducing magnetic cards, others still, in purchasing goods and drawing cash from automatic tills and subsequent laundering of the sums duly obtained. Noteworthy among the investigations carried out are the following: the *Clone* investigation against a transnational criminal organisation that led to the arrest of 21 Romanian citizens between July 2005 and Spring 2006, 9 of whom in Italy and 12 in other European states, and also to the seizure of hundreds of cloned cards and hundreds of apparatuses located in various shopping centres in Italy; the *Nasolie* investigation, completed in May 2006, with 14 custodial sentences made by the tribunal in Reggio Emilia and the *Carta Bianca* investigation which led to the arrest of 13 people who were members of an Italian-Romanian organisation for the offence of criminal conspiracy in the cloning and use of payments cards.

Recent investigations indicate that Romanian criminal organisations are involved in smuggling foreign processed tobacco. Arrests have been made for this offence in Rome and in Campania. In particular, in the course of the investigations carried out in relation to a transnational association involved in smuggling foreign processed tobacco, 4 Romanian citizens and 5 Italians were arrested, including an Italian who was a leading member of the Pianese clan, operating in Qualiano (NA) and 2000 kg of tobacco with a total value of 350,000 Euros.

§ 4. *Bulgarian organised crime*

Criminal organisations in Bulgaria are involved in human trafficking, in aiding and abetting illegal immigration and in reduction of young women to slavery and their exploitation for prostitution. Worthy of mention in this respect is the *Elvis-Bulgaria* investigation, carried out by the District Antimafia Bureau in Trieste, involving 116 suspects, which ended up with the making of custody orders without bail by the investigating magistrate in relation to 41 Bulgarian citizens (several of whom were arrested in Bulgaria and Germany), who were responsible for criminal conspiracy for the purposes of illegal immigration and trafficking in women and children (who were brought into Italy through the north-eastern frontiers with Austria and Slovenia), and slavery and international drug smuggling (cocaine from South America, deposited in ports on the Black Sea), false currency (Euros and American dollars) as well as the commission of numerous thefts and other offences (smuggling foreign-processed tobacco, fraudulent use of electronic payment instruments and recycling).

The contemporaneous execution of warrants for arrest, search and seizure in Bulgaria took place thanks to the signing of the memorandum on the 17.06.2005 in Rome, between the State Prosecution Office in Bulgaria and the Italian National Antimafia Bureau, which had the object of rapid exchange of news, information and data between the two countries in relation to the fight against organised crime and the laundering of the proceeds of crime.

Among the principal illegal activities carried out in Italy, and also in other European Union countries, were thefts carried out with remarkable skill, all day and every day, with extraordinary mobility across the territory, by women and often children below criminal age, who are nomads from the *Sinta* ethnic group (one of the Bulgarian dialects).

The children are recruited from poorer families from the central northern area of Bulgaria. They are handed over by parents *on lease*, for a certain period of time and for payment, to members of criminal organisations who use them for pick-pocketing or for begging.

It should be pointed out that investigations against these organisations are extremely difficult because of the way that members cover their tracks, generally using false documents which prevent them from being correctly identified, and also for their extraordinary mobility over the territory, as well as the difficulty in obtaining reliable interpreters who are able to translate dialects that are sometimes incomprehensible to the police investigators involved in carrying out telephone interceptions.

Bulgarian criminal groups are also involved in international drug smuggling. Evidence, in this sense, comes from the *Magna Charta* investigation, conducted in relation to a transnational organisation whose main ethnic origin was Bulgarian, operating in Turin in conjunction with members of the *'ndrangheta* from Calabria, Lombardy and Veneto. In particular, the investigation identified a complex Bulgarian organisation active in various European countries and involved in importing vast quantities of cocaine into Italy that are warehoused in the Caribbean and pass via Spain with the use of couriers (who ingest it in the form of "eggs") and on leisure boats.

With reference to arms smuggling, mention should be made of the *Sofia* investigation, against a Bulgarian group involved in importing arms into Italy. Two Bulgarian citizens were arrested during the course of the investigations and 42 non-conventional, calibre 6.35 pistols were seized with ammunition.

In all, 59 Bulgarian citizens were arrested between 01.07.2005 and 30.06.2006 for various criminal offences.

§ *5. North African organised crime, in particular, from Nigeria and the Maghreb*

The mass of African citizens present in various Italian cities are mainly illegal immigrants originating from the North African countries who live in a state of great poverty. Initially, many illegal immigrants replaced local manual workers (work harvesting tomatoes, other agricultural produce, etc.), especially in the southern regions of Italy, receiving a wage that was far below that of the local worker.

Most illegal immigrants are involved in the sale of fake clothing, produced by organisations connected with the *camorra*, as well as theft, robbery and the street sale of illegal drugs. Trafficking in drugs places illegal immigrants in contact, for purposes of supply, with members of mafia-type organisations.

But it is the exploitation of prostitution involving co-nationals that is the most alarming phenomenon, also because of the clear problems regarding health.

There are now whole towns, as well as main national and provincial roads, where coloured women, mainly Nigerians, are to be found. They arrived in Italy with the promise of work and, being unable to pay the price of their illegal entry, which was in fact paid in advance by mafia-type organisations operating in their country of origin, they are forced under threat, or often through violence, to prostitute themselves.

Most of the girls who are "trafficked" come from areas of southern Nigeria, in particular from Benin City, Lagos or from one of the inland towns, and belong to the Igbo, Yoruba, Bini or Edo tribes.

They are all young or very young women, aged between 17 and 30; some of them are married with children and they have often been abandoned by their husbands. Many of them had work or were students and had spent time in the city (often on the outskirts of Benin City or Lagos).

The Nigerian criminal groups working in Italy are fragmentations of ethnic or tribal groups, attached to a vast criminal structure consisting of a few families who have central decision-making power in Nigeria.

The phenomenon of organised crime in Nigeria is constantly increasing over the whole of Italy. There are permanent settlements in the cities of Rome, Turin, Padua, Brescia, Milan, Rimini,

Palermo and Cagliari. In these cities, Nigerian citizens have opened up restaurants, import-export companies, markets, disco-clubs and beauty parlours.

As indicated, the phenomenon of exploitation of prostitution is the most alarming phenomenon in relation to illegal Nigerian immigration. This is so, above all, in the southern regions and in particular in the province of Caserta, where there are large colonies of prostitutes who operate all day and every day. They and their pimps are tolerated by the organised criminal community in Caserta, even though it is well known that the latter never had interests in running prostitution.

This tolerance is due to two reasons: because the prostitutes and their protectors are very often actually run by the camorra, and because the pimps are forced to pay a sort of "lease payment" for the territory belonging to the individual local criminal organisations.

On the roads making up the Via Domitiana, the route which passes through the various coastal towns and cities in the province of Caserta (Castelvolturno, Mondragone, Baia Domitia, etc. constituting resorts forming a sort of “Rimini of the South”) young coloured women wait for their clients, while coloured men openly sell illegal drugs of every kind (heroin, cocaine, etc.).

Moreover, the Via Domitiana has frequently become the theatre for the settling of scores for control of the territory between men belonging to the Nigerian and Albanian "mafias", the latter also being involved in the same type of illegal drugs.

With regard, in particular, to the Nigerian girls exploited, their reduction into slavery, as already indicated, is made possible also by the religious beliefs that exist in their country of origin. In fact, the so-called Nigerian mafia "entrusts" these girls to women called "madams", who are also Nigerian and subject them to terrifying "voodoo" (or more correctly: "juju") magic rituals in order to force them into being sold.

Equally alarming is the phenomenon of trafficking in illegal drugs. It should be emphasised that, over the last twenty years, Nigeria has become the nation with the largest drug smuggling organisations: although it is not a drug producer, the country has distinguished itself for the size of its traffic, aimed at re-exportation rather than at the local market, so that it has become the principal drugs crossroads in Africa and an ideal place for warehousing vast quantities of drugs.

The Nigerian drug "lords" can, in fact, exploit two local conditions that are particularly favourable:

- a large quantity of unskilled labour, whose widespread deviance indicates the lack of direction and social failure caused by many years of inefficient government. This has strengthened the conviction, among various ethnic groups, that laws and regulations constitute an obstacle to individual success. It means that Nigerian society approves and admires the rich, irrespective of the way in which their wealth has been acquired (for example as a result of harm to another person), on condition that the wealth is redistributed among the family and those in need;

- the laxity and corruption in the political and social system, which does not seem capable of providing efficient measures for control. An example in this sense is the unclear position assumed during the course of the years by the authorities in relation to the campaign against drugs, which wavers between the wish to penalise on the western model and open tolerance of lucrative smuggling.

In this respect, the transit of illegal drugs, coming from Brazil, Colombia, Pakistan or Thailand and destined for Europe and the United States, has grown increasingly.

Nigeria is in third place in the world for the number of its citizens arrested abroad.

Nigerian (and also South America, Lebanese and Israeli) traffickers have made use of the pre-existing smuggling network for arms, ivory and precious stones. Recent estimates indicate that around 400 criminal centres operate in Nigeria, 136 of which specialise in drug smuggling, half of these with international connections.

In Italy, it seems that those people originating from that geographic area are destined to assume an increasing importance, also in the light of the major transformations taking place in their places of origin as well as the large increases in their demographic growth. They are people almost all of whom originate from the most depressed areas of Nigeria (where pre-capitalistic social relationships often predominate, with a typically rural culture) who, on arrival in Italy, find themselves having to deal with:

integration, as already stated, into the most precarious and least secure sector of the labour market, often in situations that are inevitably illegal and therefore open to the risk of blackmail;

difficulty in adapting to the radically different urban-industrial conditions of the host society.

These precarious situations sometimes contribute towards marginalising Nigerians, favouring even further their tendency to structure themselves into a separate autonomous community which, however, often has within it strong tribal conflicts. Throughout the entire Italian peninsula there is a notable phenomenon of associations providing mutual support which, however, sometimes conceal interests that are far from clear, as will be examined below.

Central and southern Italy, with the exception of Lazio and Campania, seem not to be the preferred settlement areas for Nigerian migrants. Their presence on the islands is almost insignificant. This confirms the tendency of almost all ethnic groups, who are attracted to the more advanced industrial areas.

Nigerian traffickers have a great ability to identify the most profitable markets and to exploit their potential. That capacity is derived from a well organised criminal structure that is able to obtain information about changes in the drugs markets quickly and efficiently. A decisive role is played by the frequent meetings – sometimes taking advantage of opportunities provided by international events, officially arranged by the many Nigerian cultural and mutual support associations – which provide the opportunity for an exchange of information within the groups, whose members are often related among themselves by links to clans or families, making it very difficult for any infiltration activities to be carried out.

The abovementioned criminal groups have a vertical structure, headed by one or two Nigerian figures who may have no contact at all with those at the base (the couriers), but who manage relations with the various groups at international level. The base does not generally have a clear ethnic identity, as Nigerians prefer to use people who have no close links with the organisation for the most risky phase, which is transport.

In the event of threat from the police, these groups are able to move about with great ease, since they do not necessarily have any territorial links, moving to other areas without any great harm to their illegal trafficking. Generally, they succeed in co-existing with other criminal groups, whether local or non-European, avoiding unnecessary violence, managing always, in this way, to assume an apparent low profile that enables them to effectively conclude billion Euro deals.

According to the results of police investigations, Nigerians smuggle all of the main kinds of drugs, including cocaine, heroin, cannabis and synthetic drugs, even though they prefer the first three by reason of the enormous financial returns and the ease with which they are able to obtain them. Heroin is purchased directly from the Asian markets in enormous quantities and, after warehousing

in Nigeria, is transported towards the consumer countries by air or sea, using air routes towards Italy, Greece or Spain. The purchase is managed by Nigerian citizens who are resident (usually permanently) in these latter States and constitute the terminal points of the organisation, whose "boss" is always in the nation of origin. Cocaine is imported, always though direct contact with the producers in South America, in the USA and in Europe using the same procedure as already indicated. Links are guaranteed by representatives of a large Nigerian community that is permanently resident in South America.

The couriers all have legal permits to stay in Italy and generally have no criminal convictions. After a limited number of journeys, their services are no longer used. In this way they have links only with the person organising the journey and the person waiting for them upon their arrival, but they are unable to give any information about the organisation. Sometimes they are not even aware that there is a criminal organisation involved in the transaction. With this kind of division, the organisation tends to be able to ensure its own survival with regard to any investigation into its members.

The couriers are not allowed to choose the routes to be followed. These are planned by a member of the organisation, who makes continual alterations and also sudden changes, even while the journey is being undertaken, as well as deciding which intermediate airports to use. All of this is calculated to enable them to cover their tracks. In order to do this the organisation, among other things, books and pays for seats on aeroplanes on which the couriers will never fly, because they are often diverted onto rail routes.

The courier is able to earn around 3,000 Euros on each journey and he is able to make numerous journeys, even over a short period of time, preferring to make frequent trips and carrying small quantities (up to one kilogram or little more per courier) rather than larger periodical trips.

The ease by which it was possible for police authorities to identify couriers of African nationality at intermediate European and American airports has led the Nigerian criminal organisations to make increasing use of foreign couriers. It has been found, in fact, that recruits are preferably women of European or South American origin, in particular from Brazil. This does not mean that the couriers are no longer Nigerian, or African in general, but only that the more evolved criminal associations have taken steps to prevent such possibility of identification. Sometimes it happens that couriers of other nationalities are accompanied by Nigerians, who by their apparently nervous behaviour attract the attention of the police authorities, who stop them, allowing the true courier to pass freely. These people, in fact, have the role of checking that the operation goes well, communicating to the other

members of the organisation any problem that might arise during the transport of the illegal drugs, and alerting them immediately in the event of the courier being arrested or stopped by the police.

The payment abroad for the drugs is carried out either by way of direct remittance to various money transfer agencies by the trafficker or, more often, using various people who visit the agencies to make payment towards the immediate supplier, resident in another State or in other Italian cities.

The use of money transfer is the main instrument for reinvestment of the money obtained from the illegal activities. This system is used, in fact, for payment of commissions due to the courier or for the expenses incurred relating not only to the drug smuggling (payment for tickets, hotel accommodation, etc.) but also to exploitation of prostitution and offences connected with it, as well as for transfer of sums of money to Nigeria that are earned from the profitable illegal trafficking.

Another method, which is used less in comparison with the previous method, involves payment in foreign currency through a foreign account, directly to the head of the Nigerian organisation.

Finally, it is still very common to transport money directly via the courier.

There is no concrete activity of cooperation with the Nigerian authorities. Only recently have attempts been made in this respect, because of the feeling that it is now essential to combat this dangerous form of criminal activity.

However, on the 11.11.2003 the National Antimafia Bureau signed a memorandum agreement with the Nigerian State Prosecutor, aimed at rapid exchange of information and data relating to organised crime.

Among the most important investigations carried out during the period under examination, mention should be made of the following:

- the *Fantasia 2* investigation, against 80 members of a criminal organisation, mainly of Nigerian ethnic origin (but also from the Maghreb), active in the province of Caserta, with branches in other provinces of central and northern Italy (Rome, Florence, Perugia, Bologna and Brescia) involved in international drug smuggling (cocaine and heroin) as well as in human trafficking for the purposes of sexual exploitation of young women;

- the *Niger* investigation, carried out by the Turin District Antimafia Bureau, in relation to a criminal organisation operating in Turin, Rome and other regions of central and northern Italy, in drug smuggling, aiding and abetting illegal immigration and exploitation of

prostitution. During the course of investigations, there were found to be conflicts, involving also violence, between two Nigerian criminal groups, the Eye (a magical-religious association) and the Black Axe, for the control of illegal activities;

the *Itako* investigations conducted by the Naples District Antimafia Bureau which ended in February 2006 with a custody order without bail against 3 Nigerians and a Neapolitan member of the Di Lauro clan, held responsible for the international smuggling of heroin imported from Great Britain.

the *Aye Mi Assman* investigation, which ended in April 2006 with two custody orders without bail, made by the investigating magistrate in Ferrara against two inter-connected Nigerian organisations involved in the supply of illegal drugs including cocaine and marijuana in the province of Ferrara. 32 Nigerian citizens were arrested during the course of the investigations;

the *Little Cut 2* investigation by the Rome District Antimafia Bureau, which ended in April 2006 with the execution of a custody order without bail against 14 people, Nigerian and Italian, for criminal conspiracy for the purpose of smuggling cocaine originating from Spain and Holland, carried by couriers in the form of ingested packages;

The *Area Franca* investigation by the police authorities in Santa Maria Capua Vetere (CE) in relation to 16 people held responsible for smuggling and supplying illegal drugs. The investigations found that certain local groups in Caserta bought drugs from a Nigerian organisation operating in the province of Caserta.

The *Multilevel 2* investigation, which ended in May 2006 with the execution of a custody order without bail issued by the investigating magistrate in Modena against 9 people of Nigerian origin accused of reduction to slavery for the purposes of prostitution in relation to young north-African girls obtained in their countries of origin and forced, through violence, to prostitute themselves in order to pay the *madams* the debts owed for the journey, which varied between 80,000 and 100,000 Euros.

Between 1.7.2005 and 30.06.2006 there have been 391 Nigerians arrested.

Operating in Italy are also criminal organisations originating from the Maghreb, involved in drug smuggling, in aiding and abetting illegal immigration and human trafficking for the purposes of prostitution, and in counterfeiting identity documents. These organisation consist of citizens from

Morocco, Tunisia, Algeria, Libya and Mauritania who operate in small groups, above all in the provincial capitals of central and northern Italy.

The most important investigations against organised crime of Maghreb origin include:

The *Abid* investigation by the Catanzaro District Antimafia Bureau, which ended in February 2006 with the arrest of over 30 people of Eritrean, Sudanese, Egyptian, Moroccan and Algerian nationality, and two Bulgarian women, accused of being members of an organisation operating particularly in Crotone and involved in human trafficking and aiding and abetting illegal immigration, mainly from Libya, by landing thousands of people along the coasts of Sicily (Agrigento, Lampedusa, Pozzallo (RG) etc.);

the *Addhib* investigation, in relation to a Maghreb criminal organisation operating in the province of Bari and involved in forgery of documents and aiding and abetting illegal immigration;

the *Black Jeans* investigation, which ended in February 2006 with the execution of a custody order without bail issued by the investigating magistrate in Lucca against 30 people (mainly Moroccan, but also Tunisian and Italian) who were part of an organisation operating in Viareggio smuggling cocaine and hashish which was sold in night clubs along the Versilia riviera as well as in the provinces of Livorno, Massa Carrara and Padua;

the *Tunisi 3* investigation, which ended in March 2006 with the execution of a custody order without bail, issued by the Ancona investigating magistrate against 8 Tunisians accused of criminal conspiracy for the purposes of trafficking in heroin and cocaine in various towns in the province of Ancona;

the *Contrition* investigation, which ended in April 2006 with the execution of a custody order without bail, issued by the investigating magistrate against 19 people, originating mainly from the Maghreb, who were part of an organisation operating in Emilia Romagna, Lombardy and Tuscany, involved in drug smuggling (hashish and cocaine), imported from Morocco and Spain;

The *New Kebab* investigation by the Florence District Antimafia Bureau, which ended in June 2006 with the arrest of 40 members of 2 interlinked Maghreb organisations involved in smuggling and supplying hashish and cocaine in Tuscany, Emilia Romagna, Lombardy, Piedmont and Lazio. The investigations brought to light contacts between the said

organisations and an Albanian criminal organisation which supplied illegal drugs on an occasional basis. The investigation led to the seizure of 1,300 kg of hashish, 6 kg of cocaine, numerous vehicles used for transporting drugs and 150,000 Euros;

During the period under consideration, 3,675 citizens of Maghreb ethnic origin were arrested.

§ 6. *South American, particularly Colombian, organised crime*

South American organised crime is active in Italy, in the international smuggling of cocaine and, to a lesser extent, in illegal immigration and the exploitation of prostitution, which is carried out in private houses and night clubs run by Italians. These aspects were highlighted by the investigation that ended with the execution of a custody order without bail, made in April 2006 against 9 people, including 5 Uruguayans, under investigation for criminal conspiracy for the purposes of aiding and abetting illegal immigration and the exploitation of girls recruited in the poorest areas of Uruguay and induced to take part in prostitution in four hotel apartments in Milan and Como that were sequestrated by the Milan police authorities.

Another investigation, named *Montevideo,* was carried out by the Public Prosecutor in Teramo. It ended with the arrest and the execution of a custody order without bail made by the investigating magistrate against 23 people, 17 of whom were Uruguayan, accused of criminal conspiracy, aiding and abetting illegal immigration and incitement and exploitation of prostitution. During the course of the investigation it was established that the Italo-Uruguayan organisation had recruited 50 girls in Uruguay with the false promise of work. They reached Spain and then Italy, using false documents, where they were put into prostitution.

A further investigation, named *Trans-Colombia*, started in October by the Rome police authorities, against an Italo-Colombian organisation involved in illegal immigration, reduction to slavery, exploitation of prostitution and supply of cocaine, led to the arrest of 7 Colombian citizens and 4 Italians. The investigation involved the activity of 30 transsexual prostitutes from Colombia, Ecuador and Spain, who worked as prostitutes from within apartments (22 of which belonged to the organisation and were sequestrated) and the reinvestment of the proceeds of prostitution in the purchase of cocaine.

The so-called Colombian mafia consists, essentially, of criminal groups (cartels) named according to their territorial area of operation (Calì, Medellin, Santa Marta, Magdalena etc.), which are generally autonomous and involved, primarily if not exclusively in the production, export and distribution of massive quantities of cocaine which is refined in Colombia, or purchased in other

countries involved in cultivation, such as Ecuador, Bolivia, Peru and others still, such as Venezuela, Brazil and Argentina[3], who are experts in working the *basic paste*, and running transit and warehousing areas for drugs that are to be exported to other continents.

With regard to the routes used for importing illegal drugs, Spain and Holland are the main European countries for the warehousing and subsequent sale of the drug on the European market. The massive cargoes are transported by sea or through the systematic use of couriers, who often have no criminal convictions and during their frequent travels carry with them small quantities of illegal drugs. The Colombian drug organisations have established logistical bases across Italy and, although they consider the *'ndrangheta* to be their primary contact at national level, they maintain contacts also with other foreign mafia-type organisations, such as the Albanian and Nigerian organisations.

Of particular interest is the fact that Albania has been chosen as a place for the warehousing of cocaine. The reasons for this choice can be found, on the one hand, in the widespread connivance and complicity among various sections of the police and political authorities in that country, which assure sufficient margins of safety in the various illegal trafficking operations and, on the other hand, in the possibility of using cigarette smuggling routes for the importation of cocaine into Italy, through Puglia, on board high-speed motorboats.

In the case of large-scale drug smuggling, the so-called Colombian cartels set up, not infrequently, structures for "joint ventures" in order to create efficient transport services as well as, above all, dividing the risks posed by the police authorities.

At the present time, the possibility of Colombian criminal groups using violence in Italy to guarantee their illegal trade can be excluded.

The Colombian "cartels" tend, with increasing frequency, to launder the proceeds of large-scale drug trafficking in property investment and in production activities, mostly in countries in the European Union, including Italy.

With regard to the systems for laundering and transporting money obtained from the sale of cocaine from Colombia, results from the most recent investigations show that the return of the proceeds into Colombia from illegal trafficking has taken place:

[3] Argentina is the largest producer of *precursors* in South America, due to the presence of the highest number of chemical industries on that Continent.

by way of triangulation mechanisms set up by compliant companies, along with the issue of false invoices in order to justify the receipt of sums of money that are to be sent on to Colombia;

by the transport from Europe to Colombia, by sea, of money in cash.

Among drug investigations carried out during the period from 01.07.2005 to 30.06.2006, the following are noteworthy:

the investigation by the Milan District Antimafia Bureau, named *Skipper 2*, ended in February 2006 with the arrest of 26 people (in Lombardy, Campania, Calabria, Emilia Romagna and in Belgium, Spain and Colombia), accused of involvement in a criminal conspiracy for the purposes of the international smuggling of cocaine by the Colombian Norte del Valle cartel, which reached Italy via the African route (Golf of Guinea) and through Spain and Holland.

the investigation by Naples District Antimafia Bureau, named *Mito 3*, ended in March 2006 with the arrest of 22 people accused of international drugs smuggling. In particular, the investigation showed that members of the Annunziata clan of Boscoreale, through their own members in Piedmont and Veneto, obtained supplies of cocaine from Germany and from Holland, where a Colombian broker operated on behalf of the cartel run by the Mejia Numera brothers;

the investigation by Rome District Antimafia Bureau, named *Ibisco*, ended in March 2006 with the execution of a custody order without bail, issued by the local investigating magistrate against 27 people (5 of whom were arrested in Spain and Morocco) belonging to an '*ndrangheta* organisation operating in Rome which also had connections with *Cosa Nostra*, that was able to move vast quantities of cocaine and hashish, using compliant ship owners and crew, from South America to Europe via Morocco, the Cape Verde Islands and Spain;

the investigation named *Narcos*, by the prosecution authorities in Brescia, concerning the obtaining of large amounts of cocaine by Iacomino Tommaso, a top member of the Birra-Iacomino clan. Iacomino, as a fugitive in Colombia, looked after the importation of illegal drugs into Italy via Colombia-Spain-Italy and Colombia-Portugal-Italy. The cocaine was destined for other clans operating in the Vesuvius area of the province of Naples, such as the Chierchia, Aquino and Gallo (or Cavalieri) clans. During the investigations, the Columbian police arrested Iacomino on the 27.04.2006 as a result of information received from the Italian police authorities.

With reference to the presence of people of Italian nationality in Colombia, the Colombian police arrested the Milanese fugitive Zappa Renato on the 14.02.2006 upon the request of the Italian authorities, for international drug smuggling. Since the early 1990's, Renato had been the intermediary between Italian drug traffickers and the Colombian *Los Mellizos* cartel, headed by the Mejia Munera brothers. One of these brothers, Victor Manuel, is also indicated as a leading member of the Colombian paramilitary organisation called the A.U.C. (Autodefensas Unidas De Colombia) which, for over 20 years, has fought alongside the military forces against the guerrillas who are seeking to obtain control of cocaine production.

At the conclusion of the *Dama Bianca* investigation, once again on information from the Italian investigating authorities, the Colombian police arrested a Milanese man with previous convictions, who was about to board a plane for Italy. On him were found 9.5 kg of cocaine, concealed in his hand baggage and shielded with radiographic tape[4].

With reference to the South American criminal organisations in Italy, it should be pointed out, above all, that bands operating in the large cities of northern Italy are formed by youngsters, often children, involved in committing crimes against property (theft, robbery and extortion) and in the street sale of drugs. These bands of Columbians, Ecuadorians and Peruvians often come into violent conflict[5].

During the period from 01.07.2005 to 30.06.2006, there were 156 arrests of people of South American origin.

On the 28.04.2003, a memorandum was signed between the Colombian State Prosecutor and the National Antimafia Bureau for the rapid exchange of news, information and data between the two countries in relation to the fight against organised crime and the laundering of the proceeds of crime.

§ 7. *Organised crime from Russian and other ex-Soviet Union countries*

Organised crime involving the former Soviet Union (the so-called Russian mafia) consists of a myriad of criminal groups of varying origin and not necessarily interconnected.

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[4] This method has often been successfully used as a means of passing through x-ray checks inside airports, by young Italian couriers without convictions, who have been engaged from time to time by drug smugglers who, in exchange, pay the cost of the journey and accommodation. Source R.O.S. – report on transnational crime – January – June 2006.

[5] The best known bands are those called Latin King and Neta, operating in the provinces of Genoa, Turin and Milan, Commando, active in the Milan area, Vatos, Los Templados, Forever, Soldatos Latinos etc…

It also has "imperialist targets", above all in relation to East European countries (Bulgaria, Hungary, Czech Republic and Poland).

The criminal organisations in the ex-Soviet Union have enormous financial resources obtained, above all, through the "privatisations" following the change in internal political scenarios. In fact, criminal groups have acquired massive quantities of investments that represent the national wealth, as well as property resources and control of many companies and banks.

The criminal groups in the ex-Soviet Union have become further consolidated through the election of their own representatives into local administrations and into the Parliament.

These groups are involved in international smuggling of arms [6] and strategic supplies, obtained following the process of demilitarisation of state structures, as well as being more recently involved in smuggling foreign processed tobacco [7].

In Russia there is still widespread corruption among public officials (or ex-officials) which gives rise to an unusual presence of various professions in the context of organised crime (military officers, administrators, politicians and technicians).

The "Russian mafia" can claim to have a presence in foreign countries such as Great Britain, where it is involved in the supply of arms to the IRA, Switzerland and Austria, where is has powerful financial interests, Germany, where it runs luxury brothels and smuggles strategic supplies, and the USA, where is also in contact with Italo-American criminal organisations. In particular, in New York it operates an organisation involved, among other things, in drug smuggling, money laundering, exploitation of prostitution and in the petrol "racket".

The investigations carried out over the last few years in Italy have shown that there is also intense criminal activity by these aforesaid criminal groups in Russia (kidnapping, company control and murder) as well as projects for economic activities in Italy (gold exportation, purchase of fish factories, trade in petroleum products, etc.)

It can be said that criminal activities carried out in Italy by citizens from the former Soviet Union countries, and established from the legal point of view, have the following characteristics[8]:

[6] On the 16.10.2005, in Mosciano Sant'Angelo (TE), the police, following a road check on two vans in transit, arrested 6 Ukrainian citizens and seized two 540 mm calibre grenades and an electric detonator. Source R.O.S. – report on transnational crime, 2nd semester 2005.

[7] On the 16.10.2005, in Mosciano Sant'Angelo (TE), the police, following a road check on two vans in transit, arrested 6 Ukrainian citizens and seized two 540 mm calibre grenades and an electric detonator. Source R.O.S. – report on transnational crime, 2nd semester 2005.

[8] Source of information: Antimafia Investigation Bureau.

- the availability of large amounts of money;

- the relatively young age of the people involved in the criminal activity;

- an apparent lack of contact with Italian criminal organisations.

Organisations in embryonic form have been noted, above all in towns along the Adriatic coast, involved in illegal immigration and exploitation of prostitution (in nightclubs and along roadsides), the latter carried out using violence and with widespread control of the territory, involving girls in particular from Ukraine, Moldavia and Russia, who not infrequently are sold to criminal groups from other ethnic origins (especially Albanians).

During the period under consideration in this document, there has been an increase in the number of Ukrainian citizens settling in the Campania region. The women are generally sent to work as prostitutes or to work as carers or domestic workers, while the men work in textile factories or on farms.

In Campania, there have recently been episodes of violence, including the shooting with a 7.65 calibre pistol in April 2006, in Poggiomarino (NA), of two Ukrainians who provided a transport link for clothing, food and money, between Ukrainians living in the province of Naples and their families in the Ukraine[9].

The Naples District Antimafia Bureau has found evidence of links between Ukrainian criminal organisations and the *camorra*, which ended with the making of a custody order without bail in relation to 20 people, mostly of Ukrainian nationality (many of whom are still at liberty), who are accused of criminal mafia-style conspiracy for the commission of extortion against co-nationals. The investigations obtained evidence of operations, in Naples and Caserta, carried out by three different criminal groups of Ukrainian ethnic origin which, with the collaboration of local people, were involved in controlling various minibus parks where goods and people were transported between the Ukraine and Italy and carrying out extortion activities in relation to the drivers and passengers.

There have been suspicions about the presence of Russian criminal organisations, involved in particular in laundering money from illegal activities, in Lombardy (Milan), Lazio (Rome), Tuscany

[9] Shortly before the murder, an abandoned van was found near Palma Campania (NA), containing 7.65 calibre cartridges. The vehicle was found to be the property of one of the two Ukrainian citizens killed. Palma Campania is the departure point for the bus service to the Ukraine and where there is an illegal market of goods to the Ukraine.

(Florence), Emilia Romagna (Modena, Bologna and Rimini), Piedmont, Veneto (Verona), Friuli -Venezia Giulia and in the Marche (Ancona).

In particular, there have been suspicious purchases in Tuscany[10], by former citizens of the Soviet Union, of agricultural businesses and industrial companies producing domestic consumer items (shoes, clothing, electrical appliances, etc.) for export to their country of origin and throughout Eastern Europe. The investigations would tend to suggest that these purchases have been carried out using money from criminal activities in the countries of origin.

There is also evidence of the purchase of hotels along the Romagna and Marche coast. It is thought that these purchases indicate an interest in obtaining control of tourism from former Soviet Union countries towards Italy, which is linked to so-called shopping tourism, particularly in the city of Rimini.

There has also been property investment along the Ligurian Riviera and involvement by citizens from the former Soviet Union in the management of financial intermediary companies. In Lombardy, on the other hand, Russian citizens have been involved in the restoration of fine buildings and in the management of import-export companies.

Unfortunately, it has been very difficult during the investigations to arrive at the formulation of allegations pursuant to articles 648-bis and 648-ter of the Penal Code as it is often impossible to demonstrate the existence of such an offence[11].

The typical criminal activities carried out in Italy by criminal groups from the ex-Soviet Union include trafficking in synthetic drugs such as Ecstasy and Eva, of hashish (ex-Soviet Union countries are world leaders in the production of this substance) and heroin obtained from the cultivation of the opium poppy in the Central Asian Republics (Tajikistan, Uzbekistan, Kazakhstan, Kirghizstan) and the "trans-Caucasus" republics (especially Azerbaijan). These Central Asian Republics are also the place for transit and subsequent distribution of heroin from south-east Asia to the centres of consumption in other ex-Soviet Union states, Europe and the USA.

On the 14.02.2001 the National Antimafia Bureau signed a memorandum of agreement with the Ukraine State Prosecutor for the rapid exchange of news, information and data in relation to the illegal activities of criminal organisations and the laundering of proceeds of crime.

[10] Source: Antimafia Investigation Bureau.

[11] Due to the difficulty in proving the alleged offence, considerable importance should be attached to the protocol signed in Rome on 20.01.2006 between the Italian Ministry of the Interior and its counterpart in the Russian Federation which will certainly assist collaboration between the two countries in investigations against money laundering.

Similar memoranda were signed between the National Antimafia Bureau and the State Prosecutions Departments of the Russian Federation (14.05.2002), Latvia (28.02.2002), Kazakhstan (28.05.2003), Lithuania (27.09.1999), Estonia (26.04.2004) and Uzbekistan (30.05.2005).

The number of Russian citizens arrested during the period under examination was 23, while the number of Ukrainian citizens arrested in the first six months of 2006 was 32.

§ 8. *Chinese organised crime.*

Chinese citizens first lived in Italy in the years immediately after the Second World War, when a limited number of exiles, mainly from the Zhejiang region, settled in central northern Italy.

Over the subsequent decades, Chinese family groups settled mainly in the cities of Rome and Milan, where they opened several restaurants.

The Chinese community in Italy has grown exponentially following the ratification provisions of the last few years, but above all with the opening up of relations between China and the west, after the events of Tien'anmen Square.

The regions in which the largest numbers of permits to stay have been issued to citizens of the People's Republic of China and, to a lesser extent, to citizens from Nationalist China (Taiwan), and to an even lesser extent to those from Hong Kong and Macao, are Lombardy, Lazio, Tuscany, Emilia Romagna, Piedmont, Veneto and Friuli Venezia Giulia.

Chinese communities have also settled over recent years on the islands and in the southern regions (there are estimated to be over 2000 Chinese people in the province of Naples alone).

The cities with the largest number of Chinese citizens are Milan (9,000 with official permits), Florence and Prato (15,000), Rome (5,000) and then Turin, Trieste, Udine, Modena and Reggio Emilia.

The commercial sectors in which the Chinese communities operate are restaurants, clothing, the import-export of craft and food products as well as hotels, tourism and publicity.

It should be pointed out that the progressive commercial expansion has been accompanied by a proliferation in associations for emigrants from the People's Republic, called Huaqiao, which have been set up with the precise purpose of protecting the interests of the emigrants, with the creation, for the same reason, of mother-tongue periodicals.

It has been established that, not infrequently, leading members of Chinese criminal organisations have attempted (sometimes with success) to obtain significant appointments within these associations in order to obtain greater prestige and authority over their co-nationals and to become intermediaries with Italian as well as Chinese institutional bodies.

What causes greater concern is the phenomenon of illegal immigration, mainly from Zhejiang province. The routes for this immigration include stops in various European cities with organised arrivals in Italy. Those running the illegal traffic also make use of sea routes from the Balkan coast to the coast of Puglia, which is covered by speed boats which also smuggle foreign processed tobacco and illegal drugs.

In order to arrive in Italy, each illegal immigrant pays a sum varying from 10-15,000 Euros, often loaned to them by organisations which, in China, run this kind of traffic. As a result the illegal immigrant often remains in debt and therefore prepared to commit crime in order to repay the debt.

The same thing happens for those who carry out underpaid work, mainly for clandestine companies: they can easily be obtained for unskilled labour by members of the same ethnic group who carry out illegal activities.

The investigations carried out indicate that, in Italy, there is no single Chinese criminal organisation, but rather numerous criminal groups, generally consisting of people from the same city of origin in the People's Republic.

Each group consists of a number of people which varies between ten and fifty and its members, who often belong to the same family, commit crimes almost exclusively against co-nationals.[12]

[12] The Chinese family is to be found in three forms: basic family (husband, wife, children), enlarged family (including the parents of the head of the family), extended family (which is the union of various family groups). From these forms is created the economic family – called “chia” – which is a family which, in addition to jointly owning its property, divides the work salaries of its members.

Each group has a leader[13] and entry is by way of initiation ceremonies[14].

The bond within the family or the group is very close, and therefore there is a fairly strong concept of vendetta[15] which can lead to feuding.

The Chinese generally consider the State to be very distant and absolutely incapable of protecting them, without any distinction being made in this respect between their country of origin and country of adoption. It naturally follows that they consider state officials in general, at whatever level, as corrupt or corruptible.

Chinese criminal groups, in the same way as the so-called traditional mafia organisations, use intimidation and/or violence with extreme ease and frequency in order to achieve their objectives, as well as maintaining the rule of silence and seeking to dominate the territory over which they operate.

The criminal activities carried out in Italy by Chinese organised criminal groups are:

as already mentioned, trafficking in illegal immigrants and offences connected with falsification of documents;

kidnapping for ransom against co-nationals, very often connected with extraction of the price to be paid for illegal expatriation, for the journey and for illegal entry into Italy;

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[13] Generally the groups have a single head, who makes the decisions. Only he makes the orders, which are generally communicated to deputies and carried out by individual members. The structure is therefore strongly hierarchical, with the head as strategic director and the deputies as points of contact with the individual members.
Where the head is absent, preventing any point of contact, even by telephone, a deputy is appointed with vicarious functions.

The group can be structured in different ways where it has greater importance, with interests in different States, or different cities or in different sectors. In this case each sub-group operates in effect autonomously and responds for its actions only to the head of the entire pyramid. It is the head who decides whether information is to be passed to individual members or whether it should remain at intermediate levels.
Finally, a group can include small additional groups, consisting of two or three people, who are known only by the head, who uses them only for tasks that are considered to be "confidential", such as actions against members of the same group or for gathering information without others knowing about it.
Often the groups have one member who has the role of acting as "advisor" for the head; this is generally a technical advisor who has the task of studying strategies for actions.

[14] At the initiation ceremony at least 7 initiated members of the organisation must be present; all of them, including the initiate, cut the finger of a hand with the point of a dagger or a sharp weapon suitable for killing. Each of those present allows a drop of their blood to fall into a bowl of rice liquor (symbolising life force); then each in turn pronounces the words of an oath and they drink from the bowl.
The “sword of blood” is generally a warning of death. In consists of the person concerned receiving some red coloured gladioli flowers. This warning is also binding upon the group who have sent it. Recently, in Italy, certain groups have substituted the sending of flowers with the more modern alternative a sending the bullet of a gun.

[15] The vendetta is considered to be an obligation especially in the event of a male member of the family being killed.

extortion[16] against Chinese restaurateurs and owners of manufacturing workshops;

robbery[17];

debt collection with the use of intimidation and violence;

organisation of gambling[18];

exploitation of prostitution, under the cover of massage parlours[19] and, more recently, on the streets;

illegal holding and carrying of arms;

murder of members of rival criminal groups;

tax evasion in business activities;

forgery and trading in all kinds of manufactured and imported goods, especially from China.

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[16] Extortion is the most typical way in which Chinese criminal groups obtain money. It is normally carried out with the system of offering "protection", with the use of violence and threats before and/or after the request for money.
Italy has not yet reached a situation of generalised protection with the payment of a fixed amount by the victim, as happens in France and Spain. Requests are therefore one-off payments but they frequently reach sums of even 25,000 or 50,000 Euros. Nevertheless, according to Chinese citizens who have collaborated during the course of various investigations, almost all of the owners of restaurants or workshops are subject to extortion or at least to attempted extortion.

[17] Robbery against Chinese families seems to be developing fast in cities such as Rome and Milan, or in the Florence/Prato conurbation. The robbers are generally masked with women's stockings. On 29.7.2005 the police arrested the fugitive Hu Bingqui at the municipal casino at Ca' di Noghera di Mestre (VE). He was the subject of two orders for arrest without bail issued by investigating magistrates in Milan and Prato because he was alleged to be responsible, along with others, for the murder of two co-nationals, committed in the province of Treviso on the 4.11.2004 during the course of an attempted robbery. Lhu, who was considered to be a leading figure in Chinese organised crime in Italy, was also involved in international drug smuggling.

[18] Inside illegal gambling houses the most usual games are: poker, sometimes with oriental variations; majon, which is a typically Chinese game although, given its slowness it does not allow the winning or losing of large amounts of money; dominoes, played in the same way as in Italy but with a higher point score. This is the game most in vogue in the gambling houses because it is fast and makes it possible to win or lose large sums in a short time.
Various sources have indicated that certain groups use gambling as a cover for extortion from their victims, who are the owners of manufacturing businesses. They are invited to a poker game, without the possibility of being able to refuse for fear of reprisals. At the end of each hand the game is interrupted and the person that is winning has to share his winnings with the member of the criminal group present.

[19] Prostitution is spreading, in particular in Milan and Turin. An organisation was identified in Turin which arranged from girls to be brought from China to work in brothels. The women involved move from one place to another, each of which is often advertised as a "massage centre", and they themselves tend to become the managers of new brothels and collectors of new illegal immigrants.

There have been drug trafficking cases involving Chinese citizens – especially in Piedmont, Lombardy and Tuscany – but overall, although there has been an increase, this phenomenon is still very small and limited to supply within the Chinese community[20].

With regard to relations with Italian criminals, it should be said that only in the last few years have there been cases of mixed criminal groups, comprising Chinese and Italians, involved in extortion and robbery and well as kidnapping.

The economic sectors in which the Chinese community has greater power are those typical of the first stage of development of an immigrant community: restaurants, leather and textiles (traditional sectors already in country of origin), small-scale crafts connected with the world of markets and itinerant selling (games, gifts and fancy goods). Nevertheless, taking into account the major economic development that is taking place in the Chinese community, it is probable that, in the immediate future, there will be expansion in various less traditional economic sectors. In any event, the current economic circumstances are those typically of working in the black economy, which is one of the principal factors in the development of the Chinese immigrant communities. Along with this is the failure to comply with regulations governing economic and work relationships, in particular hours of work, hygiene and safety regulations and planning rules governing the use of a building, each of which constitutes a further economic factor.

Of particular relevance is the fact – which is also consistent with an economy in the initial stages of development – that the Chinese community tends to make very few banking transactions. Investigations have shown that each transaction generally takes place using cash. These are expenses for the management of legitimate business activities or finance for illegal immigration.

Equally typical of immigrant communities are the close relationships with the country of origin which, from the economic point of view, take the form of a strong tendency to re-invest in China a significant part of profits earned in Italy.

With reference to illegal financial transactions, two investigations should be cited which highlight the attitude of the Chinese in resorting to corruption in attempting to evade the control of police authorities and which have made it possible to identify two illegal banks situated in Rome and Milan.

[20] On 22/7/2005, in Montecchio a Mare (VC) police arrested two Chinese citizens found to be in possession of 300 ecstasy tablets ready for sale inside a discotheque. A further 300 ecstasy tablets were seized on the 24.09.2005 in the same place.

The first investigation, named *Ultimo Imperatore*, carried out by Rome District Antimafia Bureau in July 2005, ended with the arrest of 9 people (5 Chinese and 4 Italians), accused of criminal conspiracy for the purposes of laundering in the illegal exercise of banking services. The accused laundered notable sums of money, partly of illegal origin, which was the profit from import-export activities involving fake textiles from China. Investigations revealed 30 import operations of goods, loaded in the port of Singapore, accompanied by false documents and the reinvestment of the earnings in the purchase of property in China as well as Rome (in the Esquilino, Prenestino and Casilino districts, where there are the largest numbers of Chinese people). In the Esquilino district, a criminal group had established a kind of banking service that was able to offer loans to foreign citizens, mainly of Chinese origin. The sums collected each day, varying between €500,000 and €1,000,000, were transferred to a branch of the Banca Nazionale del Lavoro by security van. In this way, a parallel financial market was established, in which compliant officials from the B.N.L. bank were involved, who illegally exported money to Asian banks through the production of false invoices for import operations on goods.

The second investigation, named *Oro del Dragone*, discovered in July 2005 an illegal bank intermediation activity, run by 2 Chinese citizens and 3 Italians, for the purposes of satisfying the financial needs of members of the Chinese community. It emerged from the investigations that a money transfer agency had been operating as a clandestine bank, moving money over the previous three years totalling around 31 million Euros, relating to at least 20,000 operations for the transfer of money abroad.

During the course of coordination meetings, held at the National Antimafia Bureau with public prosecutors and various other investigation bodies, various problems were highlighted regarding investigations involving the Chinese criminal community.

One of the main problems experienced by public prosecutors and police investigators relates to the use of interpreters. In fact, apart from proven cases of untrustworthiness by translators, it should be emphasised that most Chinese present in Italy, as indicated earlier, originate from Zhejiang, where a dialect is spoken that is hard to understand, for which there are few specialist translators. Moreover, the interpreters available, precisely because they are few in number, are easily identifiable by the community to which they belong and, therefore, are exposed to probable risk of intimidation.

The problem can therefore be seen as twofold – firstly, in terms of the number of interpreters and, secondly, their identity.

With regard to the first aspect, it has proven to be impracticable to seek assistance of the Chinese authorities in training current interpreters in the Zhejiang dialect due to the risk that news will spread among the Chinese community. It has been found to be more useful, however, to arrange training through private bodies (for example, universities etc.).

With regard to the second aspect, it would seem impossible to conceal identity under the current regulations. It would be necessary therefore to introduce new legislation – obviously not limited to offences by Chinese people but having a more general effect – which would move in a twofold direction: concealment of physical identity and name, with regulations that operate during the investigation stage as will as during court proceedings.

The introduction of such regulations could resolve the root of the problem also in relation to the further difficulty that currently arises from the regulations governing remuneration of interpreters pursuant to article 11 of Law no.319 of 8 July 1980, which provides that notice of deposit of the remuneration order is communicated to the parties.

However, concerns have been expressed about the possibility of introducing a system of regulations that would deprive the defence of the possibility of establishing any grounds of incapacity or incompatibility that might arise from such refusal.

During the course of coordination meetings, held at the National Antimafia Bureau, questions have been raised about the possibility of not stopping those involved in smuggling illegal immigrants at the frontier, when they are discovered, but of delaying their arrest in order to follow them and identify their contacts.

Taking the cue from the law relating to illegal drugs (article 98 of the Consolidated Legislation), on which the subsequent legislation was then modelled in relation to kidnapping for ransom (article 7 Legislative Decree no.8 of 15/1/1991) and laundering and extortion (article 10 Legislative Decree no.419 of 31/12/1991), similar regulations could be introduced and included in the Consolidated Legislation governing immigration, under article 12, that are similar to subsection 4-bis, which provides that where it is necessary to obtain further elements of proof or identify, or arrest those responsible for crimes set out in subsections 1 and 3, the investigating magistrate can delay the execution (by an order that gives reasons for doing so) or delay the execution of measures applying to an order involving custody, arrest or detention of the accused person.

The permanence of relationships that Chinese criminal groups maintain with their country of origin makes it necessary for the investigating authorities to have the possibility of a structured contact

with the Chinese authorities. At present, it is a matter of priority to have police contact, but it would probably be useful, as from now, also to move towards judicial cooperation.

One particular aspect in relations with China, with immediate useful repercussions for investigations, is the possibility of having rapid information on Chinese telephone numbers.

It has been established, however, that Telecom Italia does not have access to information on foreign telephone numbers and that, in particular cases, where the problem has arisen, it has requested the collaboration of the corresponding foreign telephone companies but that the response times have been in the region of several months.

It has been established, through the Italian Ministry of Foreign Affairs, that Chinese Telecom does not provide a public service which makes it possible to obtain personal information about the holder of a telephone number. On the other hand, it provides a service for identifying the telephone number of a particular user. There are two possible ways to obtain such information: either to contact Interpol, in which China participates, or make direct contact with the Italian Consulate General in Shanghai.

Another problem, which has arisen during the course of investigations, is the failure to indicate the city of origin on the passports of immigrants, which obstructs investigators in identifying connections between various people who are quite often linked by exactly the same geographical origin. In order to overcome this problem, it has been suggested that the investigating authorities ask Chinese citizens, during the course of questioning, to indicate their city of origin. Other investigations carried out over recent months in relation to Chinese criminal groups include the following:

- the *Lanterne Rosse* investigation by Naples District Antimafia Bureau, which ended in May 2006 with the arrest of 10 people, including 6 Chinese, belonging to an Italo-Chinese organisation involved in importing fake goods from Zeijang, through the ports of Naples and Civitavecchia. The investigations revealed that Italian citizens were covering the role of forwarding agents and had the task of mediating with customs officers in relation to the illegal importation of the goods into Italy;

- an investigation which originated with the inspection, at the port of Naples in March 2006, of a container shipped from Hong Kong and addressed to a firm in Ascoli Piceno. The investigators found thousands of imitation shoes worth around 300,000 Euros;

an investigation by the Naples authorities, which began in March 2006 with the seizure, by police at the port of Naples, of 17.5 tons of Chinese meat produce destined for sale in Rome, whose importation is prohibited by European regulations;

an investigation in relation to an ambush carried out on 22.05.2006 in San Giuseppe Vesuviano (NA), by 6 Chinese masked men who entered Hotel Villa Paradiso, managed by two co-nationals, carrying weapons, and killed a Chinese citizen, injuring three others. The victims, who were all traders operating in the clothing sector in Prato, regularly visited the area in order to deliver clothing to Chinese companies operating there.

With regard to Asian organised crime, reference should also be made to the investigation called *Thaisex,* carried out in relation to a transnational organisation involved in illegal immigration and exploiting young girls from Thailand who were forced to work as prostitutes in brothels in various cities in Italy (Asti, Alessandria, Pavia, Verbania, Ferrara and Naples). The investigation, which ended with the making of custody orders without bail against 16 people, mainly of Thai origin, who were accused of offences of human trafficking and reduction to slavery, established that in some cases the girls were sold to the criminal organisation by their own families, and were employed with false promises of work. They arrived in Italy with tourist visas, paying the sum of 2,500 Euros for the cost of the journey to an agency in Bangkok.

There were 78 Chinese citizens arrested in Italy during the period between 01.07.2005 and 30.06.2006.

On 17.01.2002 a memorandum was signed between the National Antimafia Bureau and the appropriate Judicial Authority in the People's Republic of China for the rapid exchange of news, information and data between the two countries, in relation to the fight against organised crime and laundering of the proceeds of crime.

area, Vatos, Los Templados, Forever, Soldatos Latinos etc…

Antonio Laudati

Substitute National Prosecutor, Italian National Anti-Mafia Directorate, DNA

1.3. Crimes of production and supply of drugs

§ 1.

The major criminal organisations, and especially mafia-type organisations, are characterised today by their progressive and now complete internationalisation. Their extraordinary capacity to accumulate enormous wealth from organised crime now constitutes one of the major risks for modern democracies which are in danger of remaining heavily conditioned by them.

In fact, the criminal organisations operating in the sector of cocaine smuggling demonstrate a marked capacity to penetrate the social fabric of various Countries, acting on an international scale, with methods involving high entrepreneurial capacity for investment in the economic world.

Today, criminal organisations running the cocaine trade are able to influence the economic choices of entire states through the introduction into the financial circuit of enormous quantities of earnings from the drugs trade, to which are added those accumulated from *external* economies directly linked to trafficking.

At the same time, there is a progressive improvement in the evolution of methods used for cocaine trafficking, and particularly in the operational methods: these include an improvement in communications systems, development of technical research for identifying new ways of concealing and moving drugs, and the use of sophisticated international financial channels for recovery of earnings from drugs.

§ 2.

The principal indicators extrapolated from the investigations, make it possible to identify a concentration of cocaine trafficking in America and Europe, but more recently also in Australia and Africa, even though the latter area is exclusively an area of transit and temporary warehousing.

The first example of internationalisation of Italian organised crime was the well-known setting up of a group of *Cosa nostra* in the United States of America in the early 1900s, or the "siderno group" in Canada.

The leap in quality between the *old mafia* and the markedly transnational *contemporary mafia* took place around the 1970s with the development of drugs trafficking.

In the 1980s, on the Caribbean island of Aruba, the *Caruana -Cuntrera* mafia family and the Colombian Medellin cartel decided to form an alliance, bartering European heroin with cocaine produced in Colombia and thus monopolising the Atlantic drugs market.

Today, the international panorama in this sector of trafficking, also by reason of the increasingly frequent phenomena of *infiltration* between various organisations, appears to be in rapid evolution and increasingly characterised by the need for interaction and cartel alliances, set up from time to time between criminal organisations in Italy and abroad.

§ 3.

With increasing frequency, in fact, cocaine traffickers choose unusual routes that are more tortuous, but which nevertheless ensure a lower risk of their cargoes being seized. Drugs seized in Italy continue to arrive principally from Colombia, from Venezuela and from the Caribbean countries, via:

- *the Latin-American route* (from the producer countries, towards Argentina, Paraguay, USA, Canada and Europe);

the North Pacific route (from producer countries, via Mexico, towards the western north American coasts);

the Atlantic route (from Venezuela, Colombia, Brazil and Argentina towards Europe);

the African route (from Colombia, Peru, Argentina and Brazil towards the central west African countries).

The notable flexibility of routes relates also to the methods of transport, cover and concealment of loads. For the large cargoes of cocaine, the most common method used is sea, but transport by air is still used. The choice of concealment for the loads is generally through packaging or within the goods themselves (marble, fruit, fish, wood, etc.), impregnating the covering (leather, clothing, cloth, etc.), creating special compartments in the containers, with methods that tend to avoid every form of responsibility to the delivery companies and companies concerned in the event of the drugs being seized.

As well as the most sophisticated techniques, there are also the simplest methods, such as for example the cavities of underwater oxygen tanks and harpoons, or inside packs of food products. The choice of channels used from time to time for transporting loads is also influenced by cartel agreements between producers and purchasing organisations, sometimes with the requirement of providing areas for temporary warehousing, not far from the docking point. These requirements sometimes provide opportunities for undercover operations by police investigation authorities.

The evidence obtained in several investigations has made it possible to identify the difficulties in transferring cocaine where organisations do not have control over the vehicle, while various criminal groups, particularly of Colombian origin, even have direct control over the shipping companies.

Finally, especially in the field of telecommunications, technological evolution today offers sophisticated instruments to criminal organisations, which can hamper policing methods: Steganography (hiding a text file in a picture, which is sent by email), transmission of pictures of a written text (photo of a letter transmitted with an MMS and "3" mobile telephone, taking advantage of the inability of surveillance equipment to decipher this type of material) and code language.

Investigation activities and international cooperation over the last few years has made it possible to identify the functional arrangements in most of the more complex Colombian transnational organisations. These consist of:

an organisation leader in Colombia, the head of the trafficking organisation, owner and supplier of the drug, capable of financing all operations for the profitable expansion of the trafficking activity (cf. creation of logistical platforms in other countries, for purposes of drug distribution);

local distribution groups, each independently responsible for identifying and creating suitable clandestine warehouses (for holding and warehousing the drug) and purchasers, but also distinguishable for their mutual collaboration in terms of reciprocal supply of drugs in order to meet whatever overall requirement is placed upon the organisation;

- *logistical groups for carrying out shipping by sea,* consisting of import-export specialists, through merchant ships that have been hired or temporarily acquired, or fraudulently used (without the shipping company and/or its crew being aware). In the first two cases (hire and temporary acquisition), those in charge of the logistical group have the task of identifying the "consenting" crew and the covering cargo, as well as the documents necessary to make the legal commercial shipment possible and to protect those responsible from identification in the event of the drug being seized;

- *supervisors,* with the task of checking the resources and the reliability of the purchasers, of maintaining contact with them and representatives of the supply cartels in Colombia, carrying out and being present from time to time at the withdrawal of the drug from the clandestine warehouses, overseeing the correct delivery of the quantities ordered; finally, taking steps to recover the proceeds and delivery to the brokers indicated, from time to time, by those responsible for the distribution;

brokers, with the task of receiving from the supervisors (and not directly from the purchasers, for obvious reasons of compartmentalisation) and sending the proceeds from the trafficking to Colombia, both by bank triangulation or other financial transactions identified by the operators themselves;

basic representatives, mainly South American, appointed by those in Colombia who are responsible for distribution, to identify purchasers in Europe and to forward the requests for drugs to the suppliers in Colombia. Operating in a system of absolute autonomy, the basic representatives also organise the transfer of the drug to the purchaser, identifying the most suitable place, depending upon the quantities stocked in the various clandestine warehouses, nationally and abroad. Some basic representatives, with operational ability in the import-export sector, can be appointed by those responsible for distribution to hold and stockpile consignments of cocaine in the warehouses of the businesses that they control. In this case they are offered two distinct options:

to purchase, subject to prior payment of a percentage, the entire quantity stockpiled in the warehouse, paying the balance due after the sale has been completed to independently identified purchasers or to those identified by the heads of distribution (and pointed out by other basic representatives);

to be responsible exclusively for holding the drug in the warehouse they are controlling, becoming themselves owners of a part share of the overall load stockpiled, to the extent of no less than 30% and assisting the activities of systematic withdrawal of the drug by the supervisors, who are responsible for the delivery to the basic representative, who in turn passes it on to the purchasers.

-a group responsible for recovering the proceeds of the drug sales, often operating in the country of destination as well as in the country of transit, with connections in various other countries, often consisting of companies who work in the money laundering circuits for illegal drugs.

§ 4.

The historic Cali and Medellin cartels, alongside which a myriad of minor groups have gathered over time, have always had enormous financial potential, and have established important logistical centres in Italy, which have been given the role of successfully completing drug

operations with Italian organisations, seeking also to carry out the final stages of the refining operation in Italy.

Countries along the Atlantic coast of Central-North Africa are assuming increasing importance as an area of transit and stockpiling. It has recently been ascertained that ships load their illegal cargo from the north-eastern coasts of Brazil and, once they have crossed the Atlantic, unload the cocaine onto speedboats or fishing boats stationed in north-west Africa (Senegal, Mauritania and Togo). For smaller quantities, for which mafia families have no role of intermediation, the activities of extemporary re-supplying are carried out by Colombian citizens who are not involved in the cartels. For such quantities, transported from the countries of origin to Italy by aeroplane, increasing use is made of couriers of various nationalities, including Dominicans and Nigerians, sometimes organised into actual groups stationed in Italy, headed by accomplices based in Latin-American countries.

In this context, Colombia remains the main point of contact for Italian organisations involved in drug trafficking, and therefore the political and social developments in the country, which are influenced by drug-terrorism, have an immediate impact on the world drugs market.

Due to its particular geographical position and proximity to the principal producing countries, Venezuela, in fact, emerges in almost all transnational investigations as the actual base from which massive quantities of cocaine are transported, as well as heroin and marijuana.

There are particularly sophisticated techniques for stockpiling, with the burial of drug consignments in ditches, excavated in *finca* or *woodland* areas. Only after the conclusion of negotiations are the consignments of drugs delivered to the purchasers, normally reaching prearranged shipping points on high-powered sea boats.

Argentina also has similar problems, especially in the north, even though it is not a producer country. The considerable extent of drug trafficking is favoured by the geographical conditions and by the scarcity of facilities for the police to monitor low level tourist planes that use private and illegal runways.

Cocaine is brought into Argentina mainly from Bolivia and, to a lesser extent, from Chile, Paraguay and Brazil, via land routes or, alternatively by plane. Generally speaking, after the stockpiling, the drug is transported into Europe or to South Africa, from where it then continues on towards European countries, Asia and Australia, carried by couriers on aeroplanes or ships, or in postal packages and commercial cargoes transported by sea.

As part of the security programme of the present Argentine government, particular emphasis is being placed upon the fight against drug trafficking, and the relevant action plan has provisions for strengthening policing units, for the creation of a judicial body comprising magistrates specialising in the specific sector, and for an increase in international cooperation.

In Brazil, cocaine trafficking is also on the increase. The country has become a platform for the stockpiling of massive quantities, and is an important transit area for the final markets as well as providing a source of labour and for the recruitment of couriers, both Brazilians and foreigners, with different routes and means of transport. Moreover, in this country, in the areas bordering with Peru, Colombia and Venezuela, there are modest cultivations of *epadù*, a variety of coca with a low active element, consumed by the Indios.

From the results of investigations by the Brazilian police, there is often no clear separation between legal commercial activities and drug trafficking, given that well known economic operators often offer cover for the transport of drugs or channels for the reinvestment of drug proceeds. In this respect, recent monitoring on financial trends in Brazil have shown that there has been a considerable increase in the number of bank agencies in regions such as Amazonia, Rondonia and Acre, which are certainly not matched by an equivalent and equally flourishing economic development. Internally, the sale of drugs in Rio de Janeiro and San Paolo is controlled by criminal organisations *(Primo Comando della Capitale* - *PCC, Comando Vermelho* and *Terceiro Comando.)*

Nigeria, although it is not one of the producers of heavy drugs, is involved in large-scale trafficking of cocaine as well as heroin, constituting the main crossroads in Africa for drugs, through the exploitation of a large number of young labourers.

Apart from well-established relations between Nigeria and Colombian and Bolivian cocaine transporting organisations, Brazil has also recently been identified as a new route for South African couriers who operate between San Paulo and Johannesburg, after having been recruited by Nigerian organisations in Holland.

Thanks to the military presence of Nigeria in Liberia, for example, the free port of Monrovia has become a distribution point. The traffickers also take advantage of migration into bordering countries in order to develop local markets (in particular Lomé, Duala, Cotonu, Niamey or N'Djamena).

South Africa is particularly relevant in this respect, from which 3% of world air traffic passes. According to estimates from the *South African Narcotics Bureau* (SANAB), Nigerian, South American, Lebanese and Israeli traffickers have converted the well-established arms, ivory and precious stone smuggling networks into drug trafficking networks. In particular, Nigerian couriers travel from South Africa to Brazil on direct commercial flights, using false South African passports, and return with cocaine to South Africa, travelling on to Germany, Italy, Luxembourg, The Netherlands and Switzerland.

The flow of drug profits are directed towards the mother country or abroad, through money transfer companies or couriers, and are reinvested in drug trafficking, or converted into powerful cars which are then exported to Nigeria.

Morocco, which is a leading producer of *hashish* and *cannabis* derivatives, is also (according to the D.C.S.A. in Rabat) progressively assuming the role of transit country for cocaine, which is stockpiled in western Africa and sent to Europe, where Spain continues to be one of the most important points of arrival.

The Special Administrative Region is the world leader in the distribution of containers and second airport at world level for the transit of goods and passengers. For this reason it has also become one of the prime centres for the drug management, stockpiling and distribution. For cocaine trafficking, the preferred drug for local drug-takers, Hong Kong, is particularly important, especially in relation to the accumulation of massive investments from the drugs trade. The Colombian recycling organisations like to launder the proceeds from the drugs trade through banking and financial channels in Hong Kong, where moreover, according to data from the Financial Bureau, the exchange of heroin for cocaine as well as the supply from China of chemical precursors for use in the various stages of refinement has been taking place for many years. The cocaine arrives from South America, either by air or sea, by way of other countries in Asia, Oceania and Europe.

The new terrain for criminal organisations, often connected with terrorist links, is now Cambodia, which is the setting for drug laundering operations that have been made possible by the proliferation of gambling houses in the Cambodian capital and by the extreme ease with which it is possible to open and close credit intermediation institutes, whose life is brought to an end even simply with the completion of a financial operation.

The analysis of intelligence data has also shown an increase in investments in cover activities carried out in Thailand by South American organisations present in the region, marking the beginning of an increase in cocaine trafficking.

Finally, a brief mention should be given to Poland, where the Baltic Sea ports of Stettino, Danzica Gdynia and Sopot continue to be used for trafficking and stockpiling massive quantities of heroin and also for the supply of cocaine shipped in by South American organisations using containers transported by ships carrying cargoes from Argentina, Colombia, Peru and Venezuela, which deposit them in Poland awaiting distribution in other European countries.

As mentioned, in Italy, investigations carried out over the last few years in the drug trafficking sector confirm the predomination of Calabrian organisations, in particular those on the Ionian coast from Reggio Calabria, which have stable and well-established contacts in the producer countries as well as in the transit countries through which cocaine passes.

The *'Ndrangheta* runs a broad share of Italian drugs trade through highly qualified networks spread over the national territory, and has stable operational connections with criminal organisations in Sicily, Campania and Puglia.

The passage, from traditional parasitical activities to more profitable drug trafficking, was only possible through the extensive and powerful connections of the *'Ndrangheta* with their own overseas branches, which consisted of groups from Calabria who has been resident for many years in countries such as the United States, Canada or Australia. There is also evidence of Calabrian organisations in Argentina, France, Germany, Holland, Belgium and Spain.

The clans of the Neapolitan Camorra also have historical contacts and business links with the main South American cocaine suppliers. For example, the well known Fabbrocino clan has been present in South America for many years, especially in Venezuela and Paraguay, strengthening its criminal and economic interests and trying to make direct contact with the drug *cartels* and their European representatives.

§ 5.

From the point of view of laundering and reinvestment of proceeds from cocaine trafficking, significant recent evidence has been obtained in relation to economic and financial intermediation centres. In this respect, as well as the traditional laundering techniques, which have never been totally abandoned by the criminal organisations, there has been recent monitoring of a complex

system for the movement of drug-dealing profits. Through a series of banking transactions in offshore countries, liquidity has been created on behalf of a "Company" operating in Italy and controlled by the organisation, for sums equivalent to those amounts to be laundered (principally in Hong Kong and Singapore banks). These sums, after a series of bank triangulations between various credit institutions in Singapore, New Zealand and Australia, were paid into an Australian current account, operated by the organisation's contact in that country.

The operation of such sophisticated mechanisms of intermediation always requires the involvement of specialists who are able to assure a professional management of the necessary procedures. In addition, through market globalisation and the property investment process of criminal organisations, these organisations are able to create *offshore financial havens*, or rather those centres that appear in the so-called *black list* drawn up by the Italian Government since 1992, which are also regularly used by those involved in fraud against the state or against supra-national communities, as well as in tax frauds. In this respect, the main results of the investigations show that some of these countries have developed, over time, considerable specialisation in both the banking sector as well as company and financial management, offering highly qualified service packages, while others, described as the so-called *emerging centres*, are still seeking methods which enable them to reach a significant percentage of transactions.

Today, the previous lists have been replaced by a new classification on the risk of various countries, adopted by the *Off-shore Banking Supervisor*. But apart from the distinctions made according to the individual rates, various common characteristics emerge. These include: the extremely low level of taxation for each transaction; the absolute guarantee of banking and commercial secrecy; the rapidity of financial operations permitted by the respective internal laws; the impossibility of requesting mutual assistance in criminal matters by interested countries; the favourable geographical position, almost always an island; the adequate exchange regime and the possibility of negotiating other currencies without any kind of limit.

But the transfer of drug-trading profits can also be carried out through false or real import-export operations - producing false invoices for business transactions abroad, which are non-existent or equal to the sums transferred, or purchasing goods or raw materials through controlled companies and directly in the country of destination, which are then transferred to the areas from which the drugs originate and paid for in cash. Such methods have been used by companies operating in the wholesale or retail business sector for precious metals, either finished or semi-finished, or raw materials, dross and by-products, which have been the focus of various investigations. These have brought to light a well-established and recurring system which, through the importation of metals

from abroad and false invoicing or over-invoicing of commercial operations, was able to recover the drug-dealing profits.

Another concrete risk area is laundering through the services offered on the Internet by various *off-shore profit centres:* unregistered electronic accounts, credit cards on anonymous accounts available mainly in eastern European countries, honorary certificates or citizenship or securities. These are just some of the possibilities that the launderer has when using the Internet, where each operation for the movement of capital on a computerised network consists of only a few bytes of information, sent to operators working in credit institutions spread across the whole surface of the world. Today, the online payment systems cancel out the most obvious problem of money laundering that arises from the embarrassing physical problem of handling enormous quantities of money. And once again, the question that arises is the extent to which the criminal launderer is able to take advantage of the national differences between standards of security, both through systems based on the use of computerised networks as well as solutions based on stacking investments on computerised cards or smart cards.

More generally, from an analysis of the systems used for the payment of cocaine supplies, it emerges as a common feature that there is an absolute distinction between movements of money and those of drugs. In fact, the reinvestment operation is separate and perfectly independent from the trafficking. This situation has made it possible for professional figures to be created who are completely extraneous to the traditional criminal context and are concerned exclusively with laundering the proceeds.

Evidence of the use of *money transfer* services (often linked to *phone centres*) has also been widely found in many investigations carried out in relation to criminal groups involved in cocaine trafficking. In fact, this circuit assures not only speed in the transaction, but also a very considerable possibility of concealment: any reporting of a suspicious operation is carried out by the financial agency and not by the final operators, but, in the present case, this possibility is entirely theoretical.

Those who receive the payments do not necessarily live in Africa or, in particular, in Nigeria, but rather in various EU countries, especially in Italy or Holland, in the United States and Canada, confirming the existence of vast international links.

Those countries most involved in receiving money from Italy are Romania, Morocco, Nigeria, the Ukraine, Ecuador and Colombia. The operational procedure is very effective and rapid, even if the weak link in the chain, from the point of view of control, is inevitably the sub-agent or sub-

mandatory, who does not possess (and often has no interest in developing) any specific ability to identify suspicious operations to be communicated to the agent, who is the person with effective responsibility for reporting such operations. Among Nigerians there is a strong feeling of ethnic or tribal identity, and this factor is also a dominant characteristic in transnational links: very often the foreign interlocutor is a member of the same family, a friend or at least belongs to the same family group in the widest sense.

In this respect, while, in certain respects, it is fairly possible to investigate the criminal activities carried out by organisations on a world scale, it is considerably more difficult to identify and consequently to monitor the flow of money originating from these organisations. It can in fact be seen how difficult, or indeed impossible, it is to trace back to the origin of the money, whatever it is, once it has been invested in the financial circuits.

It should also be pointed out, in this respect, that the notion of laundering under Italian criminal law is based on a definition which has been widened over time both in terms of the crimes to which it relates as well as the relevant conduct, also adding to laundering in the strict sense (substitution, transferral or concealment) those involved in investing the illegal profits in economic or financial activities and the fraudulent transfer of securities. However, from the point of view of investigation, the aspect which differentiates between laundering under Italian law and under other criminal systems, is the distinction between of the original offence and the launderer. In fact there is a requirement that the latter has not been involved in the principal offence, so that the laundering is considered as a separate aspect, although contiguous to the production of the illegal wealth. The regulations in force for combating organised crime on an economic and financial level, offer the possibility of effective recourse to many and various investigative possibilities.

In particular, it has been found particularly effective to bring together various operational modules that tend to make best use of the complementary features existing between the repressive aspects of the legislative framework and those aspects that are purely preventative and to obtain the best results by hitting the vital centres of organised crime in *military* terms as well as economic and financial terms.

Finally, it seems to be essential to cultivate, at international level, joint projects against the main criminal phenomena, in relation to which the laundering of capital is closely connected.

§ 6.

Faced with a scenario of such complexity and detail, where traditional investigation methods and approaches are insufficient to identify the vulnerable points of organisations involved in drug trafficking, it also seems vital to improve the legislation to fight it, and at the same time to harmonise the procedures in the various countries, at least at European level.

The seriousness of the phenomenon requires a unified international strategy, arranged over five areas of intervention, which have already been clearly indicated by the Vienna Convention of 1988 as complementary and indispensable:

- identification of the sources of production and dislocation of the prime links in the organisational structure through which the trafficking is managed;
- combating the smuggling of the so-called precursors, namely of those substances which are necessary for the chemical processes for synthesis of the drug;
- combating the retail distribution;
- mutual judicial assistance at international level;
- forfeiture of the wealth accumulated with the reinvestment of drug-trading profits and identification of channels used for laundering.

Consequently, it is only through investigations involving all countries involved in individual aspects of drug trafficking, and analysis of the information obtainable through channels of cooperation, that it is possible today to develop operations that are capable of having a significant effect upon the phenomenon, identifying also the flows of money derived from such operations.

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1.4. Human Trafficking in Albania

§ 1. *The significance of the phenomenon of trafficking*

Human trafficking in the 1990s reached new dimensions as a form of modern slavery, but its history as a social phenomenon is fairly long and has accompanied every phase of social development. The principal characteristic of the development of the phenomenon is that it presents itself in new and increasingly sophisticated forms and is almost always under the cover of offering support and prosperity to individuals who then become victims.

In general terms, a development can be seen, moving away from the classic form of slavery, where man was considered simply as a commodity to be traded, towards new forms of services and forced labour. It must therefore be stressed that the more ruthless forms of slavery have not entirely disappeared.

Slavery has now been abolished in all nations, but the facts reveal that around 27 million people throughout the world live in slavery or in similar conditions. [21]

From the historical point of view, the principal purpose of human trafficking was:

- exploitation of labour
- sexual exploitation.

These are not the only purposes. Four forms of slavery, however, are fairly well known:

1. slavery in the form of ownership of another (classic slavery). These slaves are considered as the property of their masters and can be traded for goods or for money. Their offspring have the same status;
2. subordination through indebtedness is the most widespread form of slavery. Extreme poverty forces people to offer themselves or their children as collateral for debts. They are obliged to work until the whole debt has been paid off, but the rates of interest are increased, making it impossible to complete the payment. Thus the debts are inherited by the children, thus creating a vicious circle that is passed down over the generations;
3. sexual slavery, which forces people, above all women and children, into prostitution. There are different forms of involvement and participation;
4. Forced labour which consists of attracting people through false promises of work. Once these people have accepted the proposal, often through abuse or violence, they are forced to work in conditions of slavery, without any remuneration or with a minimal wage.

[21] American Antislavery Group

While there have been peaks and troughs in the history of the social development of slavery and human trafficking for the exploitation of their labour, sexual slavery has had a more stable position. In this respect, historic developments (political and socio-political) in the 1980s and 1990s were followed by an increasing growth in modern forms of slavery which can be distinguished from the classic forms in their formal aspect.

§ 2. *Characteristics of trafficking*

§ 2. 1. *Characteristics of trafficking at international level*

The phenomenon of human trafficking constitutes the darkest factor that has always accompanied, and continues to accompany, the processes of globalisation.

Trafficking, as a specific form of economic crime, has not changed very much. Its victims are recruited from countries that are underdeveloped from the economic point of view and then transported to destination countries that are more developed.

The forms of exploitation, which are highly profitable, are quite varied, but almost all are based upon the abuse and exploitation of human beings. These forms can be distinguished into exploitation for sexual purposes or for work, for domestic services, for services within criminal groups, for removal of organs, for forced military service or for other forced services, as well as arranged marriages and illegal adoption etc.

The traffickers often move their victims from their own community towards other areas – within the same country or abroad – where the victim is isolated and may not be able to speak the language of that country or understand its culture. In the majority of cases the victim has no emigration documents or has false documentation provided by the traffickers themselves. But the important fact is that the victims lose all contact with their own family and friends, thus becoming more vulnerable to the demands and intimidation of the traffickers.

Around 90% of women involved in the sex industry in south-eastern Europe are victims of trafficking. Around 10-15% are children. In 2001, around 700,000 (or perhaps even as many as four million) women, men and children, were bought, sold, transported or held against their will in conditions similar to slavery. [22]

[22] Report of the American Department of State on human trafficking, 2002.

However, it should be emphasised that due to the difficulties in identifying where trafficking exists, the figures relating to human trafficking do not reflect the reality of the situation. In this respect, EUROPOL observes that "the number of victims trafficked towards EU countries is still unknown, and therefore only general estimations are valid. On the other hand, it is clearly the case that the number of victims is much higher than the figures published in EU statistics".[23]

The principal routes for trafficking leave from less developed countries or in transit towards more developed countries. Thus we can list the routes which leave from eastern European countries and Russia towards EU countries, from eastern European countries towards the USA, from Asian countries (in particular China) towards western European countries, from Asian countries towards the USA, from African countries towards EU countries, from Latin American countries towards the USA.

In dealing with social groups that are at risk of trafficking, we can state that no one is protected from the threat of trafficking. However, on the basis of a detailed analysis of the phenomenon and on the basis of experience, the social groups most at risk are young women, children and young boys.

§ 2.2. *Characteristics of trafficking at regional level*

From an analysis of the phenomenon at regional level, it can be seen that the end of the cold war and the fall of the Berlin Wall have brought about a series of processes, both at economic and social level as well as political level.

The economic situation that was created as a result of the failure of the communist system, gave rise to economic problems that the population of that region had to face. The high levels of unemployment led to hardship for families. Without the possibility of finding work that would ensure the survival of their families, people went in search of any means for doing so, and it is clear that many of them became the victims of trafficking. The social situation, especially for women, was very vulnerable, because of their social position in the family and in society, as well as their poor level of understanding of the phenomenon of trafficking and the risks which it brought.

And not just this. The process of the fall of the Eastern Bloc was accompanied by a series of political processes, such as the breakdown of states and establishment of new states, a process which, in turn, was accompanied by a series of problems relating to the control of the population,

[23] EUROPOL, Report on Organised Crime, 2000.

crime, frontiers, etc, thus providing fertile ground for intense criminal activity, especially in human trafficking.

§ 2.3. *Characteristics of trafficking in Albania*

In relation to the domestic situation, this should be examined in the context of various considerations regarding the region, due to the fact that the phenomenon has developed in similar circumstances, thus retaining the principal characteristics described above. However, it should be underlined that due to certain specific circumstances in its social, cultural and political development, Albania has various characteristics of its own. Thus, as with other countries in the region, the phenomenon began to develop at an alarming rate only in the 1990s, especially in the years 1993-1994. In addition to drug trafficking, trafficking in human beings became one of the most attractive criminal activities. The change in the system was followed by uncertainties in human values, so that immediate ways of obtaining wealth were of prime concern, without any thought for the methods used. The trafficking of Albanian girls who found themselves in a desperate social and economic situation was stimulated by the favourable terrain in Countries where Albanian emigrants lived and by their contacts with criminal elements in these countries.

During the years 1993, 1994 and 1995 there were various trafficking operations by individuals, which over the following years gave rise to a full-scale organised system. This reached its height in the years 1997-2001. At the beginning it was structure into autonomous organisations on the basis of links within the same family, or with relatives or friends. The principal forms of trafficking were of women for the purposes of prostitution and trafficking of children for the purposes of begging. Investigations have not so far identified a single case of trafficking of men. During the years between 1994 and 2002, Albania was regarded as a country of origin, but also in particular a country of transit for victims coming from other countries in the region[24]. This fact, in comparison with the risk that traffickers ran in relation to Albanian girls, guaranteed greater security for them, compared to the risk of vendettas by the families of their victims. For a long period, due to shortages, incompetence and corruption in the state institutions, this phenomenon was dealt with by the families of victims through vendetta and taking justice into their own hands. Only after 2001 can it be said that there was a serious commitment by the State to fight trafficking, especially against illegal smuggling on inflatable boats to Italy. After the years 2002-2003, Albania was no longer considered as a suitable place for the transit of victims but as a country of origin with an ever-growing tendency for becoming a country of destination for the purposes of prostitution. On the basis of official figures, around 8,000 Albanian women are exploited in various European

[24] Vasilika Hysi, Criminalogia, Tirana 2005, p. 174.

countries[25]. The recruitment of Albanian victims takes place especially in rural areas, in particular in the districts of Tirana, Durazzo, Valona, Elbasan, Lushnje, Berat and Puke.

On a smaller scale, Albania is also a country of transit and destination. Albanian victims are generally trafficked for the purposes of sexual exploitation, even if a large number are trafficked for begging or for forced labour. Many of the victims of domestic trafficking, or those who are recruited for prostitution, come from the more isolated rural areas of Albania, where customary law, or *kanun*, still predominates.

At present, Albania does not possess a specific official and centralised register of data about the victims of trafficking or a standard procedure for collecting information about victims. Each organisation collects data in those cases in which it provides support and help. According to the 2006 Report of the American Department of State on human trafficking, Albania stands in 2nd place. The Report underlines that Albania has not rigorously applied the minimum standards for eliminating phenomena of trafficking but that it has, however, made considerable steps forward in relation to these standards.

Albanian women have been trafficked in Italy, Greece, Belgium and Great Britain. The trafficking is encouraged by proximity to EU countries, by the geographical position, by the presence of seas, lakes, etc.

Another fairly problematical phenomenon is the trafficking of children. Children from the most vulnerable social classes, especially Rom children or children from the Egyptian community, are the social groups most affected by this phenomenon. They have been trafficked mainly into Greece, and to a lesser extent into Italy, for begging and illegal adoption.

§ 3. *Factors and circumstances that encourage human trafficking*

The difficulty in understanding the nature of this type of crime, the need for training and modernisation of the competent structures, difficulties in gathering and presenting evidence in a criminal trial, the essential need for the victims of trafficking to collaborate in the proceedings, the prejudices that the state structures have in dealing with the victims, the existence of evidence in other countries and the well-known difficulties in international cooperation, all tend to justify the efforts being made to understand and deal with the factors that give rise to these criminal offences in order to introduce prevention measures.

[25] National Strategy report

The analysis of the factors that stimulate this form of crime, due also to its substantial peculiarity, in other words the movement from one less developed region towards a more developed region, is based on its subdivision into two factors: a) *push factors* and b) *pull factors*. "Push factors" are those factors which, generated in the country of origin of the victims, push them to become a prey of trafficking. "Pull factors" are those factors which are generated in the country of destination, and attract them or ease the trafficking of the victims.

§ 4. *Key factors for Albania*

§ 4.1. *Push factors*

- The low economic level, especially of women in rural areas.
- The high level of unemployment among women.
- The social position of women in various areas, above all in rural areas. Discrimination and violence within the Albanian family. In general, the position of women in society, is considered by many experts to be a key factor in Albania, especially for the trafficking of women.

- The patriarchal structure which keeps women in conditions of submission to men, the scarce understanding of their rights, economic and social inequality. [26]
- The lack of information regarding trafficking and forms of recruitment.
- Political instability in the country. The periods of unrest over the past 15 years, especially those of 1997, which have had a negative effect upon society.
- The long and difficult period of transition. Over the passage of time, the hopes that Albanian people had for development and prosperity have been seriously upset.
- The ineffectiveness of the state in fighting crime.
- Lack of trust due to corruption. In many criminal proceedings it has been found that police officials have been corrupted by traffickers, especially those operating on the frontier passes, who assist in their illegal passage and allow them to pass again where there has been repatriation.
- Proximity to the destination countries assists the operations of the traffickers and of criminal groups.
- Poor frontier control. After strengthening of control measures, the traffic route has been altered towards the so-called "green frontier".

[26] Maria Grazia Giammarinaro, Trafficking in women and girls, UN expert Group on trafficking in women and girls, 2002

- The informality of life and the economy. Social and economic anarchy, as well as the lack of formal procedures assist the traffickers and create difficulties for the organs of justice in collecting evidence and seizing the proceeds of crime.
- Mass movements and anonymity of people. The lack of a census register of the population constitutes a major obstacle for the development of a strategy and an action to fight crime.

- The harsh and discriminatory visa system and migration policies established in other countries such as Italy, Greece, etc. [27]
- The low level of belief and trust, on the part of the population, in the ability of the political system to ensure short term prosperity.

- The support given by political and state structures to illegal activities. [28]

§ 4.2. *Pull factors*

- Proximity with EU countries (Italy, Greece, etc).
- The unilateral propaganda of emigrants (painful stories are not recounted).
- The astonishing publicity from the Italian and Greek media which succeeds in penetrating even into Albania. The lack of television transmissions about trafficking.
- The behaviour among EU member countries which favours prostitution.
- The inactivity of EU states in relation to black market labour.
- The presence of western military troops in Kosovo.

§ 5. *Trafficking and organised crime*

Trafficking was initially carried out on a family basis, or involving relatives and friends, but has now reached the dimensions of a highly organised activity, involving a vast number of individuals from different nationalities and origins. Thus, the general practice was for Albanian groups to collaborate with Italian criminal groups. In the beginning, the former carried out the role of suppliers of Albanian women for the Italian sex market, while the Italian traffickers, who were

[27] *Ibid, p. 9 "...the possibility of legal migration is one of the solutions for preventing human trafficking. The restriction of migration policies by countries of transit and destination increases the vulnerability of the migrant population and helps traffickers"*
[28] *IOM, Victims of trafficking in Balkans, 2001, pg. 33, study on the trafficking of women and children in the Balkans 2001 "around 10% of Albanian trafficked girls confirm the involvement of police forces in the trafficking.*

considered to have an excellent knowledge of the local area, organised the exploitation. But the Albanian criminal groups sought to obtain a dominant role, thus creating their own groups and taking over control of the activity[29]. At this point, they decided to create an external collaboration with the Italian groups for the sub-division of the various areas, recruiting Italian citizens to carry out certain services. One feature of the Albanian criminal groups operating in human trafficking, unlike those operating in drug trafficking, is that they do not manage to build up large organisations, but limit themselves to relatively small groups which have the features of a structured criminal group and not a criminal organisation. There is no formal, or hierarchical organisation to be found in them, but a horizontal relationship between members of the same group in relation to the functions and the contribution of each of them. Unlike the other groups, the Albanian groups are distinguished by their strong ethnic character.[30]

§ 6. *Trafficking in Albanian legislation and judicial procedure*

The Constitution provides a series of characteristics relating to fundamental rights and liberties which bring it into line with European standards. In the classification of fundamental rights and liberties, those relating to the person have precedence in comparison to political, economic and cultural rights and liberties, in the same way as at international level. The Constitution also provides that these rights are indissoluble, inalienable and inviolable (article 15), and for the possibility of them being immediately and directly implemented (article 4); it also provides that the minimum standards of protection for rights and liberties are those provided in the European Convention (article 17). This characteristic is considered in relation to article 122 of the Constitution, which provides that regulations established by an international organisation have priority over domestic law where the agreement or convention has been ratified by the Albanian Republic.

Article 26 of the Constitution is the provision which relates to the protection of fundamental rights violated by trafficking. It has been noted that it does not include the application of the first paragraph of article 4 of the Convention for the Protection of Human Rights, which prohibits slavery.

It is clear that this failure reflects the limitations of the period when the Constitution was drafted, the lack of awareness about the alarming reality of the phenomenon of trafficking, as well as the

[29] The CARPO Regional Project, Report on the Situation of Organised Crime and Financial Crime in South-East Europe, Strasburg 2006, p. 46
[30] The CARPO Regional Project, Report on the Situation of Organised Crime and Financial Crime in South-East Europe, Strasburg 2006, p. 46

lack of a tradition of violation of these fundamental rights. This limitation in the Constitution also extends to the Penal Code, about which we will have more to say below.

We can say that in the Penal Code there is no provision either for the punishment of slavery, nor for forced labour or services (provided by the Constitution), save for article 114/a which relates to exploitation of prostitution with the use of violence and has similar provisions for trafficking.

As a result of ignorance, or intentionally, the notion of human trafficking, compared with the relative notions in domestic and international legislation, is interpreted in a wider sense, including here the criminal activity of aiding and abetting the illegal crossing of the frontier or illegal entry into the territory of another state, on the basis of which illegal earnings are made. In international law, such activity is defined as "smuggling of immigrants" and its meaning is to be found in the First Additional Protocol of the Palermo Convention "*assisting the illegal entry of a person into the territory of a State in which he or she is neither citizen nor resident, for the purpose of obtaining, directly or indirectly, a financial profit or any other material gain".* Such concept, even though difficult to implement, is to be found in article 298 of the Penal Code, entitled "Aiding and abetting illegal passage over the frontier". The substantial difference consists in the fact that human trafficking violates the fundamental rights of individual people, reducing them, through abuse, to the level of animals or objects, thereby mistreating also their aspirations for a better life. This is the reason why human trafficking is also called "modern-day slavery". The main distinctions between them are:

- Smuggling – criminal offence against public order; trafficking – criminal offence against the dignity of the person.
- Smuggling means illegal passage over the frontier; trafficking can take place also without passage over the frontier.
- Smuggling does not harm the free will of the injured party; trafficking does.
- Trafficking involves a "victim"; in smuggling does not.
- With trafficking there tends to be an established relationship of exploitation which lasts over time; with smuggling no such relationship exists – the relationship between immigrant and smuggler ends at the moment in which the passage over the frontier has been complete and payment has been made.
- With smuggling, it is the immigrant who asks for the services of the smuggler, whereas with trafficking it is the trafficker who, through force or duress, carries out the migration. The victim has no possibility of choice.

- The motive of the smuggling is to cross the frontier – for trafficking, it is the movement of the victim to a foreign environment where there is no protection.
- With trafficking, there is a serious violation of human rights – with smuggling, such violations are not present.
- Smuggling requires that the passage over a frontier is necessarily illegal; in trafficking this is not essential.
- With trafficking, the victim is not aware of what will happen once she or he has passed over the frontier (exploitation).

Law no. 8733 of 2001 introduces an important and essential improvement to the Penal Code. The amendments seek to achieve a series of objectives including:

- harmonisation of the Penal Code with constitutional principles, with international criminal law and with ratified international agreements
- provision of new forms of criminal offence, in line with five years of experience and the need to fight crime, especially organised crime (including human trafficking).
- Compatibility of the Penal Code with other international legal agreements (in particular the Palermo Convention).
- The toughening of the penalties for serious offences involving social risk in the fight against organised crime.

It is clear that the main provisions against human trafficking are articles 110/a, 114/b and 128/b of the Penal Code. Of these, the most frequently used is article 114/b. These provisions appear for the first time in Law no. 8733 of 21.1.2001 "For amendments and additional provisions to the Penal Code of the Albanian Republic", and then modified by Law no. 9188 of 12.2.2004 "For amendments and additional provisions to the Penal Code of the Albanian Republic".

These amendments reflect the commitments made with the signature of the Palermo Convention of 15.12.2000.

Article 110/a: human trafficking, for gain, whether material or otherwise, is punishable with imprisonment from 5 to 15 years. In the event of recurrent offending and involvement with others, accompanied by physical and mental violence upon the victim in order to force her or him to provide various services, or which causes serious physical harm, it is punishable with imprisonment of no less than 15 years, and in the event of death, with life imprisonment.

Article 114/b: trafficking of women for prostitution, for gain, whether material or otherwise, is punishable with imprisonment from 7 to 15 years. In the event of recurrent offending and involvement with others, accompanied by physical and mental violence upon the victim in order to force her to provide various services, or which causes serious physical harm, it is punishable with imprisonment of no less than 15 years, and in the event of death, with life imprisonment.

Article 128/b: Trafficking in children for material profit or for any other gain is subject to imprisonment from 10-20 years. When the said act is carried out with others or recurrently or when it is accompanied with maltreatment and with the use of physical or mental violence by the accused in order for various acts to be carried out, or when it produces serious physical harm, it is subject to imprisonment of not less than 15 years and, where it causes death, is punished by life imprisonment.

From a general point of view it could be said that the legislation on trafficking was formulated and implemented with a certain 'haste', giving rise, moreover, to a failure to harmonise the general part with general legal principles or with the criminal law in general. Trafficking, in essence, is a phenomenon that is not linked exclusively to prostitution (even though this is the most evident form), in the same way as it is not linked exclusively to children. This is why I suggest that the provisions of articles 114/b and 128/b on trafficking reflect a conceptual limitation. Trafficking is dealt with only in section VII "Criminal acts against the liberty of the person", with individual offences for specific cases.

The provisions on trafficking, pursuant to Law 8733, were the provisions set out in the definition of the Second Additional Protocol of the Palermo Convention. The principle problem, in theoretical and practical terms, which arises in the case of this amendment is the fact that the parliamentary ratification of the Palermo Convention and of the Protocols took place with Law no. 8920 of 11.7.2002. In this way, from the entry into force of the provisions (March 2001) and up until the ratification of the Palermo Convention, the reference to the Second Additional Protocol was not legitimate. This has produced a series of anomalies in the actual implementation of these provisions.

The above provisions contain elements that are common and distinct from each other. From the point of view of their meaning, all three are similar. Article 114/b and article 128/b are specific forms of human trafficking, as set out in article 110/a of the Penal Code.

- With regard to these provisions, every so often, where there are circumstances in which the elements indicate trafficking and the injured party is **not a woman nor a child**, the offence falls within the meaning of article 110/a of the Penal Code.

- On each occasion where the elements constitute the offence of trafficking and the injured party is a **woman** and of **adult age** but the purpose of the trafficking is **not for the exploitation of prostitution**, the act will fall within article 110/a of the Penal Code. It should also be pointed out that our theory of criminal law has not yet developed a clear meaning to the term "prostitution", to the extent that the said concept remains within the context of a commercial sexual act, or whether it includes other commercial services of a sexual nature. I would suggest that the meaning of article 114 of the Penal Code is closer to the notion of exploitation of prostitution. The exploitation requires the essential presence of two elements: the making of a profit; abuse of another person.

- On each occasion that the elements of the offence of trafficking are present and the injured person is a **child** (irrespective of whether it is a woman and whether the child is exploited for prostitution) the offence falls within the meaning of article 128/b of the Penal Code.

- Each of the provisions is arranged into two sub-paragraphs, indeed into three, each of which describe the aspects of involvement, previous convictions, mistreatment and forcing the injured party through physical and mental violence.

Structure of the concept of trafficking:

1. Recruiting, transport, transfer, hospitality, accommodation

- **of an adult:** by means of coercion, kidnapping, fraud, abuse of a position of power, receiving or giving advantages in order to obtain the acceptance of a person who has authority over the victim.

- **of a person under 18 years of age** (irrespective of the conduct of the child, or whether or not he or she has been subjected to any pressure as described above).

2. Purposes of the exploitation

- exploitation of prostitution or provision of sexual services

- forced labour or provision of services under duress

- reduction to slavery or similar forms

- removal of organs

- other forms of exploitation.

It is irrelevant, for the purposes of the offence, or due to her or his vulnerability, whether or not the victim agrees to being exploited.

The offence is applicable to anyone.

However, it should be born in mind that both legal theory and doctrine have ruled that among the elements which are regarded as essential and which must be present in the offence, is the element of movement (transport, transfer). It is irrelevant whether this factor is present as a fact or as a purpose.

- It is not essential that the force is carried out by the person who does the recruiting or transporting- Trafficking takes place with the unlawful passage over a frontier or assistance in the unlawful passage over a frontier, under articles 297, 298 Penal Code. According to the present-day concept of trafficking, this offence is not necessarily linked to the illegal passage over the frontier, thus recognising domestic trafficking which is a recent tendency.

- This offence includes the keeping of premises used for prostitution and forgery.

- A problem arises in the relationship between article 114/a and the provisions of trafficking in cases where the purpose of the trafficking is the exploitation of prostitution. This is even more apparent in relation to points (4) and (5) of article 114/a, where a conflict can be observed between the elements of both offences. This leads us to ask whether these two offences compete with each other or are complementary. The whole question is greatly complicated by the interpretation of the expression "for the purposes of exploitation", leading to the view that there are two individual criminal offences, the first (trafficking) which is concluded at the beginning of the exploitation, and the second (the exploitation). In my view, trafficking includes the exploitation of prostitution on each occasion that the said exploitation precedes a process of recruitment, transport, transfer, hospitality or accommodation (but in particular an act of moving the victim); having reached this point I would suggest that the provisions contained in Section VIII in relation to acts against morality and dignity should be reconsidered, for the purpose of creating an organic link between the same and the provisions relating to trafficking.

Another problem that needs to be considered is whether, for the offence to be committed, it is sufficient for there to be trafficking of one single person or necessarily more than one, whether it covers one single case or more than one case. Judicial practice has accepted the fact that it is sufficient for one single case to be present, therefore involving the trafficking of one single person, for the offence to be committed. I would suggest that this approach must correspond with the way in which the provision is formulated.

In general terms, judicial practice has had difficulty in interpreting the various notions of trafficking. From the moment of their implementation, with Law no. 8733 of 2001, up to the setting up of the Assize Court, the courts have followed contradictory approaches. This is because the Courts, even though the provisions on trafficking had already entered into force, have on several occasions applied the provisions on exploitation of prostitution in aggravating circumstances. With the constitution of the Assize Court and after a series of training programmes, these notions are becoming better established.

In short, it could be said that Albania is one of the first countries to have implemented the obligations of the Palermo Convention immediately upon its signing. As already indicated, the implementation of the provisions on human trafficking has not been consistent, as has occurred with other legislation (the law on the ratification of the Convention) and also with the principles of the general part of the Penal Code and the law in general. The provisions on trafficking are full of concepts which are not only difficult to understand but also create problems when it comes to legal harmonisation. Provision in the Penal Code for criminal offences of "reduction to slavery", "servitude" or "forced labour" (which appear in the laws of most western countries) would be a serious contribution towards trafficking, in particular when it is not possible to prove the elements of recruitment, transport, accommodation, etc, (elements forming the objective aspect of trafficking).

§ 7. *Investigation and criminal conviction for trafficking: problems*

For many reasons, it should be stated that it is to be hoped that the current standards of investigation for criminal offences of trafficking are improved. In many cases brought before the Supreme Court, it is decided to return the case to other lower courts for re-examination. There are various reasons

for this, but we can mention: the lack of specialist experience by the authorities, lack of available facilities, the essential importance of gathering evidence abroad, the informal economy and movement of money outside banking channels, poor systems of border control, etc..

The offences of trafficking have certain general characteristics in common which also influence the way in which they are brought to trial[31]. Examining the three forms of trafficking from the point of view of their criminal characteristics, it can be seen that, in the trafficking of children, it is not necessary to prove one of the elements of influencing the will of the child. On the other hand, it can be seen that the trafficking of women, mainly for their exploitation for prostitution, is the most predominant offence in comparison with others, which is the reason why the following part of this heading places particular attention on this offence, referring also, from time to time, to the features of other forms of trafficking.

§ *8. Criminal ingredients of human trafficking*

Human trafficking is a process which involves three stages: The first element is the **recruitment**, which involves the identification of people and ensuring the possibility of being able to exploit and take advantage of them. This could be achieved through the use of force, by kidnapping, by full or partial deceit of the victims as to the nature of the "service" that they are required to offer, or by way of deceit as to the financial conditions or working conditions in which they will be operating, or by using both of these ways. The second element which follows recruitment is **transfer**, which represents the movement of the victim towards the profitable market and removal from the environment of protection. This movement is not based upon the freedom of will of the victim. The movement of a person could be within a national area or abroad. Movement also includes passage from one market to another, or from one exploiter to another, through the exercise of rights of ownership. The third element, after the movement, is the arrival at the destination and the **exploitation**. This is carried out through a variety of coercive mechanisms, from the use of violence, or threats of violence, to exploitation of the vulnerable economic position of the victim and her or his isolation.

§ 9. *Methods for controlling victims*

Obligation through debt (for the journey, hotel accommodation, rental of lodgings or houses). These obligations are excessively high, so that they are never-ending and are accompanied by "fines" for particular behaviour by the victims.

[31] Skender Begeja, Kriminalistika, Tirana, 2004, p.484

Isolation, which can be physical isolation, accompanied by deprivation of vital needs (lack of food, water, etc.), or cultural isolation (where the victim is prevented from learning the language or receiving education), or social isolation (prevented from having contact or links with those outside the system of exploitation).

Deceit, and the use of lies accompanied by promises of marriage once problems have been resolved, allowing the victim to send small sums of money to their family, by way of support, or purchasing objects of value.

Use of violence, whether physical, mental, sexual, periodical violence, sexual group violence, accompanied by humiliating conduct, violence that has no limits, aimed at making the victim totally dependent upon the trafficker, reducing the need for short-term physical surveillance.

"Giving lessons", when the victim shows signs of disobedience, when the victim tries to contact the police, when the victim tries to contact family, through mistreatment or the execution of other victims in front of her or him. Everything is aimed at terrorising the victim *in extremis* and producing unconditional dependency.

Threatening the life of family members is another form of exerting authority over the victims. *Administering drugs.* The use of this form of control ensures greater performance and dependency upon the drug, which has to be obtained by the trafficker. The continuation of this situation leads to mental injury to the victim, which can be controlled by the trafficker without him being in direct contact with the victim[32], transforming the latter into an actual slave.

§ 10. *Tasks of the investigators*

In proceedings involving human trafficking, the public prosecutor and the police investigator have a series of tasks to consider. These tasks are connected with:

- ascertaining whether or not this is a case of trafficking or of a similar offence (assisting in unlawful crossing of the frontier, exploitation of prostitution, etc.)

- duly ascertaining whether or not the injured person is a victim of trafficking.

[32] ICMPD, Training manual for Public Prosecutors and Judges, Vienna 2004, p.36.

- taking measures to guarantee shelter and protection for victims of trafficking. This is carried out through the use of secret police refuges as well as through the assistance provided by various NGOs through shelters that they themselves make available.

- taking measures to protect the family of the victim from the threats of the traffickers. It is necessary to make a continual assessment, during each stage of the process, of the risk for the victim and her or his family.

- providing free legal assistance for the victim when the victim is a child. Ensuring contact with the family.

§ 11. *Commencement of investigations*

Investigations in proceedings against trafficking can begin in two principal ways. The mechanism may be brought into motion as a result of a complaint by the victim of trafficking or on the basis of investigations based on information obtained through intelligence or a report made by other people. Investigations commenced on the basis of the report of the victim of trafficking is otherwise known as a ***reactive investigation***, while the beginning of investigations not on the basis of the complaint of the victim is otherwise known as a ***proactive investigation.*** Of all of the investigations carried out so far, it can be stated that proactive investigations by police authorities are almost non-existent. Almost all criminal proceedings for human trafficking have been constructed on the basis of a reactive investigation.

§ 12. *Identification of the victim*

The identification of the victim as such is one of the most difficult tasks for the public prosecutor or investigator. In the way in which he conducts the investigation he must consider the person as a victim of trafficking, but in his professional conscience he must take into account all possibilities. He must be careful not to confuse trafficking with the offence of assisting in illegal border crossing or other offences relating to prostitution.

At the moment of identification, he must take into account certain principles:

- in the first interview she must be considered as a potential victim.

- the complete identification of the victim of trafficking must only be the result of full enquiries upon elements of the offence.

- due to the complex nature of the offence and the need for the victim to deal with post-trauma stress, it is necessary to allow a little time to pass.

- it is necessary to gather other evidence in addition to witness statements.

- the technique for questioning the suspected victim seeks to provide information for a two-fold purpose:

- identify lies, or alternatively,

- increase the reliability of the evidence during the trial.

Consequently, permanent psychological contact is the key to understanding the situation.

§ 13. *Several useful indicators for identifying victims*

a) Restrictions upon personal liberty

- restriction of the social circle and social contacts, closure within an isolated environment, constant observation of the victim by the guardian and control from a distance by way of telephone calls.

b) method of payment

- the impossibility of deciding about her own income; lack of direct access to income; the proprietor of the lodgings passes the income to a third person; the payment is different compared with the general regulations for the premises.

- the woman has debts that are far beyond her working possibilities; she takes only a minimal part of the earnings, which are just enough for her to survive.

c) work situation

- constant control by the guardian – long hours in premises where she is required to work – she is not free to refuse clients or the type of services – she is not free to stop work or return home – she is kept away from other women who are in the same premises where she is required to work.

d) recruitment

- she was not informed that she would have to work as a prostitute or of the conditions in which she would have to do it.

e) objective aspects

- the woman has no passport, no money, has signs of mistreatment, a poor and dishevelled appearance, does not dare to talk about her problem, she gives you the idea of having been well brought up (consequence of mental submission to the trafficker), she tries to get away, agitated and impatient, sensitive, frightened.

§ 14. *Other indicators*

- age of the victim – the older she is, the less likelihood of being the victim, and vice versa.

- gender of the victim – women are the social group most at risk.

- the nationality of the possible victim – if she comes from one of the developing countries, the probability is greater.

- her last place – if she was found in an environment well known for exploitation, the probability is greater.

The first contact with the victim is of vital importance for the progress of the investigations and is carried out following humanitarian principles.

The following matters should be taken into consideration by the public prosecutor and police investigator in their dealings with the victim:

- Treat her as the victim of a serious crime and ensure that she does not once again become a victim.

- Conduct towards victims which is clear, open and correct ensures trust, which in turn provides security in the collaboration, insofar as the victim is convinced that the public prosecutor/police officer do indeed intend to ensure that the offender is convicted.

- The need for a period of reflection, where the victim is under the effect of post-trauma stress.

- Try not to expose her past conduct in public, in front of her family, during the trial. The less that is said about the victim's past, the more comfortable she will feel. Public prosecutors often fail to take this fact into consideration, as a result of prejudice against victims.

- The efforts to be made to avoid direct physical contact with the traffickers.

Psychological contact with the victim. In these proceedings, it is of vital importance to follow a mild and constant psychological approach with the victim, which could contribute to improving the quality of the trial. This often means that it is necessary to have a psychologist present during interviews or questioning. Human treatment that is non-offensive, affectionate, where the victim is able to feel a sense of trust that justice will be carried out, has a considerable effect on a fruitful atmosphere of cooperation. This psychological approach must continue even when the victim is questioned by the court. In addition to the above, the need for the presence of a third person during the making of the victim's statements is essential, also in order to avoid any misunderstanding or ambiguity in the way in which the statements are taken or other problems that often arise in proceedings of this nature.

Legal conduct towards the victims of human trafficking. It should be pointed out that there are circumstances in which it is illegal to bring proceedings against victims who are involved in trafficking who have committed criminal offences. From this point of view it is necessary to take into consideration the Palermo Convention and its additional protocols, as well as the European Convention which, once ratified, have become an integral part of domestic law. According to these provisions, the victims of trafficking are excluded from criminal liability where, by reason of the fact that they are the subject of this trafficking, they have committed criminal acts. This does not however mean that the victims are exempt from responsibility for criminal acts that are unconnected to their position as victims of trafficking.

In these circumstances, particular attention must be given when considering the criminal responsibility of a victim of trafficking for making false declarations or for giving false evidence. The principal cause of such a situation is the lack of constant psychological contact with the victim. The public prosecutor can consider any criminal responsibility of the victim only after having taken every possible effort to deal with the accusation of trafficking against the accused. Naturally, such efforts include investigating the causes that led the victim to retract her declaration. If the prosecutor reaches the conclusion and obtains proof that it was all the result of threats made against the victim or her family, then such evidence must be used to support the case against the trafficker. If the public prosecutor proves that the "victim" is manipulating the system of justice for particular ends, he must suspend the accusation of trafficking against the accused and pursue the allegations of criminal responsibility against "victim". The evaluation of the evidence at this moment requires a detailed analysis, objectivity and a great sense of responsibility on the part of public prosecutors.

§ 15. *Cooperation with NGOs involved in caring for victims*

Cooperation with the NGOs provides a guarantee for the successful conduct of the criminal trial for trafficking (generally against the trafficking of women). This conclusion is reached by understanding the role carried out by these agencies as well as the phenomena of post-trauma stress that is suffered by the victim. These phenomena reflect the clear mental injury to the victim, which are the result of the permanent physical and mental violence exercised upon her. In this way, given that the main function of these NGOs is the mental and social rehabilitation of the victims, it is possible to achieve a proper cooperation with victims for the purpose of ensuring that the criminal trial is conducted on a stable basis. Cooperation with the NGOs also encourages the reporting of cases of trafficking, where the victims come for treatment, but have not yet decided whether to collaborate with the judicial authorities.

§ 16. *The basic principle of cooperation - /the best thing for the victim*

The essential roles of the authorities during criminal proceedings are:

- psychological and social support, improvement in confidence and feeling of security
- escort to investigative or judicial hearings which ensure an effective presence.
- protection measures for the victim (assistance in reception centres).
- providing information to the victim about her role and the way in which the criminal proceedings operate, during the investigation stage as well as during the trial. Providing information to the victim about the role and rights of the accused person.

- being the victim's "spokesperson" in relation to the judicial authorities with regard to problems that she experiences concerning the judicial system[33].

A constant and affectionate approach towards the victims of trafficking, the transmission of faith in justice, personal and family security, and a good and unprejudiced cooperation with the NGOs, may be an answer to the most difficult requirements and problems that are to be found in criminal proceedings involving trafficking. What is the requirement? – That she has the possibility of making a complaint. Why hasn't she done it? Is she actually a victim? Has she failed to make a complaint because of mental pressure, provoked by violence exercised by the trafficker? Or is it merely a question of a civil contract with those who take advantage of her business as a prostitute?

§ 17. *Investigative action*

[33] ICMPD, Training manual for Public Ministers and Judges, Vienna 2004, p. 101.

Procedure for obtaining statements. What has to be taken into consideration when obtaining declarations from a victim of trafficking?

- The declaration must follow a logical line of reasoning and reflect the course of events.
- With victims who are traumatized, it is necessary to take a series of statements in order to carry out the above point.
- It is necessary to avoid any prejudice about the reliability of the victims of trafficking for prostitution in order to ensure the objectivity of the investigations.
- Examine the details as closely as possible – the victim becomes credible and satisfies the required level of reliability from the tribunal, the public prosecutor is prepared for the defence questions and has a greater possibility of obtaining further evidence.
- It should be made clear that exploration of the details is a requirement for guaranteeing success and certainly not a matter of simple curiosity.
- Making use of memory associations for recalling dates and places is relevant for linking events chronologically.
- The chronological definition of key moments in the trafficking allegations in order to place other events in time. The complaint and declarations of the victim, though of primary importance, are often not necessarily sufficient for the quality of the allegations and the definition of the measures to be taken against the accused. This complaint must be the point from which investigations commence. Only when a satisfactory level of corroborated evidence is acquired is it possible to move on to open investigation activity. Except in cases of extreme necessity where urgent security measures are necessary, the choice of such a strategy provides the advantages of being able to carry out secret investigations, allowing the accused to "sleep undisturbed", which helps in the gathering of evidence. Alternatively, if the accused becomes aware of the beginning of investigations, he will use all of his energies to obstruct the investigation. Another advantage is that, after issuing the terms of bail which, in cases such as this is often "arrest in custody", the terms of the investigations are limited to the terms of the arrest and the public prosecutor will have to obtain the necessary evidence within the terms of the period of custody, which is often difficult. At international level, the best examples of investigations on human trafficking show a rational method in the gathering of the statements of victims. As this is a very complex phenomenon, as much as the elements of the offence, a general list of standards has been formulated, which have questions that generally arise during the interviewing of the victims. This does not exclude the possibility, according to the requirements or the situations, of other questions being asked or of some of those questions not being asked. Something of this kind

gives us the possibility of gathering a larger amount of evidence from the statements made, better establishing the elements of the offence, and making the victim more credible.

§ 18. *Further investigative actions*

- The acquisition of all evidence indicated in the statement of the victim or otherwise ascertained though the enquiries.
- Accompany the evidence with a recording (either photographic or video) of the places, with detailed information about them, concentrating on moments that are not publicly known
- Question the witnesses referred to by the victim,
- Begin the activity of identifying the accused on the basis of the information obtained by the declarations of the victim.
- Identify accurately the places of residence, work places of the accused, places where they go to organise their criminal affairs.
- Carry out a medical and forensic examination of the victim, bearing in mind that although it is necessary to persuade the victim to consent, the victim herself must decide. For children, the consent of a parent or guardian is necessary.
- The arrest of the persons under investigation, where a rigorous observance of procedural aspects is demonstrated. The present situation demonstrates the problem of immediate involvement of the police with frequent arrests, often illegitimate, based only on the complaint of the victim. A situation of this kind often arises because of the desire to capture the culprit and also because the police sometimes have a certain lack of professional training.
- Surveillance of places and obtaining evidence is a process that requires care, because the gathering of documentary evidence of the highest persuasive quality makes it possible to collaborate the evidence without limiting it to statements, giving us the possibility of placing the defendant in a position where he accepts the evidence and provides collaboration, and ensuring the credibility of the victim's statements.

The psychological process that takes place. "If most of the allegations of the victim are confirmed, where it is possible to obtain objective confirmation, then the reliability of the witness statement is assured, including those parts of the allegations that are subjective and difficult or impossible to confirm, but which are ingredients of the offence and of the criminal conduct of the accused".

Property investigation. The property investigation seeks to trace assets invested by the accused as a result of the criminal activities, for the purpose of seizing and confiscating them. The importance of

the property investigation is two-fold. **In the first place**, it provides the public prosecutor with evidence to support the prosecution case, so that he can persuade the court that the accused has no lawful business that is sufficient to enable him to obtain the gain that forms the subject-matter of the investigation or the assets seized. **Secondly,** it is a strong blow to the criminal activity connected with trafficking, where the main purpose is to obtain large earnings, illegally and immediately. In the circumstances of an informal economy such as that of Albania, public prosecutors must not limit themselves to obtaining certificates issued by various authorities involved in registration of assets. Through police officials and investigators they must obtain the necessary information relating to the registered goods, to the sums deposited, to expenditure that is not recorded and in respect of which the accused must be investigated.

If, during the investigations for criminal proceedings, it is not possible to prove that the asset held by the accused is the product of the specific offence for which he is being investigated, through the property investigation it is possible to make use of the Law "On preventing and combating organised crime", pursuant to which the onus of proof as to the lawfulness of that asset falls upon the person committing the offence.

The taking of pre-trial evidence. In criminal proceedings for human trafficking, the taking of pre-trial evidence (the evidence of the victim) pursuant to article 316 et seq. of the Penal Procedure Code, is an extremely important instrument. The taking of pre-trial evidence, and particularly from the victims, is connected with the fact that they are under constant pressure from the traffickers, that they find themselves under threat both for their own lives as well as those of their families, and influenced by promises from the traffickers of a financial or sentimental nature, etc.

* The taking of pre-trial evidence ensures a successful outcome when used by the public prosecutor with intelligence and when the following conditions are present:

- Establishing constant psychological contact with the victim.

- Taking protection measures aimed at eliminating attempts by the traffickers to re-establish contact with the victim.

- Taking protection measures for the family.

- Establishing the most favourable moment. The identification of this moment is extremely important. The initial procedure in the investigations for these proceedings involves a situation in which the taking of pre-trial evidence is done immediately after the complaint, which, in most

cases, was not effective, given that it brought to an end the secret phase of the investigations. The public prosecutor, at the moment of taking the pre-trial evidence, must establish:

* the need for the victim to recover from post-trauma stress, which must be ensured.

* the time necessary for corroborating the victim's allegations, given the possibility that the victim's complaints are false.

* the level of protection measures take for the victim and her family, so that the victim is not worried about giving her evidence.

* the terms on which the investigation is carried out and the terms on which the arrest is made.

* the pressure by the general public and the NGOs to complete the trial.

§ 19. *Various problems in the fight against human trafficking*

At the basic level of policing, but also among various provincial prosecution authorities, there is a lack of understanding about the criminal offence of trafficking, in all its aspects, and especially about the dangers of providing assistance for illegal border crossing.

The relationships between the various police and prosecution authorities do not produce the right and proper approach in this respect. There is insufficient mutual trust. The prosecution does not have faith in the ability of the police authorities and, on the other side, the police do not have faith in the integrity of the prosecution authority.

The relatively poor professional approach of the police is particularly apparent in the stopping and hasty arrests of suspects, which seriously compromises the criminal process, and in the impossibility of following through proceedings from the beginning to the end.

The performance of the police must not be based on the number of arrests, but rather on the number of criminal proceedings followed by the prosecution authorities, as well as the quality of the files submitted and the persistence in following them to the end of the trial process.

The integrity of the prosecution authorities has been placed in doubt by the police authorities, since the investigation of offences notified by the police is not carried out by them but is managed by the public prosecutors or by prosecution investigators.

The strong instability in the role of the police and the lack of guaranteed career prospects has done much to harm mutual trust and to compromise the professional ability acquired by individual police officers. By its very nature, this type of crime requires special investigation, and certainly the frequent movements of residence, gaps in the public register, lack of identity cards etc, hamper the effective policing of trafficking.

The lack of proactive investigations into trafficking has meant that the prosecution authorities limit themselves to investigating cases commenced after complaints by the victims or their families. The use of special investigation techniques in these proceedings, in comparison with the techniques used in fighting drug trafficking, is very limited.

International cooperation between police and prosecution authorities, even though there have been improvements, does not match the needs of the investigations. The promptness and effectiveness of international cooperation remains a priority, considering that in most cases the trafficking is international and the key evidence of trafficking is to be found in the places of destination.

The property investigation of traffickers is currently fairly sketchy and investigation authorities lack training. And if we add to this the highly informal economic nature of the country, the question becomes rather more complex.

UNICRI – Seminar in Tirana, 15 March 2007

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1.5. *Transnational criminal organisations: the phenomenon of illegal immigration and human trafficking*

§ 1.

Over the past decade there has been a notable increase in the flow of illegal migration resulting from the removal of various barriers[34], from civil and inter-ethnic conflicts[35], from demographic legislations[36] and from the situation of poverty that affects many populations[37].

Such movements involve, mainly, illegal migrants in search of an opportunity for a better life, who, with the false promise of work or a marriage, have reached countries in the west, including Italy. Here, instead, they are forced into prostitution or working illegally in conditions that are very often inhuman or, in the case of children, they are forced into begging for many hours each day.
Transnational criminal organisations manage the traffic of illegal immigrants through various routes, used also for trafficking illegal drugs and arms.

The price of the journey, in the majority of cases, paid in advance to the organisers of the illegal trafficking, varies from 1000 to 15,000 and even up to 35/40,000 dollars, according to the country of origin of the illegal immigrant.

[34] In communist regimes in eastern countries.
[35] In Balkan countries.
[36] In countries of China.
[37] In African countries.

The advance payment of the price already reduces the immigrant into slavery because, having reached the destination, without having any kind of financial support whatsoever and burdened by the debt incurred, he or she remains totally subject to the traffickers.

Any kind of attempt at rebellion is suffocated by continual acts of violence against the victims and heavy threats even of death, towards members of their families in their countries of origin.
The annual turnover from human trafficking[38], which can be described as an odious form of modern slavery, is, according to the latest estimates, between seven[39] and thirteen[40] billion dollars.
The huge profits are reinvested by the trafficker in different parts of the world, in further trafficking of the same kind and also in other illegal markets, as well as within lawful economic and investment circuits, with the assistance of qualified professionals and the most modern and advanced technologies, in this way tainting the lawful production cycle[41].

Insofar as Italy is concerned, aging ships and inflatable boats unload desperate people[42] along the coast of the Italian peninsula, in particular in Puglia, Calabria and Sicily and, more recently, as a result of the investigative pressures of the police and judicial authorities in these areas, along the coast of the Adriatic and in the Veneto.

At the same time, large numbers of people reach Italy by plane[43] or through inaccessible routes over the frontier passes along the Italy-Slovenian frontier or hidden in containers or by way of tiring coach journeys[44].

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[38] It is now common to distinguish between smuggling of migrants and trafficking in human beings. In the smuggling of migrants, it is the migrants themselves who make contact with representatives of criminal organisations which, for the payment of a sum of money, guarantee the emigration. In this case the relationship between the emigrant and the trafficker is limited to the period of time of the voyage. In the case of human trafficking the people who wish to emigrate are recruited directly by the organisers of the trafficking through the use of violence, threats and deceit, who are responding to a market demand existing in the country of destination and the relationship between the trafficker and the emigrant continues on arrival in the country of destination.

[39] Estimate of the International Organisation for Migration.

[40] Estimate of Antislavery International, London.

[41] An emblematic example is the case of the Croatian Josip Loncaric, who, as a taxi driver for illegal migrants along the Italy-Slovenian border, was able to make a profit so great that he could set up an organisation consisting of 200 people and purchased an aircraft company, based in Tirana, which was used in order to assist in the illegal transfer of immigrants from China, the Philippines, Bangladesh and Eastern Europe. After two years in hiding, Loncaric was arrested by the judicial authorities in Trieste on 27.11.2000 after being sentenced to six years imprisonment for aiding and abetting illegal immigration.

[9]From Albania, Kosovo, Kurdistan, Morocco.

[42]

[43] Nigerians and Chinese.

[4411] Women from Ukraine, Moldavia, Russia, Lithuania, Estonia and Belarus.

The commerce in human lives is very often carried out in a way that is entirely open, as if genuine - local organisations that operate in Romania, transporting illegal immigrants into Italy through Croatia and Slovenia, even publish offers of illegal journeys through adverts in daily newspapers or write on the walls of the cities phrases such as *I take people to Italy*, *we offer to accompany you to Italy*, *maximum reliability and experience to accompany you to Italy*[45].

According to the intergovernmental organisation, the International Center for Migration Policy Development, based in Vienna, around 400,000 people are illegally brought into European countries each year, and between three and eight million illegal immigrants currently live in the European Union[46].

According to the estimates of various non-governmental organisations, more than 500,000 women have been trafficked for the purposes of sexual exploitation in Europe, and in Ukraine alone there is an equivalent number of potential victims of this criminal market.

In Japan, around 100,000 women, most of whom are from the Philippines and Thailand, [47] an increasing number of whom are children, are exploited for sexual purposes.

In Italy, the prostitution of trafficked people is managed, almost as a monopoly, by criminals, above all of Albanian origin. These, through an infrequent use of violence, reduce young women, often children, and not infrequently kidnapped in their countries of origin, to conditions of actual slavery, forcing them into the desperate sale of their bodies and claiming from each of them, each day, a profit that is no lower than about 500 dollars[48].

Such criminals are established into organised groups that have rigid rules of behaviour which, if broken, can be sanctioned with death, even of the members themselves.
These groups, ordered hierarchically, have set up what can be truly described as an industrial mechanism which is fed by an "*inexhaustible raw material*" that continually replaces what is

[4512] N.M. Pace, Public Prosecutor, Trieste, Movements in Illegal Migrants, international conference held in Naples 27-29 May 1999.
[4613]E. Marotta – the activity of Europol, speech given at the preparatory conference for the UN Convention. New Frontiers in Organised Crime, Turin 23 April 1999.
[14] Cfr A. Bradanini: Human Trafficking in the context of the United Nations, speech given at the international conference on human trafficking and the role of organised crime. Naples, 27-29 May 1999.
[47]

[48] Not infrequently, the victims of such exploitation are punished, even by being murdered, where they disobey the inhuman regulations dictated by their "bosses" (in recent times, in northern and central Italy, there has been an increase in crimes against the person).

regarded to having been worn out and which is transferred from a producer country to a country of consumption[49].

African criminal fraternities, in particular Nigerian, are also active in Italy in the exploitation of the prostitution of co-nationals. These consist of ethnic and tribal groups, linked to a vast criminal structure, made up of a few families who hold central decision-making power in Nigeria[50].

Large colonies of prostitutes operate daily for the whole period of the day in various areas of the national territory where there have been clashes with increasing frequency between men from the Nigerian and Albanian mafia for control of the area.

The reduction of Nigerian girls to slavery is also made possible by their religious beliefs. In fact, the Nigerian mafia, gives control of the girls to be exploited to women who are also of Nigerian origin, called *madams*, who very often subject the victims to terrifying Voodoo magic rituals in order to compel them to sell their bodies.

But the phenomenon of this modern slavery does not relate to women alone but also to children, often boys, taken away from their families or sold by their unscrupulous parents and made the subject, with increasing regularity, of sexual abuse and pornographic literature or used in gruelling labour or in long periods of begging, or are suspected of being the subject of international trafficking in human organs[51].

With regard to this last form of trafficking, investigations suggest that the removal of an organ is one method of payment that the illegal immigrant has to make for his or her transfer from the country of origin to the country of destination[52].

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[49] An example of this is the investigation that ascertained that those involved in an Albanian criminal organisation, after repeatedly and violently exploiting several women for prostitution, had made the women pregnant, even through gang rape, and had then taken them out of the country by force, where the women gave birth and the children were sold, through fraudulent adoption procedures, to couples without children.

[50] Whole areas and state and local highways in Italy have witnessed the arrival of massive numbers of coloured women who, reaching Italy with a false promise of work, and not able to pay the price of their illegal entry, which was paid in advance by the criminal organisations operating in the country of origin, are forced through violence and threats to prostitute themselves.

[51] Examples of this are the investigation into the traffic in horrifying paedophile photographs broadcast throughout the world via Internet, run by criminals of Russian origin and another investigation involving children sold or their births non registered or who are kidnapped or mysteriously disappear and who are suspected of being the subject of international trafficking in organs.

[52] During the course of a conference in Rome in October 2000, the Minister for the Interior of the Republic of Moldavia described the discovery of twenty four cases of Moldavian citizens who, for a payment of 3000 dollars, were taken to Turkey by members of the Russian mafia for a kidney explant.

§ 2. *Prospects for more effective preventative action: judicial and police cooperation between the various Countries*

The foreign transnational organisations (Chinese, Bengalese, Albanian, Nigerian, Turkish, etc.) who run illegal immigration and human trafficking have, for some time now, overcome national boundaries without difficulty, assisted also by modern transport and communications systems, including computerised systems, and by the increased possibility of movement brought about, as indicated earlier, by the removal of many frontiers. Alongside the globalisation of legal markets, there has been criminal globalisation, run by transnational organised criminal networks[53].

It has been emphasised, on many occasions, above all internationally, how there is a need for increasingly closer judicial cooperation between the various States and for the prompt creation of a legislation that is common, so far as possible, at least to the countries in the European Union, in order to deal as incisively as possible with the international aspect of criminal organisations which exploit, with great ability, the differences which exist between the national penal laws, and which choose government territories that are most favourable for their operations and for refuge[54].

The European Union has, for some time, been strongly committed to fighting the phenomenon of human trafficking. In fact, there have been numerous joint actions, conventions and framework decisions by the competent bodies aimed at improving the coordination of actions by individual States for prevention and repression. These measures, adopted in implementation of art. K1 of the Amsterdam Treaty, which sets out the obligation for the States to adopt all cooperation measures necessary to carry out incisive action in combating human trafficking, provides for a close collaboration between police forces, customs authorities and other administrative authorities, and, in implementation of article K3 of the same treaty, between the judicial authorities[55].

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[53] In a conference held in Caserta from 8 -10 September 2000, organised by the European Council, in collaboration with the National Antimafia Bureau and Naples University (the first pan-European conference of Public Prosecutors specialising in organised crime), the National Antimafia Prosecutor emphasised that alongside the globalisation of the global markets was the globalisation of crime, run by networks of transnational criminal organisations.

[54] On 29 May 2001 the Council of Ministers of Justice and Foreign Affairs agreed upon the need for the introduction in Member States of the EU of a specific offence of human trafficking which was so far as possible in the same form, providing, furthermore, for the punishment of the trafficker even in the absence of violence, threat or deception, when the subject of the trafficking is children.

The need for establishing joint regulations to fight organised crime has been felt not only in countries in the European Union but also at world level. In fact, the U.N. has approved a convention against organised crime[56], which sets out a concept of organised crime which is compatible with laws in countries that have legal systems that differ widely between each other. It also strengthens the system of judicial cooperation.

The text of the Convention was presented for the signature of the Member States in a special conference held in Palermo in December 2000.
Three Protocols are linked to the Convention, one of which relates to human trafficking. This obliges every signatory State to consider this specific question within its own internal law and to treat with humanity the victims of such crimes in the same way as trade for profit.

§ 3. *The Italian legislation on human trafficking: in particular, the recent Law no.228 of 11.08.2003*

In August 2003, the Italian legislation introduced specific penal and procedural regulations aimed at improving action in the fight against human trafficking[57].

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[55] Human trafficking was at the centre of the special meeting of the European Union heads of state and government, held at Tampere on the 15 and 16 October 1999. In the final document of the summit, point no. 23 states that *The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants. It urges the adoption of legislation foreseeing severe sanctions against this serious crime. The Council is invited to adopt by the end of 2000, on the basis of a proposal by the Commission, legislation to this end.* And at point 48, *the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance,* including *trafficking in human beings, particularly exploitation of women and sexual exploitation of children.*

On that occasion human trafficking was indicated, along with other crimes, as the priority sector for *joint investigative teams* (in two or more States); such teams were subsequently set up by the convention on judicial penal assistance between the member states of the European Union for the purposes of improving judicial cooperation, adopted in Brussels on the 29.05.2000 (and not yet ratified by Italy).

[56] In July 2000, in Vienna. This convention has recently come into force in those States that have ratified it, following the 40th instrument of ratification. Italy, as already indicated, has not yet ratified the said convention.

[57] The issue of Legislative Decree no.286 of 25.07.1998 put into operation the Consolidated Legislation governing the regulation of emigration and the status of the foreigner. In its penal aspects the Consolidated Legislation provides that migration without permission is merely an administrative offence (punished by refusal of permission and expulsion) and conduct of those aiding and abetting (smuggling) is a criminal offence. The penal provisions provided by article 12 of the Consolidated Legislation were two: aiding and abetting illegal entry and assisting a person who entered illegal to remain in Italy. The first offence, consisting of any act to assist entry…., was punished with imprisonment of up to 3 years… and with imprisonment from 4 to 12 years or 5 to 15 years where there are aggravating factors. With Law no 189 of 30.07.2002, by government initiative, article 12 of the aforesaid Consolidated Legislation was completely reformulated but the punishments were substantially unchanged (see the consolidated legislation).
It would seem appropriate to emphasise, in this respect, the new provision contained in subsection 3(5) of article 12, for the help that it might give to actions against transnational organisations involved in human trafficking. According to this provision, for offences set out in the previous subsections, the penalties are reduced by up to a half where the person

In order to punish the traffickers, the legislative framework prior to that date had a series of regulations approved in different periods, for purposes that were different to that of suppressing this kind of trafficking. In particular, various kinds of offence referable to trafficking were sanctioned by the legislation relating to private violence[58], sexual violence[59], kidnapping (also for ransom)[60], incitement and exploitation of prostitution[61] and slavery[62].

Back in 1996, the Italian legislation, taking proper account of this modern form of slavery, modified various regulations in relation to sexual violence, following the guidelines laid down internationally, with the introduction of new forms of offence and with the provision of more serious penalties for existing crimes. And in 1998[63], the same legislation passed laws against the exploitation of prostitution, pornography and sex tourism to the detriment of children, with the aim of safeguarding their physical, psychological, spiritual, moral and social development[64].

The consolidated legislation, with provisions concerning the control of immigration and regulations on the condition of the foreigner, passed in 1998, had also provided for the issue of a special permit to stay for motives of social protection of the foreigner[65], which offered the possibility of taking part in a programme of assistance and social integration in circumstances where there were found to be situations of violence or grave exploitation against her or him and there were concrete risks for her or his safety due to the effect of attempts to remove conditions of criminal association or by reason of declarations made by her or him during the course of investigations or legal proceedings[66].

But taking a closer examination of the measures for combating human trafficking, provided by Law no. 228 of 11 August 2003, it should be pointed out that it brought about a reformulation of language in articles 600 (reduction to slavery) and 602 (acquisition and disposal of slaves) of the

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accused has tried to prevent the criminal activity leading to further consequences, giving concrete assistance to the police and judicial authorities in gathering evidence of decisive importance for the reconstruction of the facts of the case, for the identification or arrest of one or more persons involved in offences or in the seizure of materials relevant for the commissions of the crimes. A preferential penalty was therefore been drafted for cases of human trafficking, which had already been tried out successfully in the fight against terrorism as well as fighting organised crime involving mafia and drug smuggling.
As can be noted, the crimes under examination punish the smuggling of migrants as stated above in note 5.

[58] Article 610 Penal Code.

[59] Article 609-bis Penal Code et seq.

[60] Articles 605 and 630 Penal Code.

[61] Art. 3(6) and (7) Law no. 75 of 20.02.1958.

[62] Articles 600, 601 and 602 Penal Code.

[63] Art. 600-bis et seq. Penal Code. Following the principles of the convention on the rights of the child, ratified pursuant to Law no. 176 of 27 May 1991 and the provisions of the final declaration of the world conference in Stockholm adopted on 31 August 1996.

[64] Law no. 269 of 2 August 1998.

[65] Article 18, Decree Law no. 286 of 25.07.1998.

[66] Around 600 women who, between January and September 2000, overcoming fear and a conspiracy of silence, have indicated to the authorities the names of their exploiters, obtaining official permission to stay.

Penal Code, providing for more severe sentences for the said offences. In particular, the new article 601(human slavery) punishes with imprisonment from 8 to 20 years the crime of trafficking[67].

The said Law also provides the possibility of using certain measures that are essential for investigations relating to human slavery, such as a special case of immunity for police investigators who are operating as under-cover agents[68], the possibility of omitting or delaying acts of sequestration, arrest, detention or application of precautionary measures, a wider possibility of making use of interception of conversations and communications, as well as a preferential system for those involved in slavery who collaborate with the investigation authorities[69].

The most important innovation in the Law under examination is, in my view, that of having provided that the functions of the Public Prosecutor, for offences of reduction or holding in slavery, human slavery and acquisition and disposal of slaves (articles 600, 601 and 602 Penal Code), are to be exercised only by magistrates in the 26 District Antimafia Bureaux, thus attributing the coordination of investigations to those carried out by the National Antimafia Bureau [70].

[67] The human trafficking law was approved in Italy even though Italy has not yet ratified the United Nations convention against transnational organised crime, signed in Palermo in December 2000, and the relative additional protocols against trafficking and against smuggling.

[68] Art. 10 (1) Law 228/2003: ……investigating police officials are not punishable who, during specific police operations having the sole purpose of obtaining evidence in relation to offences set out in articles 600, 601 and 602 Penal Code, also through other people, acquire, receive or substitute money, arms, documents, illegal drugs, assets or objects that are the subject of, profit from, or means for committing the offence, or otherwise obstruct the identification of its origin or permit its use. For the said investigations, the officials or investigating police agents can use identity or undercover documents or enter into contact with persons and web sites.

[69] Such measures can also be activated in investigations concerning crimes in articles 600(2) (child prostitution), 600 (3) (child pornography), 600 (4) (possession of pornographic material) and 600 (5) (tourism for purposes of child prostitution).

[70] Legislative Decree no.367 of 20.11.1991, activated by Law no. 8 of 20.01.1992, established the Direzioni distrettuali Antimafia (District Antimafia Bureaux), as internal departments in the Public Prosecution Offices in the regional capitals of 26 Court of Appeal Districts, as well as the Direzione Nazionale Antimafia (National Antimafia Bureau). The latter has functions of coordination and input in relation to the aforesaid District Bureaux, which carry out the action of investigating mafia-type criminal organisations. These have the power, according to the provisions of article 51(3)(b) Penal Procedure Code to carry out the investigation of crimes involving mafia-type links (416 (b) Penal Code), kidnapping for ransom (630 Penal Code), all crimes committed with mafia connections, the crime of criminal conspiracy in relation to drug smuggling (article 74 Presidential Decree 309/90), the crime of conspiracy for the purposes of smuggling tobacco processed abroad (article 291 (4) introduced by Law no 92 of 19.03.2001 in the Consolidated Text approved by Presidential Decree no.43 of 23.01.1973) and now also the crimes of human trafficking and offences connected with it. This reform in the law was made in the belief that the only way of improving results in combating mafia-type crime is through concentrating investigations on the aforesaid crimes into the 26 district bureaux described (whereas before that the investigations were carried out by 166 offices over the entire national territory). As a consequence, the district prosecutors specialise in *subiecta materia* and there is greater coordination between them, due also to a greater ease in the rapid exchange of information and data. For this purpose each of the district offices has an information system (SIDDA) that is in constant connection with a central information system (SIDNA) installed at the National Antimafia Bureau.

§ 4. *The investigation techniques relating to crimes connected with illegal immigration and human slavery. Investigations relating to exploitation of prostitution*

Judicial experience shows that migratory flows are organised and managed, up to the final destination in countries of the European Union, by criminal groups of the same ethnic group as the illegal immigrants (Bengalese, Chinese, Nigerian, Philippine, Albanian, etc…)

Such groups, however, entrust the most delicate phase of the journeys, mainly those over land, to local criminal organisations (Slovenian, Croatian, etc…) which, upon payment, guarantee a safe transit through the borders of their countries and arrival at their places of destination.

Once they have reached these places (in Italy or in another Western European country), the illegal immigrants are once again placed under the responsibility of agents of the ethnic organisation that sent them (subject to the final recipients receiving the price of the journey) i.e. family relatives of the illegal immigrants or agencies who exploit them through illegal labour or groups of the same ethnic origin who manage prostitution.
The last two cases generally lead to the beginning (if it has not already happened in the country of origin) of reduction into illegal slavery.

The investigative experience in Italy, which has certainly been positive and is capable of being applied in other countries, has highlighted how the most important moment in the investigation regards the capacity to control the final stage in the journey of the illegal immigrant, which is the point when the illegal immigrants arrive at the country of destination. This is because such control makes it possible, almost always, to trace back to those at the top of the ethnic organisation (even though they have no involvement in any way in border crossings – of one or more states – or in the actual transport of the illegal immigrants), by means of identifying their agents, who receive the *human cargo*, from the transporters, remaining in contact with the heads of the organisation from which they take their orders.

It is sufficient, therefore, to carefully follow the delivery of the illegal immigrants as well as the subsequent movements up to the final destination, and through immediate investigations (subject to agreement with the police authorities in the country of transit), to identify even a single telephone contact that the agents have with the ethnic organisation, or one of the people who deal with the transport of the illegal immigrants, and to place this contact number under surveillance.

In this way, it is certain that the numbers of other telephone contacts will be obtained, used by those at the head of the ethnic organisation which, in turn, will be placed under surveillance. In this way it is possible to obtain a network of information which provides the investigators with a mass of information, which will prove useful for investigating future traffic of the same kind.

In reality, when they work in the field of illegal immigration and human trafficking, the foreign ethnic groups that manage them are extremely vulnerable because they need to make telephone contact with the local organisations that deal with the transport of the immigrants, as well as with their agents, for the purposes of agreeing lines of strategy to ensure the successful outcome of the journey.

But it is also necessary for the transporters of the local organisations to make contact with the agents of the ethnic organisations in order to agree the procedures and the place of delivery for the illegal immigrants, which is often indicated by the aforementioned agents during the final stage of the journey.

It should also be emphasised that the persons concerned in the trafficking, of various nationalities (Chinese, Bengali, Russian, Slovenian, Croatian, etc.) need to understand the numerous messages exchanged between them during the voyage of the illegal immigrant, for which they use a common language, which is very often rudimentary English. And this circumstance certainly makes it easier for the work of the investigative bodies, who are generally able to proceed with a simultaneous translation in their mother tongue, and to fully follow the phases of the illegal movements.

In particular, during the course of the telephone calls, all of those involved in the trafficking have to mention confidential information about names, addresses and telephone numbers and give instructions about payment methods and places where the illegal immigrants are to be delivered.

In the investigations on illegal immigration and human trafficking, it is necessary therefore to operate with continuity, patience and intelligence in the investigation work, which makes it possible to link together episodes that are apparently unconnected and have taken place at different times and places.

The investigation must therefore be able to make use of measures set up by penal law and procedure. One of these measures, contained in current Italian legislation, which has been referred to above, is the possibility that the public prosecutor and the police investigators have of delaying

arrest and sequestration. It should be underlined, however, that if the investigation bodies find themselves with the possibility of following a delivery of illegal immigrants (by land, but also by sea) it is appropriate that they, in particular conditions of time and place, are able to decide whether to carry out the arrest of a single driver or of a single boatman who is dealing with the transport of illegal immigrants as well as the arrest of the person chosen by the organisation for receiving the delivery, or whether instead to follow their movements in order, through subsequent investigations, to identify those at the head of the organisations operating the transport and at the same time those organising the journeys and, through this identification, to collect incontrovertible evidence leading to their arrest, therefore dismantling the entire trafficking network, making use, if appropriate, also of the extremely useful further investigation measure of infiltration by the police investigators into the aforesaid criminal organisations, which is also provided by the current legislation.

With reference to the exploitation of women prostitutes, who are often immigrant children and illegal immigrants, at the beginning of investigations the investigator is not aware of the original criminal circumstances, namely the human trafficking, since this, as already indicated, begins and is developed in countries that are a long way away from where the investigations are taking place. It is therefore necessary to start from the exploitation activity in order to work back to those responsible for the human trafficking and trade.

For a correct organisation of the investigations, it is necessary to bear in mind the facts that the foreign prostitute is necessarily in constant contact with her exploiters (who have acquired her or belong to the ethnic organisation which, through its agencies, receives, the *human cargo* at the end of the journey) and that the activity of prostitution of women is visible, as are, very often, the links between the women and their exploiters who, out of caution, keep the women under close control, either visually or by way of mobile telephone.

This evidence must provide indications to the public prosecutor (who, in the Italian system, is the head of investigations) in order to enable him give precise instructions to the police investigators, so that they do not intervene with the identification and arrest of a single person caught in the act of committing an offence of exploitation of prostitution (where the police are present at the delivery to the exploiter of the prostitute's earnings or are present at the time when she is collected by the exploiter).

Acting in such a way would interrupt all further possibility of investigation into the exploiter's accomplices, into other women being exploited, into the organisation running the prostitution and into the human trafficking which is behind the prostitution activity.

Instead, it is necessary to proceed at the outset with a series of well managed operations of setting up emplacements and observing the activity of the prostitute in order to get to know her movements, where she resides (living with the exploiter or in a hotel) and placing her mobile or fixed telephone, once obtained, under surveillance.

In order to identify the prostitute's mobile telephone, the investigators can carry out, for example, simple checks as to her identity, pretending not to notice any false documents that she might produce and therefore to ascertain the telephone numbers of the last phone calls that she has received and made.

In this respect, it should be observed that almost all women have been given mobile phones by their exploiters who, particular during the early period of control over their victims, fear that they might turn to the police authorities or to humanitarian organisations for help in getting out of the slavery in which they have found themselves. By controlling the prostitute's mobile telephone it is then possible to obtain the number of the exploiter who will almost certainly use his own telephone for the aforesaid controls.

During the trafficking investigations, it is very useful to carry out environmental surveillance which is carried out in the place where the exploited women reside. It is possible, in fact, through this surveillance, to reconstruct the significant stages in their dramatic histories and, in particular, their relationships with their exploiters.

Through telephone surveillance of the exploiter it is possible, once again, to trace back in order to identify members of the criminal groups who manage the prostitution activity.
It should be added that, very often, the prostitutes are forced to carry out their activity on a sort of rotation basis, in different cities in the same country, so that by controlling her mobile telephone it is possible to discover further telephone contacts with other people who also belong to the criminal groups that run the prostitution activities.

Finally, it should be said that this investigation network has made it possible, during the course of particular police investigations, to discover and follow all of the stages as they happen, in relation to the acquisition of new women who are being brought into prostitution and their journey to Italy.

In concrete terms, it has been found very useful to combine a phase of telephone and/or environmental surveillance with a phase of observation and fixed-placement surveillance, for the purposes of photographing and filming meetings with members of other criminal groups for the exchange of documents and the delivery of the sums of money necessary for the purchase of other trafficked women.

Also of central importance is the carrying out of surprise actions such as the search of premises, which not infrequently make it possible to seize photographic material and other objects relevant to the crime, such as for example, documents relating to bank and post office accounts which, when studied carefully, can lead to the discovery of illegal money-laundering channels relating to human trafficking.

§ 5. *Conclusions*

In order to defeat, or at least to limit, the activity of transnational organised crime involved in the illegal traffic examined here, in addition to cooperation between the judicial and police authorities in the various States and in addition to control activities, it is necessary to create a stronger activity of prevention, making increasing use of the valuable collaboration of non governmental organisations.

It is necessary, above all, in dealing with human trafficking, for much greater work to be carried out in the countries of origin in order to educate and promote awareness among women and children who are the victims of this trafficking and to give greater training to the police and border authorities. In addition, an intense and continual press campaign is necessary at international level, so that the first effective action is of a cultural nature in the sense that the entire community must be aware and must reject the criminal phenomenon that lies at the origin of human trafficking.

UNICRI – Seminar in Tirana, 15 March 2007

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1.6. *Combating Human Trafficking in Albania. Problems and prospects in the context of international cooperation*

Trafficking emerged as a highly dangerous social phenomenon in the transition years. Despite all of the organisational, technical measures etc, that sought to prevent it, this offence is ever present, considering above all that the question of free circulation of Albanian citizens in European countries has still not been resolved.

The phenomenon of human trafficking has an aggressive and inhuman aspect to it, which is why it is considered to be one of the modern forms of human slavery.

The large profits obtained from this type of commercial activity, which is carried out mainly in the coastal or frontier cities, beyond the control of the State and despite economic, political and social developments, has created favourable conditions for traffickers to commence and build up their large-scale activities, of trafficking children outside Albania.

The extent of this crime is now worrying the public institutions, Albanian public opinion, and also the international organisations. Albania is regarded as a country of origin and transit for the trafficking of women by specialist international organisations who control this phenomenon.

The activity of bodies responsible for the application of the law in the fight against trafficking is regarded as being insufficient, ineffective and having little impact in reducing this crime. For a long time the number of people convicted for the offence of human trafficking has been relatively low. Most of the women and children victims were transported into Italy, Greece and, to a lesser extent, to other European countries such as Belgium and Holland. The foreign women who passed through Albania were mainly from Moldavia, Romania, Russia and Bulgaria, and a lesser number from the Ukraine. There are also many children, who are trafficked or exploited for begging.

The commitment and awareness of the State, of international organisations, and also of national and international non-governmental organisations in fighting this phenomenon, has progressively

increased. The commitment is also reflected in the improvement of the legislative and organisational framework.

The Albanian government has therefore taken steps to draw up strategies for fighting human trafficking as well as constructing mechanisms that seek to implement them. The Ministry of the Interior has established the Anti-trafficking Unit, which coordinates its own activities with those of Frontier Police, the State Police Headquarters and the corresponding bodies or other investigation agencies in other countries. In the meantime, the framework legislation has also been amended and brought up to date, in line with the provisions of the international Conventions ratified by the Albanian Republic, and the Assize Court has been established for judging offences relating to trafficking. An inevitable striking feature is the continuous modernisation and amendment of domestic law to bring it into line with international law. This rapid process of modernisation is due not only to political will, but also to the general will of society in combating this phenomenon.

The offence of trafficking is relatively new to our legal system. Neither Law no. 7895 of 27.01.1995, nor the Republic of Albania Penal Code included it as a specific offence.

The Penal Code of 1995 therefore gave very little assistance in the fight against this modern form of human slavery.

The amendment of the legislative framework began with the introduction of new offences, such as exploitation of prostitution committed by or through the mediation of criminal associations.

Law no. 8279 of 15.01.1998 brought about amendments to the offence of "aiding and abetting prostitution", which was defined as "exploitation of prostitution".

The year 2001 brought radical changes to the arrangement of our Penal Code. Law no. 8733 of 24.01.2001, for the first time, provided the offence of trafficking, in three circumstances, namely:

- Human trafficking, art. 110/a
- Trafficking of women for the purposes of prostitution, article 114/b
- Trafficking of minors, article 128/b

The changes made to the Penal Code of 2001 also affected the provisions added in 1998, such as, for example, exploitation of prostitution in aggravating circumstances, article 114/a. This provision brought about an amendment, from the point of view of the ingredients of the offence, insofar as it

removed the provisions relating to conspiracy, previous convictions or commission of the offence by public officials.

In considering the significance of human trafficking, there was no universal definition until very recently, nor any legislative obligation at regional or international level. This position changed with the publication of the ***UN Convention against Transnational Organised Crime and the relative Additional Protocols.***

Today, the phenomenon of trafficking is fairly well known. Trafficking of women is carried out using every means - ships, aeroplanes, motor vehicles, speedboats, rafts – transporting them from Albania into foreign territory via land, sea and air. This type of trafficking, on the basis of the needs and demand of the various regions, requires certain cross-border activities, such as organised transport of people and the signing of contracts. The trafficking of illegal immigrants has assumed such dimensions that it can now be described as a fairly profitable business, part of the underground economy.

Deception, through the false promise of a job. Encouraged by the high rate of unemployment and the extremely low wages, the victims follow the traffickers, convinced that they have the possibility of finding a job and the guarantee of a better quality of life for themselves and their families. The promise of work is very attractive. Often the work is also suitable for children who, as time passes, with the money they earn, "can study and make a life for themselves".

Deception, through false marriage. The traffickers often use this form of enslavement. At the beginning they establish a bond of love with their victims and seduce them, with fantastical stories about a hypothetical life to build together abroad. The victims, often children, blindly obey their partner.

Promise of marriage / false marriage. Having identified their victims, the traffickers study the most appropriate way of obtaining their trust. They are often presented or introduced by others who, in front of the family of the victims, make guarantees about the "wonderful man" who is asking for the hand of their daughter.

Deception, through false promise of education. Exploiting the weak point of many young people and their families, the traffickers offer themselves as guarantors of their education and university studies. They develop close bonds of trust with the victims and their families, often exploiting their knowledge of third parties. Often they present themselves in the guise of a "parent" who looks after

the victim "as they would their own child". The victims, having reached the western countries, are forced into prostitution.

Deception, through the prospect of a better life. The victims of this kind of deception are generally those who until that moment have experienced an extremely difficult, repressed, frustrated life and have suffered various forms of violence and abuse. Here, the traffickers appear as "benefactors", persons who suffer when they see the suffering of others and are prepared to "sacrifice themselves" for them, certain that one day "they will be re-compensated for the favour they are making".

Kidnapping. Information about the life of the victim is obtained in advance and her movements are studied. The kidnapping is made at the right moment. There are cases where the victim is invited by friends or acquaintances, who have links with the traffickers, to attend a party, a discotheque, etc. . If the victim accepts the invitation, the kidnapping is made easier.

False information in the newspapers/tourist agencies. The victims may be seduced by the fantastic prices and "perfect" organisation of tourist trips.

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1.7. " *International terrorism"*

The form of crime that goes under the name of international terrorism appeared on the political scene in western societies between the end of the 19th and the beginning of the 20th centuries, but was developed and consolidated only in the 1990s and the early years of 2000.

Over the last thirty years, the western world has been continually shaken by acts of terrorism which have threatened the basic rules of human society and we have passed through a time which saw a **nationalist**, autonomist and geopolitical type of terrorism (terrorists who fought for the liberation of Palestinian territories and, even before that, the Algerian National Liberation Front), with racial aspects in terms of the targets, to an **internationalist and religious** terrorism, which in certain respects has more disturbing characteristics, which act upon internal religious feelings that are deeply rooted in certain parts of the world, and in particular in the Arab and north African regions.

This epochal change is clearly demonstrated by the declarations of Islamic fundamentalist movements, now widely heard on the international scene, which are clearly terroristic and capable of presenting themselves as the mouthpiece of an international Islamist project, which identifies and western world, and especially the United States of America, as the enemy to be destroyed.

What is described today as international terrorism is certainly **Islamic terrorism**, a phenomenon which, after the events of 11th September 2001 in New York and Washington, has emerged in all its ferocity and drama.

The events of 11 September 2001 and the subsequent attacks in Madrid in 2004, and in London and Sharm el Sheikh in Egypt in July 2005, have highlighted once and for all how serious is the threat of Islamic terrorism for western countries.

Obviously it must immediately be stressed, in order to remove any ambiguity, that despite the strong religious element in Islamic fundamentalist movements, nevertheless there is no link at all between terrorism and the Islamic religion.

In fact, the religious aspect in reality represents the only factor linking together the actions of these violent groups, and therefore it represents simply the most significant causal link.

§ 1. *The instruments for fighting international terrorism*

§ 1.1. *The response to the challenge launched by Islamic terrorism*

The American response

Already, on the day after the attacks of 11th September, the most common watchword of the American administration was "war". The attack on America, unleashed by Bin Laden's terrorists, or on his behalf, was to be considered an act of war, to which the only response was that of war.

It is irrelevant to consider whether such a position was well-founded and legitimate from the point of view of international law. What is important is only that the American response to the attack of 11th September was, in fact, a military response. It was not only a military response in the obvious sense that, a few weeks later the United States of America attacked Afghanistan, expressly invoking its right to legitimate defence against a government, under Taliban rule, which housed and protected terrorists who were claimed to be responsible for the attacks in New York and Washington. Nor was it a military response only in the sense that a military occupation took place in Iraq in March 2003, on the basis of fairly doubtful motivations in factual and legal terms, as a second step in the "global war on terror". In short, apart from these military actions in the traditional sense, the American government chose to arrange its response to Islamic based international terrorism by creating an emergency situation which identified terrorists – wherever they operated in the world – as "enemy fighters". As such, they were deprived of the ordinary guarantees of criminal law that prisoners of war rightfully have, though to a more limited degree,on the basis of international human rights law.

The European response

Up until now, the European response to the emergence of Islamic terrorism has been different, and has not substantially modified, even after the attacks of 2004 and 2005 in Madrid and London.

The European countries, as everyone remembers, immediately fell into line with the United States government in adopting preventative measures (of a substantially administrative nature) against the funding of international terrorism, providing and implementing the so-called freezing of assets of individual and organisations suspected of links with Islamic based terrorism. But the overall strategy in combating the terrorist emergency – wherever the personal liberty of people suspected of terrorist links was brought into question – has continued to be carried out primarily through the channels of criminal law, in particular through the use of pre-existing forms of criminal association, though sometimes modified or supported by other laws, modelled around the particular aspects of Islamic based terrorism.

And therefore it is possible to consider a practical solution, in terms of criminal law, not only where there is a serious acceptance of the need to acquit the defendant, but also a serious need to acquit a guilty person, or someone who is a social danger, when the prosecution is unable to prove his guilt through the instruments provided by the criminal procedure.

Naturally, this does not exclude the possibility, in specific cases, of a structural response which might lead to emergency provisions that might allow the balance to be weighted more in favour of defending society than protecting the fundamental rights of the suspect – the accused (and subsequently the convicted person). In fact, there are various provisions, which Italy has played a significant part in reintroducing or refining, which are repressive measures already tried out to a large extent in other previous (or continuing) "criminal emergency" situations – from the mafia to domestic terrorism of various kinds – and which thus offer a model for combating Islamic terrorism. These provisions, in a certain sense, are hybrid: not aligned to the American military model, but characterised by a so-called double track viewpoint, or a subsystem of the ordinary methods for combating common crime.

§ 2. *Criminal offences relating to international terrorism provided by the Italian law*

§ 2.1. *Offences of association under article 270-bis Penal Code in combating Islamic-based criminal conduct*

In Italy, in particular, the legislation used for combating Islamic-based international terrorism by way of association, under article 270-bis of the Penal Code, was introduced in its original version with the emergence of domestic terrorism. It was amended after 11 September with Law no. 438 of 15.12.2001, so that it can be used in cases where the objective of the terrorists operating in Italy

could not be described as subverting the Italian Constitution but is to be found outside the national territory.

This role is carried out not only, and not so much, in order to provide a mechanism to extend the penalties against the accused, in the event of conviction for one or more final offences: in fact, for this purpose, it would be sufficient to use the already numerous penalties provided elsewhere (such as article 280 and 289 Penal Code, relating respectively to attacking and kidnapping a person for terroristic or subversive purposes, to which there has recently been added the new offence under article 280-bis Penal Code, relating to direct attacks against objects or property with the use of explosives or deadly weapons for terroristic purposes), as well as the general aggravating circumstance under article 1 of Law no.15/1980, which is applicable to all offences committed for terroristic or subversive purposes (excluding obviously those whose purpose is a constituent element of the offence), and removed from the ordinary mechanism and balance of circumstances provided by article 69 Penal Code.

One of the essential functions of the new article 270-bis of the Penal Code in the criminal system is, instead, that of placing from the very beginning any person suspected of involvement in a terrorist organisation into a special legal, procedural and custodial subsystem which is quite distinct to that applicable to common crime. This subsystem is brought into operation in situations involving a terrorism which has enormous destructive potential, also through its capacity to use men and women who are prepared to become martyrs, but which, fortunately, rarely occurs, either intentionally or due to lack of men and means. And this has arisen against a vital need to prevent, so far as possible, the commission of catastrophic crimes such as those of 2001 in the United States, but also more recently those of 2004 in Spain and of 2005 in Great Britain and Egypt.

On the other hand, the presence, in all European legal systems, of provisions which sanction mere participation in criminal associations makes it possible to intervene immediately in order to stop – before it is too late – the plan being carried out, even in the absence of any action which is sufficient, from a legal point of view, to constitute an attempt, provided that it is at least possible to identify a minimal structure suitable for carrying out the proposed and agreed plan.

The offence of association and the provisions of article 270-bis Penal Code, as amended by the 2001 legislation, are an essential point of reference in providing an effective response, through the forces of criminal law itself, to Islamic-based terrorism.

In this respect it seems appropriate to point out that the new article 270-bis, in providing penalties for participation in associations involved in terrorism, including international terrorism, reflects the current globalisation of organised crime and is directed towards protecting "public safety worldwide" from the risks posed by terrorist groups for "universal social and political stability, international public order and the higher interests of humanity". [71]

In fact, it should be noted that the "*transnational*" character of the offence, the enormity of the object of protection and the absence of any legal definition of "terroristic or subversive method" (on the model created through article 416-*bis* Penal Code for mafia activity) raise the question of identifying a structure of association along the lines of article 270-*bis* Penal Code.

Such a reconstruction of evidence is necessary when the association has never been identified– by well-known fact and/or legal investigation – as terroristic or subversive, and all the more so when, not having yet carried out terrorist acts, it is regarded only as potentially capable of causing offence to "worldwide public safety".

However transnational terrorist associations have characteristics that are entirely different from traditional groups, especially mafia-type organisations. These characteristics constitute their true strength, because they make them more difficult to identify and therefore more elusive from the point of view of investigations.

While mafia-type associations have a powerful structure and are strongly rooted in a particular territorial area, the Islamist "cells" are not rigidly structured into a single hierarchical organisation, but are mutually confederated on an entirely informal basis; they revolve around "service structures" (financial and logistical) provided by Al Qaeda; they operate with extreme mobility within a transnational terrorist "network", in which even ethnic and national identities become increasingly irrelevant.

The difficulties in taking legal action to combat terrorism – which must inevitably be carried out efficiently and with guarantees, avoiding short-cuts and gaps in the evidence – arise also from interpretative divergences, caused by the lack of a consolidated body of law on the new offence under article 270-*bis*, Penal Code, in terms of the elements necessary for establishing the conduct of participation in an international Islamic-based terrorist association.

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[71] Fiandaca-Tesauro, "*L'azione di contrasto al terrorismo internazionale - Le disposizioni sostanziali: linee"*, in *Il processo penale tra politiche della sicurezza e nuovi garantismi*, edited by G. De Chiara, G. Giappichelli Editore – Turin.

It is clear that questions of punishment cannot be reduced to a form of persecution for ideas, or for ideological positions; it is necessary to be able to distinguish between ideological adherence and radical fundamentalism and involvement in a terrorist association. It is not simply a problem of evidence, but above all a legal problem.

From the point of view of interpretation – despite the absence of established legal guidelines on the new article 270-*bis*, Penal Code – it can be said that the offence of association for purposes of international terrorism requires the existence of a number of people, of an organisational structure, of a bond that links together the participants, of a programme of violence (the purpose of "*carrying out acts of violence*") and the availability of suitable means for carrying out the purpose.

However, these requirements have to be compared with the actual phenomena of transnational Islamic-based terrorist associations, which have characteristics that are very different from traditional criminal groups. These characteristics constitute their true strength because they are less easy for investigations to identify:

- they are "cells" which are not rigidly structured into a single hierarchical organisation, but are confederated between themselves, quite informally, revolving around "service structures" (financial and logistical) such as Al Qaeda;

- operating as a transnational terrorist "network", conserving their ethnic and national identity, but remaining in contact, collaborating and specialising (for example, in Italy, specialising in the production of false documents);

- even the objectives of each group can be distinct, even though all share together the same common denominator: the holy war against apostates and non-believers;

- the "programme of violence" of such organisations takes the form of attacks and acts of violence which are carried out in various countries, whereas involvement of the individual members in that programme must be demonstrated each time through specific investigations.

The strong division and compartmentalisation of joint involvement, and the resulting difficulties in proving all of the elements set out in article 270-*bis*, Penal Code, in particular the terroristic purpose of the conduct and its international extension, not merely in terms of ideological adherence, make it advisable not to abandon the possibility of continuing to pursue – as an alternative, or rather as an additional, offence to that of article 270-*bis*, Penal Code – the offence under article 416, Penal Code, relating to a (proven) criminal programme of "logistical support".

In this respect it should be pointed out that the prevailing law and doctrine indicate that there is full compatibility – with the exclusion of the special relationship pursuant to article 15, Penal Code – between the offence of association for terroristic or subversive purposes and that of involvement in an armed criminal group (article 306, Penal Code), insofar as between these offences there is a specific purpose as opposed to a general purpose.

§ 2.2. *Article270-sexies Penal Code and conduct for purposes of international terrorism*

Here, reference should be made to the recent legislation, introduced after the attacks of July 2005 in London and in Egypt, with article 270-*sexies* of the Penal Code, provided by Law no. 155 of 31 July 2005.

In order to overcome a series of contradictions and misconceptions in the relevant law, due to the lack in the Italian legislative system of a clear **notion of terrorism**, the policy of the legislation was to identify conduct for terroristic purposes, providing a two-fold definition:

1. a first part in which a general definition is offered of conduct for terroristic purposes, completely changing it by the framework decision of the EU Council of 13 June 2002;
2. A second part in which the notion is nevertheless extended to all conduct that is considered by international law to be terroristic.

In the first part, therefore, the legislation lays down two requirements that are essential before there can be talk of conduct for the purposes of terrorism, without even specifying that it must be "violent" conduct. What is required is that **such conduct, by its nature and context, must be "suitable for causing serious harm to a country or to an international organisation" and that "such conduct must be carried out with specific intent,** which may take three alternative forms:

1. the purpose of frightening the population;
2. the purpose of forcing the public powers or an international organisation to carry out or to refrain from carrying out any act;
3. The purpose of destabilising or destroying fundamental political constitutional, economic and social structures of a country or of an international organisation.

In the second part, on the other hand, the legislation provides safeguard provisions for international law, where it establishes that **terroristic conduct is deemed to include all those acts that are defined as terroristic or as committed for the purposes of terrorism by conventions or other provisions of international law.**

The definition of purposes of terrorism, which is now positively introduced into Italian law by the new article 270-*sexies* of the Penal Code, is substantially the same as the sociological phenomenon of terrorism, to which the legislation clearly, in the absence of a specific definition, had intended to refer in the provisions of article 270 Penal Code, and therefore it can certainly be used now for the correct interpretation of this legislation.

From a sociological point of view, without any claim to a scientific definition, terrorism normally means any act of violence, committed either against a person or against property (therefore, by way of example alone, killing, injuring, kidnapping or imprisonment of persons, or damaging or carrying out attacks with explosives, or with other instruments, against buildings, installations, communication routes), carried out with terroristic methods for political purposes in the broadest sense.

The method used is terrorist when, on the one hand, the objective struck by the act of violence is of no particular importance in itself (i.e. the author of the act of violence is not interested in striking that victim, that person or his property, for what he has or has not done, which therefore constitutes the motive, the explanation of his action), but is relevant because he embodies a symbol for the society in which he belongs (this is the case, for example, of someone who holds a specific role - for example, is carrying out a government activity or is administering justice or maintaining public order - or in the case of buildings where these functions are carried out) or, on the other hand, where any member of the public who has no particular role, his personal identity being altogether irrelevant, becomes the author of an act of violence, striking the type of objectives referred to above in order to create a widespread feeling of panic or actual mass terror.

The ultimate purpose of the act of terrorism is however always "political", in the broadest sense, insofar as it takes the form of the desire to bring about a change, to a greater or lesser extent, or indeed a total change, in the legal system effectively in force in a particular society, using means that are different to those permitted by that system.

From the framework legislation, as described in this way, it would appear necessary, first of all, to prove that the persons under investigation have created a stable and consolidated association, or have become part of a similar pre-existing structure, which is ready to launch into action when the actual terrorist act is decided.

From this point of view it seems clear that not only the actual detention of explosives and/or arms, but also the movement of activists, of sums of money, of mobile telephones, of communications

encrypted according to numbered codes, the exchange of propaganda material for recruitment, the provision of lodgings and especially the continual production of false documents **constitute the necessary conditions without which the chain of events leading to the terrorist attack could not be put into motion: they are, therefore, an essential part of the final success of an action.** These acts, by themselves, where the final purpose and the absence of coincidence is proved, are sufficient in themselves to constitute the offence in question.

It should be remembered, for example, that the production of "safe" false documents, for which the Italian cells of the terrorist international jihad seem to be the most expert, are an essential instrument for the organisation, in that through these documents their members are able to move fairly easily around European and Middle Eastern countries, maintaining relationships with their associates and arriving at the necessary time at the objectives or places where the preliminary training is carried out for the launching of attacks.

§ 2.3. *The principles established by recent Italian law as to the existence of the offence of association for purposes of terrorism*

Reference has been made above to the rulings of the Court of Cassation in relation to the nature of the old 270-*bis*, Penal Code, in other words about the offence prior to the introduction of the Law of December 2001. It was held to be unsuitable to include also the conduct of participation in an association that had the purpose of international terrorism, and therefore of those organisations that directed their violence against a foreign state, because this was an activity which, even though carried out within the Italian jurisdiction, was nevertheless not directed and aimed towards subverting the constitutional order of the Italian State.

Once again, as happened in 1996, it was the Naples Judicial Authority who, after 2001, invited the Supreme Court of Cassation to consider the question of association for the purpose of international terrorism (the new article 270-*bis*, Penal Code).

And, in fact, the first judgments of the Court of Cassation were made in direct relation to two important proceedings relating to an Islamic-based terrorist organisation called the 'Salafist Group for Preaching and Combat', which was highly active in Algeria and had links with the international terrorist group, Al Qaeda.

§ 3. *Investigative measures introduced by the Italian legislation for combating international terrorism*

The international emergency caused by the tragic events of 11 September 2001 in the United States, and subsequently in March 2004 and July 2005 in Spain, Great Britain and Egypt, have led the Italian legislation to adopt a whole series of measures in relation to criminal practice and procedure, which are certainly much more efficient and appropriate in combating this form of transnational crime.

In this respect it should be pointed out immediately that the approach of the Italian legislation has been to extend so far as possible the so-called "special" procedural regulations previously tried and tested in combating the mafia, in order to cover also the phenomenon of terrorism.

Consequently, also in terrorist investigations, the classic investigation measures used against organised crime have been adopted, even though investigators were well aware that they were faced with two distinct phenomena and with measures that were often insufficient for combating a phenomenon which had objective transnational implications which were difficult to combat through unilateral actions, in the absence of a real and effective investigative collaboration at international level between the police and judicial authorities of the various countries involved.

§ 4. *Telephone and environmental surveillance as an essential tool in combating international terrorism*

Article 3 of Law no.438/2001 expressly provides, with regard to telephone surveillance, that the provisions of article 13 of Legislative Decree no. 152 of 13 May 1991, as amended by Law no. 203 of 12.7.1991, are also applicable to proceedings relating to offences committed for the purposes of terrorism or subversion of the constitutional system.

It follows from this that in proceedings relating to terrorism (in the same way as those involving organised crime) the law to be applied is that which, by way of exception to article 267 of the Penal Procedure Code, provides the possibility of authorising surveillance operations even where there is **sufficient circumstantial evidence of an offence** (and not even evidence of a serious nature) and even where they are not indispensable, but only necessary for the prosecution of investigations.

The same provision also provides, in relation to environmental surveillance, that the surveillance can take place in a private residence, even when there is no reason to believe that a criminal activity is being carried out there.

It is for this reason that recent investigations have sought to favour surveillance instruments, such as telephonic systems, identifying where possible email addresses or, in certain cases, carrying out surveillance in public places (e.g. internet points or internet cafes) or other forms of internet communication, such as for example, links to chat lines or contact (opening and downloading documents and programmes) with sites that apparently have no connection with Islamic-based associations, groups or environments.

To all of this is added the serious problem of interpreters for the Arabic language, or one of the other languages spoken by foreign suspects, who must work beside the police investigators from the beginning of the surveillance operations and play a major role in the investigations.

It is essential to have professional people available who are qualified and above all reliable. Unfortunately it has to be stated that, despite everything, our system still has serious shortcomings and, as often happens in our country, the solutions (certainly insufficient) to the problem have been left to the good sense and professionalism of the police investigators and prosecutors heading the investigations.

Until now, in fact, it has been possible to obtain a reasonable number of interpreters – Arabic language translators, who are generally appointed as auxiliary staff – to advise the prosecutor and who often work side by side with the police investigators for more than eight hours a day, thus making this work entirely incompatible with other work activities.

It would therefore be desirable to devise a more suitable system for selecting Arabic language interpreters and translators through the creation of a national register of interpreters and translators who already have experience in international terrorism investigations, but who would be guaranteed some form of employment by way of fixed contract.

§ 5. *Preventative surveillance: benefits and limits in combating terrorism*

Article 5 of Law no.438/2001 governs this particular preventative and/or information measure in relation to offences committed for terrorist purposes or for the subversion of democratic order.

In fact, the legislature has taken the opportunity of re-writing the general essential aspects of these provisions, previously set out in article 226 (implementation provisions) of the Penal Procedure Code and in article 25-ter of Law no. 356/1992 for offences involving organised crime (both provisions repealed by the new law respectively with sub-para. 1 and sub-para. 2 of the aforesaid article 5).

As is known, this is a residual institution of our procedural system, precisely because our criminal system contained the general principle according to which interception can be authorized exclusively within the context of criminal proceedings and for the purpose of obtaining evidence only in relation to an offence already committed.

Article 229 (implementation provisions) of the Penal Procedure Code was therefore the last provision still in force that made it possible, for certain types of offence, to carry out preventative operations.

Obviously these provisions gave the possibility of authorising not only preventative telephonic surveillance operations but also of preventative interception of communications between these persons and interception of internet conversations and communications.

The sub paragraph which creates major problems is sub-para 5, which provides that the results of preventative surveillance operations cannot be used in the criminal trial, but only for investigation purposes.

Furthermore, it is expressly provided that "preventative surveillance activities and information acquired as a result of the same, cannot be referred to in the investigation documents, nor form the object of a witness statement, nor be otherwise divulged".

In this way, a clear and absolute procedural rule is established: the impossibility of using such information, which is also the subject of a serious penalty, so that two new kinds of offence have been introduced to protect the objective nature of the information acquired, as well as the person who is the subject of the protection.

This is the explanation for the offence in sub-para 3-bis of article 5 and the criminal nature of sub-para. 3-ter of the same article 5, under which there is indeed an offence to protect the identity (and probable immunity) for police officials and investigators who carry out the operations.

It is clear that a provision such as this prevents all possibility of reconverting the results of these interceptions into evidence.

§ 6. *Search of buildings or building complexes*

Article 3 sub-para 2 of Law 438/2001 also extends the application of the provisions of article 25-bis of Legislative Decree no. 306/1992, converted into Law no.356 of 57.8.1992, to proceedings involving terrorist offences.

And therefore, notwithstanding the provisions of article 27 sub-para. 2 of Law no.55 of 19.3.1990, police investigators can proceed to search entire buildings or building complexes where they have good grounds to believe that arms, ammunitions or explosives are to be found, or fugitives or absconders, implicated in any of the crimes indicated in article 51 sub-para 3-bis of Penal Procedure Code (in other words, terrorist offences).

§ 7. *Undercover activities of police officers*

Article 4 of Law no.438/2001 provides special rules governing undercover activities carried out by police officers in combating international terrorism, which is substantially reiterated in the regulations governing undercover activities in **article 9 of Law no.146 of 16 March 2006 on transnational crime**, which makes express reference to undercover activities in matters of terrorism.

It should be immediately pointed out, before entering into detail about the regulations, that – at least insofar as investigations into Islamic-based international terrorism – there are no cases in which an undercover agent has been used. This absence is obviously due to the objective difficulties of finding a police officer who is capable of speaking and understanding Arabic and who has the appropriate features that would enable him to make contact with the suspects. The possibility of obtaining auxiliaries of Arabic origin who would be able to collaborate with police investigators undercover has also proven difficult, both by reason of the unwillingness of those few people who have been contacted, as well as by reason of their lack of reliability. It is therefore necessary, also for the future, to invest in this sector and seek forms of recruitment for people of Arab origin who can be used effectively in undercover operations.

Finally, the undercover activity which, as already indicated, can also, from the external point of view, have the characteristics of illegal conduct forming an integral part of the offence in abstract terms, must be aimed at obtaining evidence in relation to crimes committed for the purpose of terrorism; otherwise the public official cannot rely upon the protection provided.

In this way, the model chosen by the legislation clearly emerges, which tends to transfer the major part of the responsibility, as well as the undercover activities themselves, from the police authorities to the body overseeing preventative policing. For confirmation of this, it is sufficient to refer to the second part of article 4 sub-para 6 of Law no.438/2001, with provides that the name of the officer responsible in the operation will be communicated to the investigating magistrate only upon request or where necessary, and the last part of the same sub-paragraph, which gives no interlocutory

powers to the investigating magistrate who has received information about the commencement and results of the operation.

Article 4 of Law 438/2001 therefore provides another possibility of an agent provocateur, a figure who is not entirely apparent, either according to law or doctrine, and once again the emphasis is placed upon the professionalism of police investigators specialising in combating terrorism, to make careful use of this new instrument, which is new to this sector, and above all to respect the pre-requisites set out in article 4 of the said law. When these are not respected, since the general justification for carrying out such a duty can only operate in the conditions indicated above, there could be negative consequences, giving rise even to the prosecution of the police investigator who is implicated in serious criminal allegations. In fact it is likely that the law will not alter its previous approach, even in relation to these new provisions.

Having looked briefly at the problems relating to the agent provocateur, reference should be made to the provision of Law no. 438/2001 which enables police investigators to carry out acts of provocation "through third parties", which clearly seeks to refer to the possibility of using people who are not police officers for these types of operation. In this respect, reference has already been made to the difficulties, in investigations involving terrorism and international subversion, of finding people who are capable of carrying out such a delicate and dangerous role.

§ 8. *Deferring the execution of pre-arrest and arrest warrants (article 4, sub-para 3, Law no. 438/2001)*

Of particular relevance is the provision in article 4 sub-para 3 of Law no. 438/2100, which extends the application of article 10 of Legislative Decree no. 419 of 31.12.1991, converted with amendments into Law no. 172 of 18.2.1992, to cover terrorist offences. Through this provision (already available for proceedings relating to offences of laundering, extortion and usury) the investigating magistrate has the possibility of deferring, by order, the execution of arrest, custody and search warrants and the application of precautionary measures. Also in this case, the provisions have been reiterated in the context of the law on transnational organised crime **(article 9, sub-para. 7, Law no.146 of 16.3.2006).**

When it is necessary for the acquisition of important pieces of evidence or the identification of those responsible for acts of terrorism, the investigating magistrate can delay the execution of the said warrants through the issue of an order containing reasons, or also by oral order, in urgent cases (which must however be validated in writing within 48 hours).

In cases of even greater urgency, the investigating officer himself can omit to carry out acts within his own competence (namely, arrest in the act of committing a crime or criminal seizure of goods) giving written notification of the fact to the investigating magistrate within 48 hours.

§ 9. *Interviews during investigations into terrorist offences and permits to stay for investigative purposes*

As indicated earlier, the second involvement of the Italian legislature in this area was with Law no. 155 of 31 July 2005. As well as introducing a clear definition of conduct for terrorist purposes and new offences of terrorism under article 270-sexies of the Penal Code, it completed the legal framework in relation to the provisions governing methods for combating terrorism, adding further investigative and preventative instruments into the criminal law.

In this respect, reference should be made to the provision introduced in article 1 which amends article 18-bis of Law no. 354 of 26 July 1975 (law on the prison system). This provides that the provisions already in force which, in cases involving organised crime, allow the possibility of carrying out investigative interviews, for the purpose of obtaining useful information from persons detained or in custody for the prevention or repression of offences committed for terrorism, including international terrorism, or subversion of democratic order, apply also to head officials of at least provincial level in offices or divisions of the state or military police, as well as to police investigators appointed at national level and, so far as aspects limited to the financing of terrorism, to officers of the taxation police appointed at national level.

It is clear that this measure is often (as has happened in mafia-type crime), though not always, preparatory to a possible and desirable collaboration by those involved in international terrorist investigations, but can certainly prove fruitful, from the viewpoint of information, even for the sole purpose of clarifying positions and activities of suspects in an initial phase of the investigations.

The authorisation to carry out an investigative interview during the enquiry phase is issued by the investigating magistrate, who will then be placed in a position to assess whether there are grounds for any form of collaboration. On the other hand, in the case of persons already convicted or in custody, the authorisation is issued directly by the Minister of Justice or by a person appointed by him.

A further instrument introduced by Law no. 155 of 2005 is article 2 which, by way of exception to the regulations on immigration, makes it possible to issue a permit to stay for foreigners when, during police operations, investigations or proceedings relating to terrorist offences, including

international terrorism or subversion of democratic order, there is a need to ensure that a foreigner remains within the state territory, where he or she has collaborated with the investigation authorities or the police within the terms set out in article 9 of Legislative Decree no. 8 of 1991. In this case, in fact, the Chief of Police, either independently or upon notification by heads of police forces, of at least provincial level, or directors of security information services, or by the Public Prosecutor, issues a special permit to stay to the foreigner, of annual duration and renewal for the same periods.

However, the notification must include all elements showing the existence of the conditions indicated in article 9 sub-para. 3 of the said Legislative Decree of 15.1.1991 (i.e. there must be statements that are intrinsically reliable, new or complete, or must appear to be of significant importance for the development of the investigations, or for the purposes of the proceedings, or for the investigation activities, etc.) with particular reference to the importance of the contribution made by the foreigner.

The permit to stay can obviously be renewed, for reasons of justice or public security and will obviously be revoked in the event of conduct that is incompatible with the purposes for which it is issued, as notified by the Public Prosecutor, by other bodies set out in sub-para. 1 or however ascertained by the Chief of Police, or when the other conditions justifying its issue are not fulfilled.

Finally, article 2 sub-para. 5 of Law no. 155 of 2005 also provides for the possibility of issuing a permanent authorisation to stay (which would generally require a lengthy period of stay and is normally issued only to the citizens of other European states) to a foreigner whose collaboration has been of extraordinary importance for the prevention, within state territory, of attacks upon life, human safety or the real reduction of the harmful or dangerous consequences of the attacks themselves or in identifying those responsible for terrorist acts.

§ 10. *Funding channels for international terrorism*

Law no. 438/2001 includes the funding of terroristic or subversive associations among terrorist offences. This is obviously a very important provision which takes into account the need to combat terrorism also by identifying those who directly or indirectly guarantee money or funding to terrorist groups or cells.

In fact, it would appear appropriate to emphasise that the investigations have shown that there are various forms of indirect funding of terrorist groups, in relation to which a great deal of investigative energy is required in order to present complete legal proof of the transmission (or indeed the delivery) by a particular financial centre of interest to members of a terrorist association.

Furthermore, it should be pointed out that, unlike the mafia-type criminal sector, where there is often an activity of money laundering obtained from illegal activities, in the case of terrorist groups there is often, on the contrary, an activity of reinvestment of money from lawful activities (business profits, collection of funds in mosques, etc.) for illegal purposes (not always with the knowledge of the funders) in order to support the Islamic jihad and therefore to provide support for terrorist cells operating in Europe and in other countries outside Europe.

During the course of investigations, small transfers of money have been discovered through alternative channels to those of banks, such as for example, the well-known channel used by non-EU citizens in Italy of the Western Union or also a much simpler, but much safer, system from the criminal point of view, involving the transfer of sums of money in cash, for example, from Italy to France or Great Britain, where such sums will be received by persons who are close to, or members of, terrorist cells or groups.

Finally, a rather disturbing phenomenon has emerged, once again during investigations carried out by the Antiterrorism Division of the Naples Prosecution Department, which was also discovered during investigations carried out by the Spanish authorities after the Madrid attack of 2004, that there is a connection between Muslims operating in transnational criminal organisations involved in international drug trafficking and Muslims belong to terrorist groups. In fact, it has been proven that some of those involved and arrested during the investigations on the Madrid attack were in contact with members of Camorra organisations in Campania involved in drug trafficking between Spain, Holland and Italy, and that Muslim drug traffickers (Moroccans, to be precise) used drug profits to finance the purchase of weapons, explosives and false documents by terrorist groups.

§ 11. *Conclusions*

The judicial experience over the last few years demonstrates that the choice of the Italian legislature to use the criminal law in the fight against international terrorism (using particular measures as well as the so-called two-track system, as it does in the fight against the mafia) is certainly the most appropriate solution for a state governed by the rule of law, and preferable to any recourse to military-type measures and structures.

Obviously, this does not mean that there no gaps in the law, or questions of a practical nature to be resolved with haste, in order to improve and render more efficient the fight against international terrorism.

These include, for example, the need to ensure a coordination structure at national level and the need to establish a national database on the subject of terrorism.

It must also be underlined once again that it is absolutely indispensable to improve and perfect development of international cooperation, both in terms of police investigation as well as at judicial level, starting from the assumption that, in this sector, as in all sectors involving transnational crimes, collaboration between police and judicial authorities in the various countries involved is an essential factor, and that it is necessary to ensure – from the very beginning of the preliminary investigations – a prompt, appropriate and genuine exchange of information and documents, overcoming mistrust and bureaucratic delays which certainly do not assist the fight against international terrorism.

UNICRI – Seminar in Tirana, 15 March 2007

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2.1. *Financial measures to combat International Laundering. The role of the Financial Information Unit*

§ 1.*Introduction*

Financial laundering takes place through a process of decontamination through successive phases. In the first *placement* phase the launderer attempts to break through the block of rules in order to introduce illegal money into "healthy" areas (controlled intermediaries). This is the most delicate phase, because this "outside client", as soon as he enters the protected world, runs the risk of being recognised by the sensors operated by the intermediaries. These sensors, in fact, are adjusted in order to identify any inconsistency, in terms of quantities and methods, with what is "expected", considering the financial profile of the new client. The launderer must therefore conceal the origin of the illegal proceeds by means of intimidation, corruption or falsification. In the second *layering* phase, the launderer sets off a process in order to conceal and distance the origin, taken from the usual financial "liturgies", but developed unnaturally. This is also a delicate phase insofar as the apparent anomaly is the inconsistency with the financial logic of the behaviour adopted by the launderer, who is not seeking profit but concealment. Finally, the third *integration* phase seeks to bring about the "peaceful" co-existence of the financial assets which have now been "certified" and are therefore "spendable", with ordinary legal investments. In this phase the inconsistency is difficult to detect; it can be done where there are different territorial situations and can be carried out using highly sophisticated financial analysis.

Illegal financial assets, therefore**, always need to be laundered**. In simple terms, it can be said that the fight against laundering has the purpose of preventing the "certification" of illegal financial assets, or to make it more costly. The greater the cost of "decontaminating" illegal financial assets, the lower is their "spendability". And the lower their "spendability", the greater is the price that criminals are prepared to pay for laundering them? This price can be expressed in terms of money or in terms of risk. A reasonable objective of a **Financial Information Unit** is therefore that of making laundering more costly, reducing the productivity of illegal financial assets and increasing

the possibility of discovering offences, as well as **reducing to a minimum the amount of laundering carried out through banks and controlled intermediaries**, forcing the launderers always further into the margins of the financial system.

And this role is carried out through financial intelligence activities. It is therefore necessary, as already indicated, to find a system of *alarming*, activated by the people who actually carry out those transactions, in other words the banks and financial intermediaries. These operators are, in fact, required to collaborate with the authorities, evaluating the personal and financial behaviour of the client, and sending an alarm message each time that the transactions requested raise suspicion, by reason of being "**anomalous**", or because they are unusual in comparison with the "expected" behaviour of a particular client in a particular territorial area, or they are **anti-economic**. In relation to the theoretical phases of decontamination, the measures that allow us to identify the profiles of inconsistency in the various laundering phases are: in the first *placement* phase, exclusively the reporting of a suspicious operation, in that the operator is able to identify the inconsistency between the financial profile of the client and the operation; in the second *layering* phase the contribution of the intermediary in identifying the anomaly, and then the reporting, is often crucial, even though the financial inconsistency of a complicated operation is difficult to identify. In this case the Financial Information Unit is able to carry out specific analysis of anomalies that emerge from information requested in unregistered form (*financial analysis*). In the third *integration* phase, the identification of inconsistencies is very complicated because the process has been substantially concluded. In purely theoretical terms, only a detailed reconstruction of the territorial situation could enable particular anomalies to be identified.

In general terms, the alarming mechanism established by the laundering system is based on methods that are not dissimilar to those forming the basis of forms of "simplified confiscation" provided by article 12-*sexies* of Legislative Decree no. 306 of 1992, converted into Law no. 356 of 1992. Where the legality of origin of such resources is not adequately demonstrable, on the one hand, the banks and other intermediaries report transactions in which they are involved and, on the other hand, the investigation authorities proceed, subject to the need to evaluate the existence of all legal requirements, in adopting appropriate measures for seizure and confiscation.

§ 2. *The role of the FIU (Financial Information Unit)*

According to the provisions of EU law, and in particular the GAI decision of 2000 on methods of cooperation between the FIU (Financial Information Unit), and the 3rd Anti-laundering Directive of 2005, the FIU represents a "national centre which, for the purposes of combating laundering, is

responsible for receiving, analysing and providing information about suspected money laundering". In Italy, the FIU was effectively established in 1997 when the UIC was given the exclusive and centralised responsibility for receiving and investigating reports of suspicious transactions, and it was formally recognised in 2000, when the CIU was renamed the FIU and given further powers. The FIU has an important role, at national level, in identifying and recovering the proceeds of crime and also, in terms of obtaining, processing and using financial data.

From an operational point of view, the FIU has a wide range of information channels. In the first place, it **receives and investigates reports of suspicious transactions (SOS reports)**. As is well known, these SOS reports relate to transactions which, by reason of their characteristics, entity and nature, lead to the view that the assets or resources are the proceeds of an intentional crime. SOS reports are compulsory not only for banks and financial intermediaries but also for a wide category of professionals (such as notaries, advocates, accountants, book-keepers, employment consultants) and non-financial operators (such as casinos, gold dealers, security transport firms and financial agents). **SOS reports consist partly of personal data and are partly descriptive.** The descriptive part normally contains an important series of financial information, such as i) dealings between the clients under suspicion and the institution (such as bank current accounts, securities dossier, deposit book), ii) transactions carried out during these dealings, from which it is possible to trace back to other dealings with other institutions (as happens in the case where a bank transfer is made on another current account with another institution), iii) the assets and company activities that are directly or indirectly attributable to the institutions, iv) other clients who are "connected" with the client under suspicion, linked to him through family, personal or professional connections.

Secondly, the SOS report constitutes the subject matter of **investigations** by the FIU. For this purposes, the FIU has the power to **i) obtain from the reporting institution** which has effectively prepared the SOS report, or from other reporting institutions, any **information useful** for carrying out their investigation, including information contained in their archives or registers, **ii) request information,** including financial information, **from foreign FIUs**, and for this purpose using a bilateral *memoranda of understanding,* or a multilateral exchange platform (such as the *Egmont* network, which provides a link between FIUs in 101 countries, or the *Fiunet,* which at present is limited to EU member states); **iii) access** to information held by the **Central Risks Bureau** at the Bank of Italy (relating to overdrafts held by private clients with banks), the **Revenue register** (with which a specific convention was made with the CIU), and the archive of relations with intermediaries, **iv) formulate requests to public administrations** who are responsible in various different ways for holding, obtaining and managing relevant information; **v)** exchanging

information, including information of a confidential nature, with authorities controlling private finance (Bank of Italy, Consob, Isvap, Covip).

In the third place, further data can be usefully extracted from archives to which the CIU has access in carrying out its own functions. The FIU can therefore obtain access to **i) information contained in the archive of the SOS reports,** on which it is possible to carry out intelligence activities, such as a) identifying previous SOS reports in relation to the same suspects or "related" persons, b) identifying possible links between SOS reports, in relation to the same territorial area or business sector, **ii) data collected in the archive of information received,** which has been transmitted on a monthly basis, from banks and financial intermediaries, or it can send or request further information relating to failures to report suspected operations; **iii) entries made in the register of financial intermediaries,** from which it is possible to discover whether the suspect owns shares or has appointments from a wide range of institutions in the finance market, such as financial intermediaries, whether or not they have dealings with the public, trustees, credit mediators, financial agents (which include sub-agents in money transfer services); **iv)** information available through the **archive of cross-frontier transport declarations** relating to money or securities of more that € 12,500, or through the claims information service, from which information can be obtained about liquid financial resources available to reported clients.

The financial data collected and processed by the FIU are then used in four principle ways. First of all, they are transmitted in the form of a technical report, attached to the individual SOS reports, to the **Anti-mafia Investigation Bureau** (the **DIA**) and to the Special Investigation Unit of the Revenue Police (**NSPV**), which provides supplementary information, including financial information which it has access to for its own investigation purposes. Furthermore, this data can be transmitted also to the **Public Prosecution authorities**, subject to issuing a prior decree with motivations, for criminal proceedings to be brought against the suspect or "related" persons, in relation to which the FIU can be called upon to collaborate, with its own officers, as a consultant for the financial aspects. Furthermore, the financial information can represent the basis for proceeding in **suspending the suspicious transactions**, which the FIU is entitled to do, also upon request from the Anti-mafia Investigation Bureau and NSPV, for a maximum of 48 hours, provided that it does not give rise to prejudice in carrying out the investigations or in the operations of the intermediaries, who must give immediate notice of such prejudice to the investigation authorities. Finally, on the basis of information collected in carrying out its own activities, the FIU can make **contact with foreign FIUs**, for the purpose of obtaining and assisting operations or the seizure of

goods and assets traceable to the suspect in the foreign country. We will return later to the results achieved through the exercise of this power.

§ 3. *Some cases examined*

In the **Capital Leben case,** the FIU was able to secure the foreign seizure of more than $20,000,000 which had been illegally obtained in the **Parmalat** affair**.** In particular, i) in carrying out investigations launched on its own initiative in relation to information in the archive of collected data, the FIU found a financial anomaly that occurred in the province of Parma, which consisted of a bank transfer of a sum of $20,000,000 towards Liechtenstein; ii) when contacted on the point by the FIU, the bank which had carried out the operation made an SOS report, from which it appeared that the bank transfer had been made on a current account in the name of the Parmalat company in Malta, in favour of an insurance company in **Liechtenstein**, with funds obtained from the payment of a previous bank transfer by a Parmalat company in the Netherlands; iii) with the benefit of this information, the FIU contacted the FIU in Liechtenstein, which provided the information that the money transferred had been used, on the instructions of an investment company in the British Isles, for the purchase of a life policy in favour of a lawyer resident in Brazil; iv) on the request of the Italian FIU, the Liechtenstein FIU **froze** the life policy, which was followed by legal sequestration carried out on the application of the Public Prosecutor in Parma.

In the **Islamic Charity** case, the FIU gave its assistance in a criminal investigation involving international terrorism. In particular, i) in January 2002, the FIU received an SOS report regarding an anomalous movement on a current account in the name of an **Islamic charitable association**, administered by a **Jordanian**, a **Kuwaiti** and an **Israeli** citizen; from the investigations conducted by the FIU it emerged that the association's current account received a large number of bank transfer payments, for sums between € 5,000 and € 10,000, in relation to which other bank transfers were made of larger amounts in favour of other **Islamic charitable associations** in Italy and abroad; iii) the SOS report and the various related investigations were subsequently passed over to the prosecution authorities, who were already carrying out an independent criminal investigation into the affair; iv) in the meantime, the FIU received a request by the **Israeli FIU** for any useful information about the administrators of the Islamic association in question; v) as there was a **criminal investigation** in progress, the FIU placed the Israeli FIU in contact with the national prosecutor, and there was an exchange of letters of request between the Italian and Israeli prosecution authorities on the matter.

§ 4. Achievements

Using the measured described above, the FIU has managed to achieve the following results. Since 1997, the FIU has received more than 57,000 SOS reports, almost 90% of which have been transmitted by the banks. In terms of the areas concerned, more than 40% of the SOS reports come from the north-western regions of Italy, around 17% from the north-eastern regions, more than 20% from the central regions and the remaining 22% from the south and from the islands. Of the SOS reports received, more than 55,000 have been investigated and transmitted to the Anti-mafia Investigation Bureau and the NSPV, while around 1,940 have been dismissed. On the basis of the information supplied by the investigative bodies since 2001, around 9,300 SOS reports have been dismissed, while around 1,400 have been transmitted to the prosecution authorities. In 70 cases, the FIU has suspended suspect operations, which have been followed by seizure of more than €100,000,000. The FIU has also received more than 2,000 requests for information by foreign FIUs relating to more than 5,500 suspects; conversely, it has made 234 requests for information to foreign FIUs relating to a total of 565 suspects. Since 2004, the FIU has also requested foreign FIUs to block or suspend goods or assets situated abroad, which has led to orders for seizure of a total of €270,000,000 and $28,000. Finally, FIU representatives have carried out 50 consultancy appointments for the prosecution authorities.

§ 5. *Current initiatives and questions to be considered*

Considerable support in terms of the investigation activities carried out by the FIU comes from the Archive of reports from financial operators, which has been recently set up by Legislative Decree no. 223 of 2006, converted into Law no. 248 of 2006[72], and governed by the Order of 19th January 2007 of the Income Tax Agency, as well as the Agency's Circular no. 18 of 4 April 2007. The reports to the Archive must: i) be made by banks, the Italian post office, financial intermediaries and other financial operators, ii) relate to a wide number of relationships (such as current accounts, deposit accounts, joint management activities), iii) provide information identifying the person holding the account (but without indicating the amounts available in the accounts, the transactions carried out on them, the amount of the transactions, the persons delegated to operate the account), iv) be in computerised form, v) relate to relations established after 31 December 2006 or closed after 1st January 2005, vi) by 30th April 2007. The information obtained is used exclusively in cases of persons in respect of whom financial investigations have been commenced, subject to

[72] (Urgent measures for economic and social recovery, for restricting and rationalising public expenditure, as well as operations in relation to incomes and combating tax evasion). Methods and ways of notifying information to the Revenue Register by financial operators pursuant to article 7, sub-para 6 of Presidential Decree no. 504 of 29 September 1973, as subsequently amended).

authorisation of the Central Director of the Income Tax Office or the Commandant general of the Revenue Police. The information can also be used by the prosecuting investigation authority, by police investigators, by the CIU, by the Ministry of the Interior, by the Head of Police, by police authorities, by the director of the Anti-mafia Investigation Bureau and by the Commandant of the Special Tax Investigation Unit of the Revenue Police. The CIU and the Income Tax Agency will soon be launching a direct link, which is due to begin next June.

There may also be important modifications as a result of Directive 2005/60/EC, the so-called third anti-money laundering directive, which introduces at least three new aspects: 1) (confirmation of) the extension of the money-laundering regulations to include also the prevention of terrorist funding; 2) modulation of anti-laundering obligations according to the extent to which the client is exposed to the risk of money laundering (as, for example, with operations or business relationships with "persons who are politically exposed" and resident in another EU state or in another country); 3) the introduction of the concept of an EU-wide FIU, appointed to receive, investigate and notify competent authorities about information which might relate to money laundering and terrorist funding, and giving it the power to have direct or indirect access to financial, administrative and investigative information necessary to properly carry out its responsibilities. In order to implement these principles, a draft Legislative Decree is currently in the process of being drafted by the Ministry of Economy and Finance and will then be examined by the Council of Ministers. Important new measures are expected as a result of this decree, such as the exclusion of certain categories of person from obligations of registration, changes in the methods for identification and registration of clients, the diversification of the methods for reports suspect operations, and the reorganisation of administrative structures involved in regulating and monitoring the sector.

In this last respect, it is necessary to ensure that the draft Legislative Decree implementing the 3rd Directive is consistent with the proposed law (no.1366 of 5 March 2007) which reforms the responsibilities of the monitoring authority on financial markets, providing, as is well known, for the incorporation of the CIU into the Bank of Italy, ensuring that the FIU complies with those guarantees of independence and autonomy required by international legislation. In this sense, the proposed law seems capable of bringing about significant improvements in preventing and combating financial laundering, by strengthening the powers given to the PIU and improving interaction with the functions (especially those of monitoring) exercised by the Bank of Italy. In this respect, a study commission has recently been set up at the Ministry of Economy and Finance for the creation of consolidated legislation against money laundering. The commission has the task of formulating proposals for the implementation of the responsibility contained in the EU law of

2005 for the creation of consolidated legislation regarding money laundering, aimed at bringing the decree implementing the 3rd directive in line with the current legislation in force, "making only amendments that are necessary to ensure simplification and logical, systematic and lexical consistency of the legislation".

§ 6. *Proposals for reform*

In the light of the considerations set out above, a series of proposals are currently being discussed for the purpose of increasing the efficiency of the system for preventing and combating money laundering , also with reference to the instruments for financial investigation. **Above all,** in terms of policing, it would be appropriate for the legislature to introduce an offence of money laundering for the personal benefit of the accused. At present, the offence of laundering is difficult to apply, due to the difficulty in proving, in criminal proceedings, that the accused is laundering money for a third person who has committed the supposed offences. This can lead the prosecuting authorities to charge the alleged offence as aiding and abetting the offence. The offence of laundering money for personal benefit would make it possible to pursue a more "aggressive" and effective investigative policy, which would not only make it less necessary to prove the author was laundering for a third party who has committed the supposed offence, but also because it would be possible to maximise the benefit of the SOS report system.

Secondly, in terms of prevention, it would be helpful to have a structured flow of information feedback from the investigation authorities to the FIU. At present, the feedback relates only to reports of suspicious operations which are not pursued by the investigation authorities, without any indication as to the reasons for the decision as to their "irrelevance". In this respect, a better structuring of information flow would enable the FIU to evaluate independently the relevance of the SOS reports and the effectiveness of their own investigative action, as well as subsequently improving their reporting system, also through the issuing of specific operational guidelines, the identification of anomaly rates, and notifying recurring (illegal) operations.

Thirdly, once again in terms of prevention, it would be useful to adopt measures aimed at reducing the "visibility" of the person making the report, in such a way as to ensure that he or she cannot easily be identified. This could be carried out **by creating greater objectivity** in the reporting procedure, to be followed (as indeed has been requested by the GAFI) through an improvement in the mechanisms for rating the suspiciousness of the operations and assessing the risk profiles of clients.

Fourthly, more attention should be placed upon the opportunity of introducing **greater limitations on the use of cash** in payments between private individuals and in transactions by way of money-transfer. In this way, it would be possible to further extend the sphere of action of guarantees derived from the channelling of operations, as well as further "restricting" the possibility of laundering outside the overall financial system.

Fifthly, adequate measures should be adopted for the purpose of **increasing the ability of the FIU to intervene.** Moreover, in this respect, it would be appropriate to: **i) increase controls** on those who are obliged to make reports, above all in terms of direct controls on those making reports, increasing penalties where there has been a failure to report or collaborate; **ii)** extend the effectiveness of suspension measures from 48 hours to 72 hours, in order to assist in making the subsequent operations of seizure by the investigation authorities more effective [73]; **iii) rationalise and speed up information exchanges** between those making the reports, the FIU, the investigation bodies and the prosecution authorities; **iv) give power to the FIU to launch financial investigations on its own initiative,** irrespective of whether there has been an SOS report, on the basis of individual "anomalies" found while it is carrying out its operations; v) **ensure a closer collaboration between the FIU and the prosecution authority,** through the simplification of information exchanges and the possibility of prosecution authorities using the services of financial analysts; **vi) confirm and strengthen the power of the FIU to provide indications on SOS reports** beyond those set out in the "Decalogo", also in relation to particular situations where there is a contingent risk of money laundering, **vii)** assist the participation of the FIU, as injured party, in criminal proceedings for money laundering, for the purpose of obtaining all matters that are useful for carrying out their role of investigating the SOS reports.

Lastly, in this context, it would be useful to give some thought to rationalising resources and procedures for identifying, seizing (through sequestration and confiscation) and managing assets and proceeds from illegal activities. At present, as is well known, these resources and procedures are difficult to apply, procedurally complex, financially inefficient or indeed counterproductive, insofar as the methods used for managing the assets subsequently acquired are not structured and, above all, are not profit-orientated.

[73] In other European states, for example, the effective period of 48 hours is exceeded by a long way, as can be seen, for example, by **Finland** (5 days) , **Luxembourg** (3 months) and **Austria** (6 months).

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Bibil Mete

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2.2. *Investigation techniques for combating organised crime, with particular reference to financial investigations*

The Albanian Parliament, as is well known, ratified the "Stabilisation and Association Agreement between the Albanian Republic and the European Communities and their members states" with Law no. 9590 of 27.07.2006. Article 1 of this agreement states: *"…an Association is hereby established between the Community and its Member States, of the one part, and Albania, of the other part. The aims of this Association are… to support the efforts of Albania to complete the transition into a functioning market economy, to promote harmonious economic relations and gradually develop a free trade area between the Community and Albania, to foster regional cooperation in all fields covered by this Agreement".*

In the considerations of the European Council on Albania, in the project "For the strengthening of capacity to combat organised crime in south-east Europe", it is stated, inter alia: *"The principal threats for Albania are organised crime connected with drugs, human trafficking, financial crime and corruption".*

Economic and financial crime in general and, more particularly, criminal groups who commit criminal acts in financial affairs, have been, and still are, a serious threat to our country and to national security. The financial abilities of these groups serve not only to strengthen and further extend their operations, but also to penetrate public structures, for the purpose of assuring protection from these structures and even influencing decisions in political, legislative, executive and economic terms, or in terms of justice.

In addition, the financial and technical capacity of these criminal groups sometimes exceeds the capacity of the Albanian authorities who are applying the law. In these circumstances, the fight against economic and financial crime and, in particular against organised crime, represents a particular challenge for the organisations enforcing the law in the country, especially in terms of

investigations, police enquiries, but also in more complex enquiries that today dictate the need for a wider use of specific investigative instruments, a closer cooperation between local and international institutions, the seizure and administration of confiscated assets, the protection of witnesses, as well as a more effective judicial process.

During the years between 2003 – 2006 it was possible to combat various organisations and criminal groups involved in offences of drug trafficking, human trafficking and exploitation of prostitution, falsification of documents etc. .

The international institutions operating in our country estimate that there is tax evasion in Albania totalling 50 per cent. In money terms, this means that there is a loss of more than 1.5 billion Euros due in taxes to the State. What then are the causes leading to such widespread tax evasion and what are the measures to be taken by the authorities appointed to enforce the law in controlling and preventing financial crime?

There are many factors giving rise to the failure by the State to collect such high amounts of tax. We shall seek to indicate some of these:

§ 1. *Falsification of accounts*

It is certain that a considerable number of large companies in Albania systematically falsify their accounts or operate a dual accounting system which contains completely different figures. The accounts presented to the tax offices falsely indicate profits that are lower than the true figures. The falsification of these accounts is carried out by experts in collaboration with the directors, the accounts staff and the employees of these companies.

In my view, in order to combat this phenomenon it is necessary for the prosecution and police authorities to be actively involved, for the figures to be analysed, especially those of large companies, and that criminal proceedings must be commenced, also against employees.

This must be continued with the immediate seizure of accounts and property asset records for several consecutive years, the seizure of basic documentation (income and expenditure sheets, payment mandates, account books, etc..) documentation which according to tax law must be kept for 6 consecutive years, or the seizure of contracts entered into at lawyers' offices, in property registration offices and those held by the purchasers of apartments; reports of accounting experts with teams of specialists; to be followed then by investigations into the accuracy of the contents of the documents, etc., and identification of criminal responsibility for the wrongdoers.

§ 2. *Theft through improper reimbursement of VAT*

A phenomenon that is no less common is the presentation of false documents at tax offices and obtaining the reimbursement of VAT which in reality has not been paid by anyone. This is therefore not a failure to pay tax but an actual misappropriation of public funds. Indeed, this offence is committed along with falsification of documents.

How is the theft and falsification carried out?

The income tax authorities sell to various people blocks of un-compiled tax invoices with VAT, but in most cases they do not keep exact details containing information about the people who obtain them, the series numbers etc.. The tax offices do not follow any further the transactions carried out and do not check who are the people who actually use these blocks of tax invoices passed on to private businesses, so that certain companies pass on these blocks to other companies.

These latter companies falsify these invoices, presenting data that suggest they have acquired goods imported from abroad on which VAT is paid prior to customs clearance (when these goods enter Albanian territory). In fact, these goods have been produced in Albania. These invoices containing false information are presented to the tax offices and the falsifiers are reimbursed large sums of money.

This criminal phenomenon is due to the failure to make any connection between the quantities of goods cleared by customs and the quantity reimbursed and the failure to control the business activities of the respective persons involved. Worse still, some of these goods, such as agricultural and sheep farming products, are sold to public institutions, such as the Ministry of Defence, universities, schools or military academies, etc, and through this method of false documentation, they are improperly reimbursed for considerable amounts of VAT which in fact have never been paid.

Once detailed information about these criminal activities has been obtained, I would suggest that they must become the subject of criminal proceedings and that it is necessary to prosecute the wrongdoers by means of surveillance, video recordings, photographs, controls, etc.. After this, all of the documents must be seized and complete investigations must be carried out to ascertain the false nature of the documentation presented, carrying out a full investigation of the data relating to the customs clearance and the chain of transactions of these goods up to the last recipient.

In this respect, I would say that collaboration should also be strengthened with the State Auditors Department, as it is the responsibility of this institution to reconcile the data provided by the customs offices with that provided by the revenue authorities. The truth is that until now the State Auditors Department has limited itself to carrying out superficial investigations, without a deeper examination of the nature of this criminal phenomenon, with serious consequences for the economy.

§ 3. *The registration of "fictitious" persons and the inconsistency of data*

Cases have been found in which businesses have been registered with the Ordinary Court of Tirana and in the tax offices, whose directors are persons with false details. This occurs above all because, first of all, it is the lawyers who falsify the documents, which are then presented to the court and are registered without the persons applying for registration being accurately identified, and without noting the numbers of the identity cards or other documents of identification.

It has therefore happened that three businesses have been registered in Durazzo with false names, and even certain employees of the revenue authorities were found to be operating under false names and were subsequently arrested. The names of these imaginary businesses are used for customs and tax purposes in order to evade payments of income tax to the State. These court orders containing false names are accepted by the tax offices, which proceed with the registration of the fictitious names (these are always only the surname and first name and without any further details) and the persons with false details continue to carry out customs clearance and sell goods under a false name for many years, without paying any tax.

Information has recently come to light in Tirana about 40 such businesses. I would suggest that it is absolutely unacceptable that the Central Tax Office, on the basis of article 66 of Law no.8560 of 22.12.1999 "For tax procedures in the Albanian Republic", has made a formal request to the Court of Tirana for a copy of the business register and for the orders of the court so that it can make the necessary comparisons, and that the Court, contrary to the law, and even though the relevant request obliges the Court to proceed with the transmission, has failed to comply.

I would suggest that it is equally unacceptable that copies of all licences issued by the public administration (from the Ministries of Health, Agriculture and Economy etc. - for professionals such as stomatologists, pharmacists, private doctors, vets, etc.) are not transmitted to the respective tax offices so that a correct record of obligations can be made in relation to the State, and so that

they do not carry on private practices for years (as has happened in the past, and still happens) without paying any tax towards the State.

§ 4. *Smuggling of goods, especially those subject to excise duty*

Tobacco products and alcoholic drinks are sold and continue to be sold without the excise label. In our country, it is estimated that only half of the quantities of cigarettes necessary for consumption, namely around 3 thousand tons a year, pass through customs. The other three thousand tons enter the territory of the Albanian state as contraband and are sold without an excise label, or with a false excise label. In order to prove the origin of the goods, the customs authorities continue to accept documents issued by fictitious firms according to the so-called "triangulation" system, a phenomenon which has led not only to evasion of customs obligations but also to actual theft. Criminal groups are involved in this activity, within which there are also customs officials.

In my view the moment has arrived when officials from the Serious Crimes department of the State Prosecution authority must take action.

In my view it is also necessary, for the identification of the wrongdoers, to carry out not only surveillance and video recordings, but also to obtain the collaboration of those who are less seriously involved and even to carry out undercover operations with the infiltration of police officials.

I think it is necessary to emphasise that for criminal offences involving customs and tax matters the prosecution can revoke only criminal seizure procedures, but it has no competence in relation to the restitution of the goods, insofar as it is the function of the customs authorities and the tax offices to decide, since it is not the task of the procedural authority to consider administrative penalties.

I would say that in relation to the above matters the Serious Crimes department of the State Prosecution authority can and must commence proceedings against officials, and that it should act, as it has already acted, in exemplary fashion, in the case of passports, for identifying and arresting a group of persons who for years had been falsifying documents of every kind.

§ 5. *Theft and illegal reimbursement in the health system*

The health system is one of the most problematic areas, and most subject to corruption. Powerful criminal networks are involved in the theft of medicines and in their sale to private pharmacies situated in close proximity to public hospitals. Often, the patients and their families, as well as

paying a bribe, are asked by doctors even to obtain the medicines, even indicating to which pharmacy they are to go.

Major problems also exist in this sector for tender competitions which end up with the purchase of medicines that have passed their expiry date or are of poor quality, with large payments for the organisers. There is credible information about the falsification of purchase invoices for medicines from abroad and reimbursements that lead to theft of large quantities of public funds.

The offenders use falsified invoices, falsely increasing the prices of the medicines and the respective public offices reimburse them without first ascertaining that the invoices are accurate and without acting as they should do, and even obtaining a part of the illegal profit.

In my modest opinion, it is absolutely necessary and imperative to follow these problems, understand the criminal phenomenon in detail and commence criminal proceedings, and take any necessary steps to catch the offenders in the act, etc.

§ 6. Thefts and offences committed at the KESH

As is well known, the situation at the Albanian Electrical Energy Corporation is alarming. Various facts were published in a newspaper article of 23 January 2007 relating to an annual study of the Distribution Division of this Corporation, where it was confirmed that in Tirana alone, for the whole of 2006, 22,000 families and 11,000 private businesses had made no payment whatsoever for electricity consumption and that 400,000 blank bills were presented, in other words with a total consumption of "0". An approximate calculation indicates that 10 million Euros were lost through the false bills of "zero" kilowatts of consumption, in exchange for bribes paid to KESH employees and staff. The Deputy Director of KESH has stated that the persons involved in this affair are engineers, electricians and staff employed in calculating the bills.

According to the various inspections carried out by the State Auditors at KESH, the company receives only 22-23 per cent of production and is making a profit due to the fixed charge applied to regular clients.

In my view, there has been a great delay in commencing proceedings for the above matters.

§ 7. *Illegal industrial production*

A new offence was introduced into the Penal Code with Law no. 8733 of 24.01.2001, where it became an offence to produce industrial articles and goods and food without authorisation. According to the second sub-paragraph of the provision, where the offence is committed with others or repeatedly or produces serious harm, the sentence provided is from three to ten years imprisonment.

The statistics show that in only one case has there been a trial for breach of this provision, whereas in reality our market contains a large number of counterfeit articles, such as detergents, alcoholic liquor, fruit juices etc.,.

A careful examination of the question indicates that this offence harms important legal relationships, such as: the health of citizens, tax evasion, free and honest market competition, etc. For this reason there should be a greater commitment by the police and prosecution authorities in obtaining evidence, arresting persons carrying out such acts and investigating these offences.

§ 8. *Illegal employment*

A well known and widespread phenomenon in our country is illegal employment. It is therefore found that employers make no registration or declaration of their employees with the competent authorities and do not pay their contributions. Many people either fail to register their employees or register only a part of them.

The non-payment of contributions leads not only to a loss of compulsory revenue but also seriously harms the legitimate interests of citizens. It often happens that employees who are without assurance are injured at work and that neither they, nor their family in the case of death, receive any compensation.

Even more serious is the situation where employees appointed to carry out the provisions of the law fail to carry out their proper duty. Despite the fact that the situation is exactly as it has been described, legal proceedings are very few, which is why it is necessary for the authorities responsible for implementing the law and bringing prosecutions to be more active.

Organised crime is to be found also in cases of fraud, forced bankruptcy, money laundering, undue restitution to persons of ownership title on real property, etc..

In my view, the Serious Crimes department of the State Prosecution authorities must foster the spirit of cooperation with the district prosecution departments, so that it directs investigations relating to organised crime where there are motives for investigating such offences.

In order to strengthen the fight against economic and financial crime and the reduction of tax evasion, it is in my view essential to amend, supplement and draft certain laws, and in particular:

- The Customs Code should be amended in the sections dealing with administrative penalties and smuggling. The formulation of these provisions is ambiguous and confused. The amendments must seek not only to bring these provisions in line with the provisions of the Penal Code, but also to the provisions of the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, otherwise known as the Nairobi Convention, to which our country has complied through Law no. 8759 of 26.03.2001, which is already in force.

- It is appropriate that, in implementation of article 45 of the Penal Code, a specific law is drafted and approved which establishes the offences and restrictive measures that are to be applied in relation to legal entities. This law is essential, in that through its implementation it is possible to consider as criminally responsible those entities that commit offences against the State or against individuals, in addition to physical persons who can be indicted pursuant to the current criminal law.

- Article 32 of the Penal procedure Code states, inter alia, that police investigation officials include officials of the financial police who are so qualified by a specific law. But the financial police no longer exist by reason of Decree no.1074 of 21.04.1995, approved with certain amendments by Law no. 7938 of 24.05.1995. Instead, the aforesaid Decree and the Law have established the revenue and the customs police.

Under the provisions of article 9 (4) of the Customs Code the customs police have been given the powers of police investigators, but there is no law that gives the same powers to the revenue police. As a result, a gap has been created in the law with regard to the revenue police and it is essential to ensure that they are recognised as having the full powers of investigation. This branch of the police is of considerable importance in investigating criminal offences, as a specialist body with an excellent knowledge of the revenue legislation.

- It is most important to approve the Revenue Code, which should sanction the basic principles and organisation of the revenue activities, establish the rules for defining and collecting the fiscal debt,

and for dealing with administrative breaches and violations that constitute criminal offences, etc.. In my view, once again, it is for this code to extend the powers of investigation to the revenue police.

- The Penal Code should be amended and improved in relation to the protection of forests and grazing areas, the protection of animals, etc..

The obtaining of evidence could be carried out directly within the meaning of the Nairobi Convention, as indicated above, insofar as the said convention contains specific provisions in this respect. Evidence can also be obtained through bilateral agreements made between our country and countries within the EU region and beyond.

Great attention, from both the theoretical as well as the practical point of view, should be given to the phenomenon of organised crime in general, as well as economic and financial crime, due to the great danger that it represents and the extremely serious consequences that it produces in economic and political terms. It is therefore necessary not only to adopt the most effective measures for its speedy repression, but also to cooperate and coordinate the activities of the respective authorities, in Albania and abroad, and to study the forms and methods used by criminals in order improve the means and instruments available for combating such crimes.

UNICRI – Seminar in Tirana, 15 March 2007

Lucio di Pietro

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2.3. *Organised crime, economy and politics in Italy*

Mafia-style organised crime originated in the southern regions of Italy, where traditionally there is greater economic and social hardship, caused also by high levels of unemployment that have always existed there. Four organisations operate permanently in Italy:

- "Cosa Nostra", established in Sicily at the end of the nineteenth century. Its *origins* are to be found in the countryside and it gradually spread over time into the cities. Its structure is absolutely hierarchical - pyramidal in type;
- the "ndrangheta" is active in Calabria and operates through criminal groups formed by people who are often members of the same family. None of the groups has command over the other, so that it can be said that the ndrangheta is essentially horizontal in structure;
- the "Camorra" developed in Campania in the 16th Century, in particular in the centre of Naples under Spanish dominion, and had a hierarchical structure until the beginning of the 20th Century. Today, however, it consists of numerous criminal groups which each operate more or less autonomously in specific districts of the city or in the provincial areas around it. There are many ferocious camorra conflicts each time that one group tries to "appropriate" the territory of another group;
- the "Sacra Corona Unita" is active in Puglia. It was created by the camorra, with which it was an ally for a long period of time, but over recent years it has developed a definite autonomy. This organisation consists of several families, each with control over a particular portion of territory, and therefore it too has a horizontal structure.

The basic requirement for the existence of these organisations is the rule of **omertà**, in other words, the undertaking by each member to follow the rule of silence which, if it is not accepted, can be punished with death, decided by a special *camorra tribunal*.

The violence and intimidation towards their victims is the method used by mafia-type organisations for pursuing their criminal activities. The abovementioned organisations exercise a **tight control over the territory** for which they are "responsible" and where they are involved in carrying out illegal activities of every kind.

In order to achieve their objectives, the aforesaid groups often tend to **influence electoral competition**, above all in the administrative elections, by including their own members in the lists or supporting candidates who receive masses of votes, which they acquire using the *door to door* system, through the subtle use of intimidation, derived from the criminal charisma of their leading exponents. In this way they seek to **infiltrate** the activities of the Public Administration, for the ulterior purpose of influencing policies and assuming direct and/or indirect control over public contracts.

The **principal illegal activities,** providing the source of enormous earnings for mafia-type organisations operating in Italy, are the traditional crimes of blackmail, usury, trafficking in drugs and arms, fraud against the EU, as well as smuggling and illegal gaming.

All economic activities, even those of more modest dimension, are the subject of blackmail. Criminal groups, through their constant and complete control over the territorial area, identify business activities with extreme ease, imposing the payment of a bribe upon their owner (bars, restaurants, commercial businesses in general).

The phenomenon of blackmail relates also to public contracts and construction activities in general. In public contracts, a sub-contract or freight charges are imposed in favour of a business which is directly or indirectly managed by camorra groups.

It is in the area of public contracts that a convergence of interests is to be found between mafia-type organised crime, the business class and politicians (generally speaking, local administrations, which are the main centres for decisions on public spending).

Through this convergence, the mafia-style organisations are able to achieve their main object of controlling the economy, undermining the principle of free competition, and therefore democracy itself, at its very foundation.

In many cases, the investigations have established that the contracting companies, even prior to beginning work, fearing acts of violence against their personnel or against the highly expensive machinery to be used in carrying out their work, have sought out the camorra contact in the area concerned in order to agree the price of the bribe.

The same has happened with the owners of businesses appointed to carry out supplies and services.

The criminal groups are paying constant attention to any public works to be carried out on important projects such as, for example, the high speed railway line, the redevelopment of run-down areas in various Italian cities and the modernisation of road and motorway networks.

Legal experience over the last few years has confirmed the widespread use of the *turnover* system (the so-called *tavolino*, described by Angelo Siino, a well known Sicilian collaborator with justice) for businesses close to criminal organisations, for the conventional distribution among them of contracts for **major public works**. For **small-scale contracts**, on the other hand, the traditional forms of infiltration and criminal influence continue to survive, above all in southern regions where there is a powerful mafia presence. These include:

- *tailor-made contracts*, especially through the drafting of *special qualification conditions*
- *exclusion by way of pretext* of certain businesses for formalities, unnatural interpretations or for superficial reasons;

- *breach of the rules governing the secrecy of the offers;*
- *substitution and/or falsification of the offers;*

- *presentation of several offers at the same time,* apparently from different applicants but, in reality, traceable to the same business or group of businesses;
- *the production of fictitious documentation,* proving the existence of the necessary requirements for participation in the competition;

In substance, in public contracts, a **perverse relationship** and a convergence of interests is established between three main figures, namely the camorra, the contractor and the political and/or administrative class. Actual *business committees* existed (and still exist), especially in the southern regions, comprising administrators, businessmen, engineers and representatives of camorra organisations who established (and continue to establish) a sort of *reciprocal contract* for their corresponding services, which last for a period of time and ensure enormous illegal profits. In particular, **the public administrators** (in some cases, politicians at national level) guaranteed (and continue to guarantee), through organised crime, a systematic control of the vote on a particular territorial area, obtaining extraordinary electoral support, while the businesses assured (and continue to assure) a constant flow of funding to their personal advantage or in favour of the political and administrative system to which they belong.

The mafia-type organisations were guaranteed (and continue to be guaranteed), for their part:

through **public administrators**, the necessary institutional cover;

through **businesses**, considerable economic resources, under the form of percentages on contracts and the consequent establishment by the businesses themselves of funds outside the official accounts, as well as in terms of agreement to manage the contracts;

the systematic control of economic activities over the territorial area, as well as the possibility of providing jobs and therefore, **widespread social support**.

Finally, the businesses, by force of the above agreement, acquired (and continue to acquire), in permanent form, a considerable share of the public contracts market, distorting the competition mechanism and, at the same time, they ensured (and continue to ensure), **building site security** across the territorial area, the **absence of any form of dispute** with union representatives and, as already noted, instruments for setting up illegal accounts and the availability of large quantities of funds outside the accounts, used for the payment of bribes to public administrators and the relevant camorra organisations.

It can certainly be said that the *mafia-type organisations* have used (and continue to use) the abovementioned tri-lateral relationship as a central mechanism for financial accumulation and for expanding their criminal power.

Usury, in essence, seeks to provide temporary but deceptive funding for businessmen who find themselves in economic difficulty, also by reason of the high costs of previous extortion activities carried out against them. Invariably, the impossibility of paying the extremely high **usurious** levels of interest force the businessmen to hand over their entire businesses or a part of them to members of the mafia groups who leave them with only formal title as owners or managers of the businesses.

Usury is therefore still used today as a means for acquiring lawful businesses by way of criminal morganatic arrangements, through which it is also possible to launder illegal proceeds and reinvest them in activities that are legal in appearance only.

All mafia-type organisations operate in **drug trafficking** of every kind, which produce considerable illegal profits. These drugs come from producer countries such as Latin America, Turkey, Asia and the Far East. It includes, therefore, the need for the organisations to enter into contact with foreign drug sellers and with people in various countries who are able to organise transport and warehousing, and to guarantee their final delivery.

The ndrangheta has assumed almost monopolistic control over drug trafficking and it very often acts as guarantor for other mafia-type organisations in the purchase of the same substances from South America and, in particular, from Colombia.

For some time, the mafia-type organisations have exceeded their **original local operational areas**, carrying out different criminal actions in various parts of the national territory and also abroad, becoming truly **international organisations**, or operating in collaboration with foreign criminal organisations of the same kind, assuming the size of **transnational criminal confederations**.

A particular tendency of mafia-type organisations is to interweave links, in the areas where they operate, with the heads of credit institutions, accountants and other professionals who are able to carry out operations to conceal illegal capital and then to reinvest it in activities that are legal in appearance only, also moving it abroad to so-called tax havens by way of transnational commercial operations.

Recently there has been a worrying transnational criminal phenomenon involving links between the interests and activities of terrorist groups and those of mafia-type criminal organisations. Various investigations have, in fact, established links between international terrorism and transnational organised crime, especially in relation to illegal drugs and arms trafficking and the laundering of illegal proceeds (for example the so-called F.A.R.C. terrorist groups operating in Columbia who trade massive quantities of cocaine in exchange for arms).

These links have formed the subject of two EU Recommendations of 2002 and 2005, which urge States to strengthen internal cooperation and to create an effective structure for combating those transnational crimes that support and assist terrorist activity; also to examine and exchange information in order to ascertain the nature of links between terrorism and international crime and, in particular, the way in which terrorist organisations sustain their activities through the commission of other crimes and, where necessary, to develop strategies enabling concentrated action to be carried out to dismantle and weaken such activities.

An identical line has been followed by various UN resolutions, especially after the Islamic fundamentalist attacks on New York (September 2001), Madrid (March 2004) and London (July 2005).

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2.4. *Recent amendments in the Penal Code and Penal Procedure Code – effective measures for combating the phenomenon of corruption*

Corruption is a harmful phenomenon in society. It stops economic growth, compromises financial stability and weakens the ability of the State to guarantee the necessary benefits. Corruption discourages lawful commercial trade, destroys the middle class and makes it more difficult to attract foreign investment. **"Corruption is the act by which a bribe or any other recompense is received or given in relation to persons who hold appointments and roles in the public and private sector, who violate the responsibilities arising from their status as public official, private employee, independent agent, or other relationship of such kind, for the purpose of benefiting from unjustified advantages of any type whatsoever, in favour of themselves or others".**

There are many areas in which there is great danger of corruption, but we shall limit ourselves to mentioning only a few:

1. Issuing of licences for vehicles or qualifications for exercising various activities.
2. Collection of taxes and duties.
3. Public expenditure
4. Funding of political parties.

The campaign against corruption is carried out primarily through:

1. Strengthening the activity of observance of the law.
2. Improving the current public systems and mechanisms in order to prevent corruption
3. Promoting public awareness about the importance of the campaign against corruption.

Encouraging implementation of the law is one of the key points in the campaign against the phenomenon of corruption. A series of laws was therefore approved, at the end of 2004, which contained various amendments to the Penal Code and the Penal Procedure Code. These amendments were primarily concerned with definitions of offences, aspects relating to the specific investigation methods in terms of acquiring evidence and proving the offence.

At present, there are eleven provisions in the Penal Code for the Republic of Albania which relate to the offence of corruption. The provisions of the Penal Code relating to corruption are the following:

Article 259

Passive corruption of persons carrying out public functions

Article 260

Passive corruption of high public officials or locally elected persons

Article 244

Active corruption of persons carrying out public functions

Article 245

Active corruption of high public officials or locally elected persons

Article 245/1

Exercising unlawful influence towards persons exercising public functions

Article 164/a

Active corruption in the private sector

Article 164/b

Passive corruption in the private sector

Article 312

Active corruption of a witness, expert or translator

Article 319

Active corruption of a judge, prosecutor and high official of justice

Article 319/a

Passive corruption of a judge, prosecutor and high official of justice

Article 328

Offer of payment and promises

All of the above provisions of the Penal Code were approved by Law no. 9275 of 16.09.2004 (with the exception of article 328 of the Penal Code).

With regard to the old provisions of the Penal Code, the term "corruption" is now used, instead of the previous terms of "receiving bribes" or "offering bribes"; there is now a clear distinction between private and public persons, also within the same category of persons; now, for the first time, there are provisions for corruption in the private sector; there is a detailed description of the methods for carrying out corruption; penalties on conviction are generally more severe.

§ 1. *Various comments on the offence, provided by the provisions of the law on corruption*

In the above provisions, the offence covers persons of various social status. In order to make a classification of persons, it could be said that the offence of corruption relates to public officials (articles 259, 260 and 319/a of the Penal Code); private sector employees (article 164/b of the Penal Code); and citizens (articles 164/a, 244, 245, 245/1, 312, 319 and 328 of the Penal Code).

Article 259 of the Penal Code indicates as the subject of the offence "a person who exercises a public function". There is no definition in the Penal Code of a "person who exercises a public function". In these circumstances, in my view a division could be made according to the place where a person exercises their activity, so that a person who exercises their activity within an institution is answerable within the meaning of article 259 of the Penal Code.

On the other hand, in cases where a person who exercises a public function carries out an activity in the private sector, he will be answerable within the meaning of article 164/b of the Penal Code.

Such a division becomes more acceptable if we look more closely at articles 259 and 164/b of the Penal Code. Article 259 of the Penal Code (which is exactly the same as the other articles which relate to a public official) provides, inter alia, that "…the person who exercises a public office, carries out or fails to carry out an action **connected with his appointment or office**…). On the other hand, article 164/b contains the expression "…a person who exercises a directive office or provides a service **in any position in the private sector**, who carries out or fails to carry out an action **incompatible with his appointment or office**....").

A study of these provisions indicates that they relate to two different situations. Article 259 provides that the action is connected with the appointment or office, whereas article 164/b provides that the action is incompatible with his appointment or function. And most importantly, article 164/ b uses the expression "in any position in the private sector", therefore irrespective of whether or not he exercises public functions, when the person carries out a service in the private sector and commits an act of corruption, he is answerable within the meaning of article 164/b of the Penal Code. The division of offenders is more clear in the other articles relating to corruption.

Article 260 of the Penal Code therefore relates to high public officials or local elected persons. Two categories of employee fall within the concept of high public official. The first category relates to political officials, including members of parliament, ministers, their political staff (councillors and heads of cabinet), government institutional directors appointed by Parliament or by the Council of Ministers. The second category includes high public officials pursuant to the law "concerning the status of the public official". This includes general secretaries, departmental directors and general directors.

Article 319/a relates to the corruption of judges, prosecutors or officials of the organs of justice. The definition of judge includes all categories of judge, as well as investigating magistrates. On the other hand, the meaning of "officers of justice" is rather ambiguous. However, until such time as there is a clear definition of this concept, the evaluation of who is to be considered an officer of the organs of justice is subjective and to be established in each individual case.

In cases of corruption, every citizen can be the subject of accusation, irrespective of the office or appointment that he holds. Therefore, anyone who proposes or offers a bribe, or other improper favours can be accused of the offence of active corruption. The subdivision into the respective provisions of articles 164/a, 244, 245, 245/1, 319 and 328 of the Penal Code arises on the basis of the position occupied by the person proposing or offering a bribe or undue advantage. All of the articles relating to the offence of corruption contain two new concepts, "active corruption" and

"passive corruption". The separation of these two concepts arises in relation to the fact as to whether it is prior to the receipt of an undue advantage by a person exercising a public office, or whether it is prior to the giving of an undue advantage by a particular citizen. It will be active corruption in cases in which a particular citizen promises or concedes an undue advantage to a person who exercises a given function. On the other hand, it will be passive corruption in cases where a person who exercises a given function claims or receives an undue advantage.

The case of active corruption gives rise to one or more different situations: the promise, the offer or the giving, either directly or indirectly. Each of these situations is to be considered in itself as the commission of an offence.

In the case of passive corruption, we are faced with other situations: the claim, the receipt or the acceptance, either directly or indirectly, by a person for themselves or on behalf of others. Once again in this case, each of these situations is to be considered in itself as the commission of an offence.

What all of these offences of corruption share in common is the expression "undue advantage". The concept of undue advantage includes tangible and well as intangible advantages.

Article 245/1 of the Penal Code provides a different form of offence compared with the typical offence of corruption, in other words of giving-receiving between the two parties. Article 245/1 relates to the exercise of unlawful influence towards persons who exercise public offices: in other words, the corruption is committed by intermediaries, or by agents as they are commonly described.

What is common to both sub-paragraphs is the fact that the offence is considered to be committed even without the unlawful influence actually being exercised, or without the desired consequence actually taking place. It would therefore be sufficient for the person to agree to carry out the unlawful influence, or pretend to carry out the unlawful influence, where the other requirements are met, and we find ourselves in front of a fully completed criminal offence.

§ 2. *Special investigation methods and their use in investigating cases of corruption*

The Penal Procedure Code provides for and permits the use of special investigation methods in investigations involving corruption.

Surveillance, and the conditions and methods for carrying it out, are set out in articles 221 – 226 of the Penal Procedure Code.

From investigations in corruption cases carried out over the last two years, it appears that various citizens or journalists have recorded conversations, outside criminal proceedings, and documented cases of corruption involving public officials.

In the first place it should be said that these interceptions have been carried out privately by various persons, without the prior commencement of criminal proceedings. The criminal prosecution authorities, police and prosecution investigators, were not informed nor did they carry out any action in respect of these interceptions. As such, they were not carried out in accordance with the provisions of the Penal Procedure Code relating to the obtaining of evidence.

But the recording of the interception at the moment that it is made available to the prosecution authorities constitutes a document in the same way as any other document that is collected during an enquiry. It must therefore be examined as to its truthfulness and as to the facts and circumstances that arise in it. In the event of it being ascertained during the investigations that the facts presented in the interceptions carried out by private persons exist, are truthful and that the said facts constitute the offence of corruption, then it is essential to pursue the accusations against those who have committed the offence and to commence proceedings against them.

Another method used during investigations into corruption is the simulation of the act of corruption provided by article 294/a of the Penal Procedure Code. Pursuant to this article the investigator or police officer, or an authorised person can be instructed to simulate the act of corruption. In this case the authorisation is given by the public prosecutor who is following the investigations, or by the prosecutor under whose jurisdiction the action is to take place. Article 294/a, point 3 of the Penal Procedure Code provides that where it is ascertained that there has been provocation, the results of the simulation cannot be used.

An investigation for offences of corruption generally finds itself in a vicious circle. This is because there are always two parties, one who gives and the other who receives, neither of whom have any interest in talking because they run the risk of being convicted. In these circumstances, article 245/2 of the Penal Code provides for "exemption from serving a sentence". Pursuant to this article, exemption from serving the sentence or reductions in sentence, in accordance with the provisions of article 28 of the Penal Code, are given to persons who have promised or given payment or other benefits, pursuant to articles 164/1, 244, 245, 312, 319 and 328 of the Penal Code. These provisions therefore benefit those persons who are guilty of active corruption but have reported the matter to the police and have made a contribution in the criminal proceedings for these offences. It should be

emphasised that the right to exemption or reduction of the sentence rests entirely within the discretion of the court.

In short, considering the time available for this presentation, these are some of the considerations relating to the significance of the offences of corruption, provided by the Penal Code of the Republic of Albania.

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2.5. *Contracts for public works and mafia infiltration: an examination of investigation procedures*

§ 1. *Contracts for public works, mafia infiltration and the new Code for public contracts: further controls and new investigative professionalism*

The subject of this paper, which is restricted to the investigative techniques used in combating mafia infiltration into the specific area of *contracts for public works*, relates to only one aspect of a much wider question regarding the infiltration of criminal organisations into lawful financial circuits. We will not be dealing with the equally topical and burning questioning of mafia contamination of the area of *service contracts*. From the financial point of view, the relationship between the current total of public works which Authorities have so far been monitoring and that far greater total of the (ordinary and special) services and supplies sectors ought to be more less of the same proportions.

If the figures are alarming in terms of quantity, the qualitative data is equally alarming from the point of view of the prospects of monitoring criminal phenomena due to the significant expansion of the area of risk of mafia infiltration[74]. In fact, it cannot be ignored that, **in terms of control of an administrative nature as much as control of a criminal nature, *new professional resources* will be required**, that are capable of dealing with the ***various economic and financial, professional, planning and management aspects which are now to be found in the services provision and product supply sectors in comparison with the works sector.*** It is also necessary to consider the various market aspects that determine the regulation of the product supplies and service provision sector (which is more dynamic because it is orientated towards the cooperation between entities that are involved and connected to the **life cycle of the service, which is generally short, or to the exploitation of a product, which is equally short**) in comparison with the works sector (which is

[74] In the aforesaid study by the Authority (see above note 2), its responsibilities have been extended "from surveillance of public contracts relating solely to the market category of public works" to a control on "service and supply contracts relating to around 60 different market categories, in ordinary and special sectors".

more static, in that it is connected to the very nature of the service and the period of the existence and use of the building, which tends to be indefinite)[75].

In short, the expansion of the Authority's responsibilities in policing the public contracts sector relating to services and supplies and, above all, the *actual exercise* of the relative powers will inevitably lead to the training and gradual strengthening, even in this specific sector, of the necessary professional skills of the administrative bodies which are appropriate for tackling any abuses, irregularities and deviations relating to the correct application of the **community principles set out in article 2 of the new *code on public contracts (free competition, equal treatment and non discrimination, openness, proportionality and publicity*).**

It is clear that the quantitative and qualitative extension of this type of controls to the service provision and product supply sectors is destined to have positive implications on controls of a criminal nature in the same sectors, independently of the activation of the controls carried out by the prosecution authority or police investigators, on their own initiative or upon instructions, or by investigating magistrates. In other words, even controls of a criminal nature, though they are able to make use, during investigations and proceedings, of the vast background of case histories in relation to mafia infiltration of the public works sector, have to deal with a series of independent variables that are capable of strongly influencing the investigation of certain situations of criminal relevance in the circumstances under consideration here.

§ 2. *Mafia and public contracts: two concepts in perennial evolution: attempts to rationalise the legislation and mechanisms for legalisation of economic activities ascribable to organised crime*

In order to remain within the specific theme of this subject, it is worth emphasising that, as a consequence of changes in the relevant legislation – that of public contracts – of possible interest to the mafia, the traditional mafia organisations (cosa nostra, 'ndrangheta, camorra) have demonstrated a particular propensity to exploit the gaps in the legislation and elude and evade the tighter restrictions or continue to cultivate their own criminal interests.

This has happened, in fact, after the umpteenth attempt at a systematic rationalisation of the subject of public contracts carried out by the **framework legislation of 11 February 1994** (the so-called ***Merloni Law***) and its subsequent legislative amendments and additions, and also especially after

[75] These ideas, which are fully sharable, are the subject of the study by the Surveillance Authority on public contracts for works, services and provisions referred to above, note 2, p. 29-31.

the entry into force of Law no. 443 of 21 December 2001 (the so-called ***objective law***) which implemented Legislative Decree no.190 of 20 August 2002.

In general terms, it can be seen that over the last few years the two words **mafia and contract** have been used to summarise a method adopted by organised crime for polluting the public and private economy. This method is a **particularly insidious form of attack against the rules of the free market and free private economic initiative**, and also, in cases in which there has been an involvement of certain national or local political sectors, a **dangerous factor in polluting the democratic system itself**.

In certain Italian regions (Sicily, Calabria, Campania) which are particularly exposed to the risks of mafia infiltration in the political and administrative sector, mafia-type criminal organisations have had particular success in cultivating powerful links between *politics, mafia and contracts*. The so-called ***Merloni Law*** and subsequent amendments to the fundamental rules governing public contracts responded to the need to bring the legislation in line with EU directives[76] with a view to bringing about a moral reform within the sector in question, which – until that time – seemed to be no different to the *service* contracts sector, in which already serious dangers of mafia infiltration were apparent.

Without wishing to enter into detail, it can be seen in general terms that the new legislative system introduced by EU law through the abovementioned **Directives 2004/18 and 2004/17 EC** constitutes a **valid attempt at a systematic organisation of the subject of public contracts for works, services and supplies,** dictated no doubt by an understanding of the dangerous infiltration by organised crime into the sector in question[77]. And yet, the search for a lowest common denominator for determining the strategy for controlling the sector was in danger of constituting a **serious limitation** upon the entire legislative regulation of public contracts.

The main risk is the ***danger of emigration of the mafia business***. Indeed, it is fairly probable, **thanks to the freedom of establishment** guaranteed at EU level, that businesses and financial operators which are already contaminated by the virus of organised crime have attempted to move within the European market and to other EU countries (especially those that have recently joined)

[76] See Directive no. 89/440 EC, in relation to the award of public works contracts and Directive no. 93/37 EC in relation to coordination of relative procedures.

[77] It should be pointed out that, with regard to *consideration 6* of Directive 2004/18/EC, it is permitted – inter alia – to apply "*measures necessary for the protection of order, morality and public safety (...) on condition that the said measures comply with the treaty*. And it is significant that such an *explicit* reference protecting the requirements of public order, relating to the danger of infiltration by organised crime into the public contracts system, does not seem to appear in the new Code on contracts for public works, services and supplies.

which, while respecting the minimum standards set by the directive concerned, have still not yet adopted adequate provisions for effectively combating mafia infiltration, at least to the same extent as Italian law. It is therefore widely to be expected that the mafia firms, and those directly or indirectly controlled or financed by organised crime, can (so to speak) "*emigrate*" into the territory of more "*permissive*" States in order to find shelter from the possible policing actions of authorities in member States, such as Italy, who have adopted effective instruments for prevention and repression of financial and company crime, so that they are able to operate with impunity, thanks to the freedom of establishment and trade guaranteed by community law.

In addition, the **lowering of the threshold of qualitative selection criteria for participation in public contracts**, to the point of not excluding a financial operator who has been declared bankrupt or is definitively convicted for an offence which is relevant to his professional morality or where he has made false declarations in providing necessary information to the relevant authority regarding his personal situation or his personal economic, financial, technical and professional skills, represents a **serious gap in the entire system**.

And this appears all the more serious when it is considered that, in Italy, judicial experience over the last few years has amply demonstrated that this is the chosen territory of mafia business or, at least, business which colludes and has links with the mafia. Indeed, in order to achieve its objective in infiltrating the system of public contracts, it has so far had no hesitation in using *false* and *fraudulent* means, as well as the illegal practice of *systematic breach of obligations relating to the payment of national insurance and pension contributions* or the *total or partial failure to pay duties and taxes*[78], for the purpose of obtaining, in whole or in part, the means for paying mafia *bribes*.

And thus, even after the entry into force of the new Code of public contracts, the continuing complexity of the system of laws and regulations governing the subject concerned is in danger of constituting, of itself, a further risk factor, which is destined to have a more negative effect on the mechanisms for preventing and controlling the danger of mafia infiltration as the level of openness and simplicity of the system is lowered.

In the ***sector of public works contracts***, the judicial experience over these recent years has now taught us that, in many cases, the business to which the contract is awarded or, at least the company carrying out the public works, has – itself – sought contact with the local mafia associations or with the businesses with whom they work, in order to ensure the advantages already described above and

[78] In breach of the provisions of article 45 (2) (e) and (f) of Directive 2004/18/EC.

at the same time, the *absence of difficulties on the building sites*. It often happens that he makes use of the ***intermediation of auxiliary or colluding firms*** in order to enter into ***mafia protection contracts*** to insure against the risk of direct contact with organised crime. These have become a more frequent expression of *placid consent*, rather than the result of any coercive behaviour by the intimidator.

§ 3. *Observation on the principal methods of infiltration by organised crime into public works contracts*[79]

There is not doubt that, in the Italian regions most exposed to the risk of mafia infiltration (Sicily, Calabria, Campania), the continuous pressure exercised by organised crime, especially in relation to the business world, has contributed, on the one hand, to the spread and consolidation of a climate of silence and, on the other hand, to an overall lowering of the level of legality in civil society. At the same time, **the two parties, mafia and business, who originally stood in opposition to each other, have gradually moved closer together**. Indeed, the former, taking advantage of the locally recognised position that it has obtained through its power to control the area, has found it more **convenient to reduce the use of force to a minimum**, preferring to cultivate a prudent policy of ***obtaining consensus*** from the industrial class.

In **Sicily**, the **method of the so-called *tavolino***, devised and successfully tested out over a long period of time by the mafia entrepreneur Angelo SIINO, who then decided to collaborate with the authorities, represented the most refined and insidious system of infiltration into the system of public contracts and, at the same time, a strategic method for controlling and managing economic and criminal power, not only in Palermo and the surrounding area, but also potentially over the whole island[80], benefiting from criminal **links with the world of politics and business.** In reality, the *tavolino*, in providing for ***complex criteria that allowed businesses to take part in turn in contract competitions***, constituted a ***mafia substitute for free private initiative*** and, abolishing every form of free competition, reaffirmed the **hegemonic role of *cosa nostra***, with the consequent possibility of exploiting the inherent potential of the criminal system to the maximum.

Similarly, in **Calabria**, the **infiltration techniques used by organised crime** in that area strongly reflect the peculiar type of organisation of the ***'ndrangheta***, which is eminently localised, founded

[79] For a brief historical description of the "traditional" methods of mafia infiltration into the system of public contracts, see *Coordinamento investigativo e cooperazione istituzionale: nuove prospettive della lotta alla criminalità organizzata nel settore dei lavori pubblici*, published by the Surveillance Authorities in *Il coordinamento delle indagini di criminalità organizzata e terrorismo*, Milan, Giuffré, 2004, 359- 373.

[80] In the light of the results of the most recent investigations, aimed at ascertaining any existence of phenomena of mafia infiltration in the carrying out of certain ***Major works*** **being carried out in various parts of Sicily**, it can be justifiably stated that the method of the *tavolino* is still used, thanks also to the involvement of companies of national importance.

on so-called *locali*, and on so-called *'ndrine* which, at various levels, reflect the respective control over the territorial area. This action of control has been exercised by individual *locali*, which are **autonomously operated in the territorial context which relates to their sphere of influence**.

This is carried out in relation to the company which has been awarded the contracted in ***two distinct ways***:

- the first, more properly described as *parasitic*, takes the form of the direct collection of a proportional ***percentage cut*** of the total value of the contract work;
- the second, carried out through *subtle forms of pressure,* has the purpose of obtaining a ***contract or sub-contract for the works (or for the principal supplies)*** **for small and medium sized businesses controlled directly or indirectly by the *'ndrangheta***; this is done through the use – or behind the formal façade – of various forms of contract (*sub-contract*, *hire of services with or without personnel, earth moving, transport of materials, supply of aggregate or cement and bitumen conglomerates).*

In general terms, it can be said that in an area such as Calabria, where there is a strong presence of many tough mafia-type criminal organisations, businessmen are naturally induced to adopt a ***strategy of cooperation***.

In **Campania** the evolvement of ***relationships between the camorra and the business world in the specific area of public works*** has been heavily influenced by the fact that an increasing number of businessmen sought (successfully) to turn their relationship with camorra organisations to their own advantage, recovering the cost of the payments they had to make by way of extortion in terms of an increased **possibility of purchasing new clients**, thanks to the *good offices* of the camorra, **or of obtaining the recovery of payments otherwise to be paid, or, yet again, agreement with the unions and the guarantee that there will be no difficulties in carrying out works on the individual construction sites**[81].

From a relationship of mere subjection to the camorra, many businessmen have moved on to a relationship of reciprocal interaction which has further aggravated the state of infiltration that had already brought about a high rate of illegality throughout the business sector at local level.

[81] On this point, see the (unpublished) study by F. ROBERTI and C. LEMBO for the Public Contracts Department of the National Antimafia Bureau, on the question of *Methods of infiltration by organised crime into public contracts*, Rome, 2001, p. 11 et seq..

The establishment of ***business consortiums*** around the **end of the 1980s** was a contributory factor in strengthening the *system* in question and the spread of a distorted business mentality, above all in the **sector of production and distribution of aggregate and cement and bitumen conglomerates**. In substance, these were **business cartels that were linked and/or dependent upon the camorra**, in which the primary objective was not to create an interactive distribution consortium centred around business skill, responsibility and profit but rather of enabling the business members of the consortium to fix higher costs from an artificial – but shared – increase in prices for the supply of concrete[82], in order to guarantee, in the same controllable way, the payment of the camorra's percentage cut.

The destruction of the camorra organisation known as *Nuova Famiglia*, formerly headed by Carmine Alfieri, was followed by the dismantlement of this system, which has partially survived – as several recent investigations show – in the agreed and artificial increase in market prices relating to the supply of aggregate and cement and bitumen conglomerates.

This new strategic option, which is a suitable method for concealing the payment of percentage cuts to the camorra, absorbed by the **artificial increase in the market price**, has rapidly spread among businesses working in collusion with the camorra or controlled by them, and it would seem that it is still the preferred method for obtaining funds for criminal organisations from most of the works carried out through public contracts and/or sub-contracts.

§ 4. *Development of the legislation relating to public works and new measures and ways for preventing risks of mafia infiltration*

As already indicated, following the entry into force of Law no.443 of 21 December 2001, (the so-called objective law), entitled "Authority to the government in relation to strategic infrastructures and developments and other programmes for re-launching production", the danger of mafia infiltration into the public contracts sector does not seem to have abated.

With the creation of the new figure of the *general contractor*, who is appointed to carry out the work "*by whatever means*" according to the requirements of the authority awarding the contract, the situation is radically changed[83].

[82] The increase was generally equivalent to 2000 *old* Italian lire per cubic metre.
[83] On this point, see note 6.

The privatisation of relationships, so to speak, *below* the **general contractor**[84] has, in fact, led not only to a marked ***simplification and liberalisation of the procedures for contracting and sub-contracting to third parties*** (contractor, sub-contractor and, more generally, the contractor supplier and sub-supplier for vehicles and materials), but has also meant that they have ***substantially disappeared from public view***. Rules that are similar to those for subcontractors have been established in the case of carrying out infrastructural works with a **licence** for construction and management pursuant to articles 6 (1) (a) and 7 of Legislative Decree no 190 of 2002.

In extremely simple terms, it can be said that the most recent legislation on public works and on the carrying out of major infrastructural works as part of programmes for re-launching the Italian economy, involve a **simplification of procedures** and a **tendency towards privatisation of relationships between, on the one hand, the general contractor and the licensee and, on the other hand, all other entities involved in carrying out the work.**

In addition to this, the **new system for the qualification of companies,** presently centred around the **Società Organismi di Attestazione (S.O.A.)** – which are private limited companies authorised by the Authority responsible for overseeing public contracts for works, services and supplies – does not so far seem able to guarantee the necessary transparency in the qualification procedure. Nevertheless, in the actual implementation of reform to the system of qualifying companies, it still has to be seen whether – and, if so, to what extent – the sole requirement of (presumed) independence of the SOA, though the subject of (potential) control by the competent supervisory Authority, is capable of guaranteeing the necessary transparency in the qualification procedure. In this respect, it is appropriate to point out that the profit motive, which is an innate part of the business functions of the SOAs, may not, in reality, be irrelevant to the way in which they carry out their certification activities[85].

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[84] The relationships of the *general contractor* "with third parties", however involved in the execution of the works, "*are relationships of private law, to which the provisions of the framework legislation and related regulations are not applicable*", save insofar as provided by the subordinate legislation of 2001, by the legislative decree implementing and supplementing the provisions of article 15 of the same decree: See article 9 (6) of the aforesaid Legislative Decree no. 190 of 2002.

[85] It should not be forgotten that the National Antimafia Bureau and the President of the Authority for the Surveillance of Public Works have expressed concern as to the insufficiency of the system of controls operated by SOAs and the overall inadequacy and lack of clarity regarding penalties relating to the truthfulness of declarations and certificates issued by them: See the interviews given by the State Antimafia Prosecutor, Dott. Piero Luigi Vigna, and by the President of the Authority for Surveillance of public works, Prof. Francesco Garri, in the *Il Sole - 24 ORE* journal, *Edilizia e Territorio*, 1-6 December 2003, year VIII, no. 47, p. 1-3.

With the second legislative decree which made corrections to the new code on public contracts[86] there was an express recognition of the "public law nature" of SOAs "in exercising certification activities for those carrying out public works". The same regulation provides that the certificates issued by SOAs "constitute a public document for criminal purposes". The legislation has therefore resolved the doubts regarding interpretations as to the legal nature of the certification activity carried out by the SOAs. Prior to this opportune clarification by the legislature, there was in fact a risk of a wide area of illegal conduct, which experience had already been found to exist, being left without any legal sanction[87]. On the other hand, in the absence of such a useful clarification, the protection of interests which were undoubtedly of a public law nature, such as those under article 97 of the Constitution, was dealt with through declarations and certifications of questionable legal nature, made by private bodies (the SOAs) or simply subject to authorisations and controls by way of publication by the Supervisory Authority on public works[88].

Despite recent efforts by the legislature in the direction of openness and simplification of public contracts, it must nevertheless be acknowledged that the new system of awarding and executing major public works, centred around the figure of the general contractor, gives rise to new aspects of vulnerability – and perhaps also more serious than in the past – in comparison with the infiltration by organised crime that has already been already noted and identified.

It is widely predictable, in fact, that mafia-type organised crime, which has already for some time been involved in an intense activity of camouflaging itself within the economic and productive system, will attempt to penetrate the new system of public works, passing through the net – which is too wide – of a legislation which, in these last few years, has concerned itself with the rapid completion of large infrastructural and industrial works which have been regarded as being of strategic priority for the development of the social and economic system in Italy, rather than with the dangers connected with this process of modernising the country.

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[86] See article 3 of Legislative Decree no.113 of 31 July 2007, n. 113, in which, under the heading "*Work safety and surveillance in public contracts*", the "*public legal nature*" of SOAs was expressly recognised "*in their exercise of the activity of certifying the executors of public works".* The same regulation provides that certificates issued by SOAs "*constitute a public document for the purposes of criminal law*".

[87] See the article in the weekly journal *Edilizia e Territorio*, referred to above, note 12.

[88] On this point, see the observations by the National Anti-mafia Procurator in the above interview (note 12), where he points out the anomaly "*caused by the fact that the access filter to the system of public works, although it consists of attestations and certifications made by private entities, is in any event aimed towards the full implementation of constitutional principles indicated for the public administration and poses as its objective the carrying out of prime interests of a public law nature*".

Nor is it worth objecting that the new Code of public contracts has established (article 12 sub-para 4[89]) that "*the regulations providing for controls on public contracts for the prevention of criminal offences remain unchanged"*, and that a specific final provision (article 247), has explicitly retained the anti-mafia law in force "*in relation to prevention of mafia-type crime and anti-mafia communications and information".*

Of symbolic importance, in this sense, are the events relating to article 18 of Law no. 55 of 19 March 1990, which are expressly repealed by article 256 sub-para 1 of the new Code of public contracts, which came into effect from the date when the new Code of public contracts came into force (1 July 2006) and substantially survived its formal repeal by being reproduced in the new Code, but with certain significant additions and amendments in the legal wording.

In fact, from a recognition, albeit summary, of the guiding principles that currently regulate the anti-mafia legislation in the area of completion of major strategic public works, it emerges sufficiently clearly that the legislation itself is inadequate, in particular regarding the *obstructive regulations*, which are largely confined to the penalties provided by article 21 of Law no. 646 of 1982 or, which are dependent, as we shall see, upon the free initiative of local institutions and private entities involved in carrying out the public works.

In this respect it should be observed that alternative forms of protection have recently become more widespread. These involve the drafting of *legality protocols* and the introduction into tender competitions of special *satisfaction clauses*, drawn up for the purposes of avoiding the danger of mafia infiltration.

The legality protocols are an instrument by which entities and institutions regulated by public law, or persons or bodies regulated by private law, enter into an agreement in which they undertake, each within the sphere of their own specific skill or institutional and/or professional capacity, to combat organised crime, setting up a series of programmed parallel and concurrent actions to those carried out by institutional authorities (such as the police and prosecution authorities) in order to ensure conditions of safety and legality for all citizens, in such a way as to provide the most favourable conditions for ensuring the legality of the areas which the negotiated programme concerns.

The use of this measure, which is theoretically suitable for involving all entities, institutions and the community concerned in the social and economic development of a particular area, has not

[89] The heading of the article relates to "*Controls on documents in the contract award procedure*".

managed to achieve the desired effect, not only because of the absence of a specific legal or conventional framework that is capable of defining the precise contents, objectives, methods and implementation periods, but also due to an innate tendency to avoid responsibility on the part of the entities concerned, who have often been found to be incapable of developing in concrete terms a common strategy for the safety of the area.

In the absence of explicit legislative recognition and, above all, in the absence of an effective system of penalties which guarantees full compliance, it seems unlikely that the best results are going to be produced through the so-called ***protocol agreements*** which are entered into by the awarding authority and other public authorities (e.g. the Surveillance Authority for public works) or private entities (e.g. companies, firms or consortiums of businesses interested in taking part in tender competitions for public works) through which those signing the agreement mutually agree to accept the **introduction into the competition tenders of *satisfaction and self-protection clauses***. In effect, the signing of the *protocols* in question aims to place additional responsibility upon those taking part in the tender competition in such way as to discourage the adoption of unlawful practices, by reason of the "serious penalties" arising from breach of the *satisfaction clauses*[90]. This measure certainly represents a worthy attempt at creating greater responsibility among those taking part in public competitions through greater and more vigilant controls by the awarding body. However, it has to be acknowledged that this is once again a measure whose operation depends to a large extent upon factors linked to a certain margin of uncertainty and randomness.

In order to draw up a full list, however brief and approximative it might be, of the **new dangers of mafia infiltration into the new system of public works**, it is necessary not only to take into account the established and inveterate tendencies of organised crime in the specific sector under consideration but also the new possibilities offered by the system which can be summarised broadly speaking in the following way.

In the first place, it does not seem to rule out altogether the danger of mafia-type organisations who, instead of sub-entering during the stage of carrying out the public work through the established – but precisely for this reason better known, from the investigative point of view – mechanisms of sub-contracting of every kind (rental with or without personnel, supply of building materials, earth moving activities, offers of other complementary services, such as site watchmen, unlawful labour

[90] On the *satisfaction clauses*, the Council of the Authority for Surveillance on public works adopted resolution no. 14/2003 of 15 October 2003.

intermediation, etc.), take part in the **financing of businesses to whom the work as awarded**, either in terms of *project financing* or where the contract is awarded to a *general contractor*.

The financing can be carried out either be contributing and/or introducing massive amounts of illegal money (constituting laundering or reinvestment pursuant to articles 648-bis and 648-ter of the Penal Code) into the funds of the company appointed to carry out the works (or companies connected with it by way of temporary company association) or through the ad hoc constitution, merger or incorporation of companies or cartels of companies, which are apparently lawful, managed by nominees or, in any event directly or indirectly controlled by criminal organisations, who provide all or part of their capital, or provide additional capital where necessary – always in forms that are obscure, covert and difficult to investigate – according to the business needs of the moment.

At investigative level, it is therefore necessary to intensify controls in this direction in order to prevent mafia businesses from achieving their objectives of indirectly financing the carrying out of public works through parallel laundering activities. This seems all the more necessary when it is considered that the *general contractor* can award most works to third parties without any restriction in terms of public law – except for the obligation of observing EU legislation – along with the observance of the corresponding principles provided by article 97, sub-para 1 of the Constitution. He therefore ends up assuming a function that is in fact similar to a financial intermediary rather than that of a entrepreneur contractor.

In the second place, it is necessary to **explore in depth the entire situation of the SOAs**, in order to ascertain whether irregular procedures of qualifying companies managed or controlled by mafia-based criminal organisations, might provide the basis for new and even more dangerous forms of penetration by these organisations into the business circuit involved in carrying out major public works. Large companies or business cartels of national importance, which are normally awarded contracts as general contractors for public works in the so-called *regions at risk* (Sicily, Calabria, Campania and Puglia), could have interests in building or maintaining contacts with mafia-type businesses which have been appropriately legalised through false qualification certificates issued by compliant SOAs and specially established or linked to the parent company which has been awarded the contract through complex and fictitious mechanisms.

In the third place, in terms of general prevention of the phenomenon of mafia infiltration, it would be appropriate for the legislature, which has been aware of serious distortions in the Italian

economy caused by incorrect business practices, to introduce once and for all, also in order to comply with EU obligations, the offence of **corruption in private acts**. This might also encourage the virtuous practice of parallel and complementary commitments which public companies are able to assume in compliance with the so-called *legality protocols*, through the observance of the so-called *satisfaction* or *self-protection clauses*.

In the fourth place, the bodies for preventative control and policing, including the Supervisory Authority and those with responsibility for overseeing the works (Committee for Surveillance of Major Public Works established by the Ministry of the Interior, the Surveillance Office at the Ministry of Infrastructures, Surveillance Directorate and the Auditing Office within ANAS SpA) should examine with the greatest care, in terms of procedures, not only the existence of the conditions of legality of the award, but also the effective adoption of suitable measure for carrying out an effective, real action to combat any possible mafia infiltration. This relates, for example, to examining the ways in which the general contractor has carried out the "***pre-financing**, in whole or in part, of the work to be carried out"* (see article 176 (2) (e) of Legislative Decree no. 163 of 12 April 2006[91]), providing "*indications, to the authority awarding the contract, of the **plan for contract awards**, expropriations, provision of materials"* (see article 176 (2) (g) of the above Legislative Decree which has reproduced the wording of the repealed article 9 (2) (g) of Legislative Decree no.190 of 2002), or also to the effective "*formulation of appropriate **agreements with the competent bodies in relation to safety as well as prevention and repression of criminal activities"*** (see article 176 (3) (e) of no.163 of 2006 which has reproduced the wording of the repealed article 9 (2) (e) of Legislative Decree no.190 of 2002). This, in fact, relates to **compliance with the obligations which make it possible to measure *on site* the effective antimafia commitment of the company which has been awarded the works** and of adopting, where it arises, the appropriate countermeasures with the necessary speed in the event of breach.

In the fifth place, and once again in the context of policies relating to criminal prevention, it is necessary to carry out ***penetrating controls in so-called "traditional" sectors of mafia infiltration*** *(quarries, industrial production procedures, sale and transport of aggregate and cement and bitumen conglomerates, earth moving, hire services with or without personnel),* also through the *reconstruction of economic and financial profiles of the firms operating, sometimes through licences (quarries), in these sectors*.

[91]The pre-financing of public works was previously provided for, in the same terms, under article 9 (2) (e) of Legislative Decree no.190 of 20 August 2002, repealed by article 256 of Legislative Decree no.163 of 2006.

§ 5. ***Investigation strategies to combat mafia infiltration into the public works sector***

With regard to criminal investigation, it should be observed, by way of preliminary comment, that the complete reduction to the context of a private negotiation of every relationship relating to the contractual options operated by the general contractor "beneath", so to speak, the original award of the contract, has brought about the ***crisis in the investigation model traditionally adopted by the investigating magistrate and by the police investigator***. This model, through the investigation of any conduct constituting offences pursuant to articles 317, 318, 319, 321, 323, 328, 353, 354, 476, 477, 478 or 479 of the Penal Code, by persons, whether holding public office or appointed to carry out a public service, involved in carrying out works or responsible for controlling their proper execution, sought essentially, **by examining the visible *effects*, to identify the *causes* of any mafia type conditions and their concrete results upon a particular territorial context**.

All of this requires a careful reconsideration of the "traditional" investigative procedures, through the evaluation and systematic study of new and, probably, more promising forms of investigation, closely linked to the various operational techniques and/or procedural stages (in the broadest sense), from the design stage to the awarding of the contract, from the execution to the certification of the work, through the various ways in which mafia infiltration is capable of taking place.

In this respect, there are no certain or precise methods for developing investigations, since the starting point of the criminal investigation is entirely random or, more accurately, subject to many variables. These varies from the "classic" – though, in practice, now rare – information of an offence obtained from a formal report of an explosion (symbolically threatened or actually carried out) involving machinery on a construction site, to evidence obtained in the form of an anomalous offer carried out by a business which has been awarded a contract; or from the investigation of a sub-contract or unauthorised piece-rate employment by the contractor, to suspicious reports about meetings and interests, which occasionally emerge through telephone surveillance, between a known member of a mafia group and the director of a sub-contractor of public works awarded to another business of national importance, and so forth.

However, where there are grounded suspicions or evidence of criminal offences, whether they relate to incomplete offences (e.g. articles 476, 477, 353, 354, Penal Code) or complete offences (e.g. articles 648-*bis*, 648-*ter*, 416-*bis* Penal Code) which directly or indirectly appear to indicate a probably mafia infiltration[92], there is a possibility of proceeding systematically, organising the

[92] For example, firstly, the clear or concealed ownership by a member of the mafia of a company which is awarded a public contract or is involved in carrying out public works and, secondly, the use of mafia capital to finance a company that has been awarded a public contract, or a company that has purchased machinery with money obtained through

investigative action on the basis of the hypothesis (or hypotheses) which is most fitting to the nature, complexity and actual prospects of developing and investigating the complete offences that are the subject of the hypothetical, though embryonic information.

Naturally, an **in-depth understanding of the legislative framework** regulating the overall subject under examination will be the starting point and constant point of reference for any investigation which seeks to **penetrate the screen of apparent legality**, which is sometimes erected artificially by disloyal public officials or entrepreneurs colluding with, or subject to, the mafia, behind which may be hidden the aims or interests of organised crime.

In recalling the *historical* developments of the *mafia* organisations in this specific sector, it should be observed that the investigation presents a lower degree of difficulty on each occasion when the ***mafia infiltration*** is carried out in a form that is more properly described as ***parasitic***, consisting of receiving the direct payment, on the part of the mafia-type criminal organisation, of a percentage *cut* in the total sum of the works awarded, or in the imposition of custodians or the assumption (real or fictitious) of employees who are connected with the same criminal organisation through family relationships, interests or mafia solidarity. As already indicated, this is the original form of mafia infiltration, in which the typical behaviour of the victim can be identified, in the form of the ***entrepreneur subordinated to the mafia*** (in the widest sense). Generally speaking, this person, although he has achieved *peace* on the construction sites, is forced to comply with the criminal claims made by the mafia, which are put forward in particularly insidious and ritual ways and difficult to investigate in the sense of obtaining proof (examples include a "*contribution for the families of prisoners*" or a loan, which is necessary to meet the expenses of a difficult "*operation*", or of the *offer of a custodian* in order to guarantee proper surveillance of the construction site in order prevent the risk of *possible* attacks, and similar pretexts). In such cases, where the collaboration of the victim is absent, it is necessary to concentrate on "*routine*" investigations, but also and especially on technical investigations (telephone and environmental surveillance of the victim and his family and professional *entourage*), being careful to safeguard, with appropriate methods, the genuine acquisition of every useful source of evidence (for example, where there is a conspiracy of silence, telephone surveillance carried out in relation to any persons having knowledge of the facts and/or environmental surveillance of cars used by the informers themselves to reach the offices of the investigators or on their departure after making their statement; also environmental surveillance and the use of video cameras ordered (where necessary as a matter of urgency) by the investigating magistrate pursuant to article 267 of the Penal Procedure Code, in

profits from activities of extortion or drug trafficking.

waiting rooms in the offices of police investigators or of the investigating magistrate himself, where the victim or other persons with knowledge of the facts have been invited: indeed, these persons might overcome their silent resistance – before the magistrate rather than the investigators – and may provide spontaneous information or statements that are useful for the development of the investigations). However, these methods of investigation are widely tested and unfortunately, in most cases, already well known to those in relation to whom they might be used. When there is an ongoing activity of extortion and/or mafia influence and there is good reason to believe in the sincere desire of the victim to collaborate, it could be useful to install, subject to taking every possible precaution, video surveillance equipment that is capable of recording any criminal activities and/or identify the authors, or to infiltrate, with even greater caution, one or more police investigators among the personnel present each day on site (giving them a fictitious role, as appropriate, of director of works, site manager, supervisor, worker) in order to have reliable sources of information directly on the site and in proximity to the illegal activity, especially where there is a prospect of carrying out an arrest in the act of committing an offence (e.g. extortion or attempted extortion, perhaps aggravated pursuant to article 7 of Legislative Decree no. 152 of 1991, as confirmed with amendments by Law no. 203 of 1991).

However, as already indicated, investigations become more difficult and complex when the mafia infiltration has already brought about some kind of active cooperation in the sector under examination (public works contracts), where there is a convergence of interests between the mafia-type criminal organisation and the businessman who is the object of their criminal attentions. In this case we find ourselves dealing with the so-called ***collusive businessman***.

In fact, the local mafia groups might adopt a two-fold strategy in relation to businesses involved in carrying out public works. On the one hand, they might put pressure on them by using the "traditional" method of requesting a percentage cut (generally of a sum equivalent to 3% of the total value of the contract works). On the other hand, they might activate complex **illegal cooperation mechanisms**, with the positive support of technical officials, at management level, as well as the support of the contractor and the awarding authority. Through them, it is possible to obtain access (through **false invoices**) to financial resources to be used for paying the percentage cut, but also to introduce works – through the **wrongful concession of subcontracting awards** – to businesses with mafia links that have none of the prescribed requisites, to the detriment of other businesses

which are correctly indicated as official participants in the competition but which have none of the "necessary" local mafia support[93].

The interest of criminal organisations is naturally concentrated around the most valuable works, by entering into prior illegal agreements with the subcontractors in question and at the same time with the **use of a small group of businesses linked to the local mafia groups, above all for *earth-moving works***, which are paid for "*per person*" and not "*in quantity*", making it more difficult to carry out controls. Various officials in the awarding authority have also been involved in various ways in these illegal agreements. Nor should it be forgotten that there is a lack, or even a total absence, of serious effective controls on the way in which most of the subcontracts are awarded, where the work is carried out by firms which have not been previously notified by the contractor at the conclusion of the tender competition. In certain cases, the **lack of adequate controls by ANAS** (the State Highways Authority) has led to the identification of **various anomalies arising during the competition** (*excessive reductions*, of up to 36% on the price fixed as the base price, *false outline projects*, which are made to correspond falsely with the executive projects, *expert reports for variations* in the works that are carried out for the sole purpose of increasing the cost of the works)[94].

In relation to investigations, it is worth pointing out that, where there is appropriate evidence to justify an allegation of mafia infiltration, in terms of evidential logic or at least reasonable suspicion, the uncooperative conduct of the victim – even where there is no obvious reticence or deliberate silence – must not necessarily lead the investigators to suppose or indeed to jump to the conclusion that there is a convergence of interests between the criminal organisation and the businessman involved. And yet, it should be considered that, not infrequently, the passage from the situation of the subordinate businessman to that of collusive businessman is part of a process of evolution – or, if you like, involution – of links between mafia and business, which is the result, as already indicated, of the lowering of the overall level of legality in the special territorial area in which such a relationship arises. In fact, it can happen that the businessman who is subject to undue pressure ends up concluding a sort of *pact with the devil* for reasons of convenience and in the hope of obtaining advantages that he would never otherwise have achieved, thanks to the *good offices* of

[93] In the report to the Parliamentary Antimafia Commission during the XIVth Legislature, approved at the sitting of 30 July 2003 (report by Senator Centaro), doc. XXIII, no. 3, p. 266, it was described how "investigations have highlighted the factual power of the criminal structure in relation to the major Contractor, which, clearly for the purpose of avoiding incompatibility with the surrounding environment, replaced the technical director who had immediately reported the first attempts at extortion, with another officer, who was fully able to adapt to the criminal surroundings".

[94] See criminal proceedings no. 5726/2001 R.G.N.R. of the District Antimafia Bureau, Catanzaro (the so-called *Operazione Tamburo*).

the mafia, constituting an offence under article 110 of the Penal Code or even article 416-*bis* of the Penal Code.

Even more difficult are anti-mafia investigations in which, in the environment under investigation, there is a reasonable suspicion or there is solid evidence indicating that one or more businessmen or business entities (partnerships, companies or consortiums of companies etc.) have used their ownership of property or company control in order to conceal their direct involvement as the *long hand* of the mafia, following the business logic described above, for *expanding their search for mechanisms for legalising economic activities* in which they are directly or indirectly involved. This phenomenon, summarising the figure of the ***mafia businessman*** and of the ***mafia businesswoman***, is more difficult to penetrate because, on the one hand, there is a greater tendency by the protagonists to hide or dissimulate their mafia connections and, on the other hand, there is considerable support and protection not only from the business class itself but also from politicians and administrators. At political, bureaucratic and administrative level, in fact, decisions are made regarding the funding, positioning and carrying out of the work. Consequently, where the circumstances so permit, there may be reasonable grounds for supposing (making use of the appropriate investigative measures) an in-depth knowledge of the mechanisms governing the publication procedures ("open", "restricted" or "negotiated", according to the new terminology introduced by the Public Contracts Code in 2006) for awarding of public works.

The question of ***financing (whether total or partial) of the work by organised crime*** is worth particular mention. This creates a new and extremely serious danger of mafia infiltration which may occur even *prior* to the carrying out of the public work, even before and independently of any traditional methods of criminal infiltration being set into action.

The financing can occur with the award of the contract and/or with the introduction into the business capital of the company which has been awarded the works (or companies to which it is connected in a temporary business association) of illegal capital (with subsequent money laundering activity). Alternatively, it may be carried out through the *ad hoc* constitution, merger or incorporation of businesses or business cartels, which are apparently genuine but are managed by a nominee or controlled directly or indirectly by a crime organisation. At investigative level, it is therefore necessary to intensify controls in this direction in order to prevent mafia businesses from achieving their desired objective of indirectly financing the carrying out of public works through parallel laundering activities. In this way it ends up assuming a function that is in fact similar to that of a financial intermediary rather than that of an entrepreneur contractor.

As for the methods of manipulating the public procedures, in which the individual entrepreneurs or businesses or business cartels connected or supported by organised crime take part, legal experience has provided us with a broad case history which illustrates the various and different types of intervention on public contracts by the so-called *traditional mafia*. The conditioning and control of the various procedures can relate, as already indicated, both to the public financing stage of the work (placing the emphasis on any relationships with corrupt, or at least collusive, politicians) as well as during the actual contract stage. And it is precisely during this stage that the most insidious and sophisticated techniques of illegal manipulation of the procedure can arise, as the most recent judicial experience has shown us, which is carried out for the purpose of eliminating any true and free competition and for protecting the interests of the mafia and the firms connected to them.

Reference has already been made to the method of the *tavolino*, which is still used by *cosa nostra*, as several recent investigations seem to indicate. *Cosa nostra* used it to ensure complete control over every stage of the contract, from the financing of the work to its actual execution. And the mafia, precisely during this last stage, after having safeguarded the fundamental interests of the organisation, was also able to assist the local mafia businesses, helping them in the award of sub-contracts, hire contracts with or without labour, and the provision of materials.

But even where such a method was not practiced, they were able – and are still able – to carry out alternative or addition forms of control over public contracts, such as:

a. the ***arrangement, in the rules for the tender competition, of technical requirements*** (with the complicity of corrupt officials responsible for drafting the rules), which limit the number of businesses able to take part, or even identifying a single pre-determined winner (the so-called ***tailor-made rules***);
b. the ***prior determination of discounts*** (in such a way as to reduce them to a minimum);
c. the ***participation by way of support*** of businesses who present offers that are falsely inflated or who withdraw after the competition (so-called ***cartels***);
d. ***exclusion from the competition by fraudulent methods*** (carried out with the complicity of any corrupt officials: for example, the removal of documents from the envelope containing the offer) of businesses which do not obey the rules imposed by the mafia.

Knowledge about such mechanisms can quickly point investigators in the right direction, enabling them also to rapidly select and acquire documentation of investigative interest (competition rules, envelopes with relative offers, documentation relating to the organisation of the companies taking

part in the competition or those who have withdrawn from it, certificates of qualification, anti-mafia certificates, etc.).

But, more frequently, the most important evidence, which makes it possible to bring allegations and even to prove mafia infiltration into public works contracts in criminal proceedings, can be found during the so-called ***site stage of the work***.

According to a recent study carried out by the National Antimafia Bureau[95], it is during this phase that "*the most insidious forms of criminal activity are to be found, in the execution of works, on the part of mafia-type criminal organisations*".

On the basis of this acceptable view, the National Antimafia Bureau has drafted ***General guidelines for investigative activities on work sites relating to public contracts*** which provides useful operational indications to be followed "*in the initial and more delicate stage of identifying and acquiring sources of evidence, with particular regard to the activity to be carried out, where necessary with the use of police investigators duly appointed pursuant to article 370 of the Penal Procedure Code, on work sites or at the headquarters or offices of businesses directly involved in carrying out public works contracts"*[96].

In this respect, it is most important that the initial investigations, even if they are carried out jointly or separately with police investigators, proceed in coordinated fashion, in such a way as to ensure the necessary speed in obtaining evidence and, above all, to ensure the continual updating and reasoned selection of information which is capable of assisting the development of the investigation, and destined to form the common denominator in terms of the information in the enquiry carried out by the investigating magistrate.

During the stage where the public works are commenced on site, a factor of decisive importance for obtaining significant investigative results can be the ***promptness and relevance of the initial operation in the site areas***, especially when there are many sites in various different places, as often happens with major public works that are organised into different lots, situated over various regions and/or provinces[97].

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[95] See the (unpublished) Note of the State Antimafia Prosecutor, dated 12 February 2004, addressed to 26 District Antimafia Prosecutors.
[96] See Note referred to in the previous footnote.
[97] This is the case with the widening and improvement works to the A3 Salerno-Reggio Calabria motorway, which have recently been the subject of investigations by various District Prosecutors in Meridione.

The *investigative guidelines* produced by the National Antimafia Bureau[98] appropriately advise that there should be a ***preliminary*** – but always coordinated – ***examination of any complaints about threats or extortionate actions and other forms of mafia-type pressure or conditioning*** (explosions, fires or other kinds of attack; explicit or veiled threats, intimidating telephone calls, offers to protect the site, forceful requests for employment, presumptuousness or other typical mafia behaviour, specious union disputes with threats to block the work sites, and similar events) against the businesses involved, in whatever respect (contractors, sub-contractors, hirers, suppliers of materials and services, etc.), in carrying out the work.

Immediately after this stage, it will be useful to proceed – according to the aforementioned *guidelines* – to acquire further selected evidence through a further examination – almost a ***"snapshot" of the state of the works***, with all of the relevant criminal implications – of every situation where it is possible to suppose mafia infiltration. For this purpose, it may be useful to ***ascertain***, for example, in the sites where works are being carried out, ***any physical presence of people*** (business owners, directors or partners and their nominee, managers and technicians, workers, etc.) ***and mechanical vehicles*** (machines, lorries, service vehicles, etc.) ***traceable to businesses whose owners, managers or directors have been convicted, indicted or investigated for offences involving organised crime and/or corruption***[99].

It may also be appropriate to consider, case by case, the possibility of investigating:

- the methods of ***control provided and actually carried out by the various bodies of the awarding authority***, as well as any
- ***breaches of regulations providing for work safety and for the proper conduct of the work relationship*** including workers' national insurance and pension protection,
- ***revenue violations and tax fraud, fraud in public supplies*** (in this respect, it will be useful to carry out, on site, where possible without prior notice, appropriate sample checks, to be compared with any previous samples carried out by the contractor or sub-contractor and/or the contracting authority during routine quality and quantity controls, with a view to expert examination pursuant to articles 359 and 360 of the Penal Procedure Code);

[98] By reason of article 371-*bis* sub-para (3) (c), of the Penal Procedure Code, the responsibilities of the National Antimafia Bureau include the processing of figures, datas and information concerning organised crime. The investigation guidelines, referred to in the text, represent the result of this activity, which is aimed at assisting in coordination and guidance by the State Antimafia Prosecutor and/or increasing the information available to the District Antimafia Bureaux concerned.

[99] In this last respect, the possibility of consulting the SIDDA-SIDNA information system – the so-called *"tactical" database* of the National Antimafia Bureau – could be extremely useful.

- ***false information in public and private documents*** (relating, for example, to the issue of so-called *anti-mafia certification* or of qualification certificates issued by SOAs; false information in invoices, delivery notes, receipts, site records or other written accounts).
  For the reason, it may be useful to:
- ***obtain documentation*** (correspondence relating to offers received, notes made by staff employed by the contractor, subcontractor and/or hire firm or supplier) ***concerning the determination of prices charged for the hire of machinery (with or without operators) or for the supply of aggregate, cement or bitumen conglomerates and compare them with the prices charged in the free market*** or in price lists and official market charges;
  It may be equally useful to investigate the following further aspects:
- ***comparison of the costs of machinery hire with the prices awarded in the contracts or sub-contracts;***
- ***existence of any schemes used to conceal the ownership or the effective management power in firms involved in carrying out the works;***
- ***preferential relationships between firms hiring machinery or supplying materials and other similar contractual relationships;***
- in the case of works already carried out and tested, the existence of ***any fraud or discrepancies found in the testing procedure*** and any captious or tendentious civil or administrative dispute.

In setting up the investigation, the investigating magistrate, in coordinating the activities of the various police investigation bodies delegated to carry out specific activities, may instruct them to cooperate with other institutional bodies (the Inspector of Works, Health Authority, Chamber of Commerce) in order to improve the effectiveness of the on-site operation, requiring prior secrecy in order to guarantee the ***surprise factor***. Finally, it may be useful in carrying out all appropriate measures (telephone and environmental surveillance, any specific observation activities, including fixed or mobile cameras, following and checking suspects, etc.) to safeguard the genuine acquisition of possible sources of evidence.

Naturally, I cannot claim to have covered all aspects in describing the lines of investigation which I have summarised above. Every good investigator who knows anything about the complexity of this subject well understands that the lines of investigation, especially in this particular sector, cannot be determined beforehand and depend largely upon the intuition and the investigative sensitivity of each individual person. But both of these depend upon an understanding of the legislation which currently governs this complex subject, as well as an understanding that the new forms of mafia

infiltration into this sector, which is the nerve centre for the economic development of the country, seek to create insidious situations of ***apparent legality*** which it is the task of the criminal investigator to unmask and to prosecute.

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2.6. C*onsiderations about Antimafia controls in Italian law in relation to public contracts: the role of the prefect in prevention activities and controlling attempts at mafia infiltration with particular regard to the system of monitoring Major Works*

§ 1.1 ***Introduction and general outline***

§ 1.1.

A description of Antimafia monitoring in Major Works requires various introductory comments and some explanation about the specific ways in which the Italian system monitors public contracts with regard to the risk of infiltration by organised crime.

The term Major Works refers to operations relating to public and private infrastructures and industrial developments of major national interest, to be carried out for modernising and developing the Country.

Law no.443 of 21 December 2001, known as the "objective law", was created in this context. The term 'objective' alludes to the need to remedy as quickly as possible the out-datedness of various strategic sectors of our country, including not only rail and road links in this respect, but also including the need to improve and develop the various transport links, and to modernised energy supply, as well as the telecommunications and water systems.

The Major Works Plan, as can be seen, is not limited to a brief list of priorities, but deals radically with the problem of the historical backwardness of our country, considering that, as various studies show, Italy is five points below the European average in the special classification table that measures the infrastructures necessary for satisfactory economic growth. Thirteen Italian regions have a level of services below the average. Of these, Umbria, Calabria, Basilicata, Trentino Alto Adige, Sardinia and Molise have a level of services that is one quarter below the European average, and are therefore at the bottom of the international table.

§ 1.2.

With the approval of Law no. 443 of 2001 special rules have therefore been introduced which, in short, run parallel to the ordinary legislation (which is applicable in general terms in operations) and have an objective area of application that is very much more reduced, relating **only to strategic infrastructures, identified in the specific Programme[44] provided by the said Law no. 443** (article 1, sub-para. 1).

Law no. 443 therefore operates by way of exception, for the precise reasons that stand at its origin, for the purpose of overcoming the main difficulties that are encountered when major works are carried out. These consist, in particular, of rigidity in the procedural mechanisms that tend to arise during every stage, from the planning to the execution of the works, and the limited amount of financial resources available for infrastructural investments, which are often the cause of the traumatic interruption in the cycle of operations, which thus produces another factor, consisting of the so-called category of "works left unfinished", which have a major impact on the relationship of trust between institutions and citizens.

§ 1.3.

With regard to ***Antimafia controls***, the legislative decree that brought into effect the objective law – Legislative Decree no. 190 of 2 August 2002 – contains very few specific provisions.

A first provision establishes, with regard to the procedures for awarding the work to the ***general contractor,*** that the contractor has an obligation to conclude ***appropriate agreements with the police authority*** which has responsibility for preventing and policing crime, for the purpose of carrying out a prior examination of the programme for execution of the works in view of the subsequent monitoring of all the stages of execution of the works and of those who carry them out.

A second provision provides that Antimafia controls in relation to the general contractor and other entities taking part in the works in pursuance of their direct or indirect contractual relationship with the said general contractor[45], are carried out with the procedures provided for public works, with identical procedures to those used for all other operations included in the Major Works Programme, which are to be considered as "ordinary".

It can be said, therefore, that the exceptional status of the objective law and of the decree that implements it has not been followed in the system of anti-mafia controls, in the sense that that status has had ***no effect whatsoever on that system***.

Finally, a third provision provides that the Minister of the Interior, the Minister of Justice and the Minister for Infrastructures and Transport shall by joint decree identify procedures for monitoring infrastructures and industrial developments for the prevention and repression of attempts at mafia infiltration. This provision has been implemented through the adoption of the Ministerial Decree of 14 March 2003 (which will be further described in paragraph **2.1**.).

§ 1.4.

From the matters set out in the previous point, the system for anti-mafia monitoring of public contracts remains the same as that applied for whatever other kind of "ordinary" operation, even in the case of Major Works.

This system ***is centred around the figure of the prefect***, who is responsible for the investigations carried out in relation to entities, physical and legal persons, involved in carrying out the works. The legislation governing such operations by the prefect are to be found in Presidential Decree no. 352 of 3 June 1998.

§ 1.5.

Anti-mafia investigations and, in particular, the information released by the prefect, contribute towards the system of prevention, a system which is unique in the European legal panorama.

The personal prevention measures are relevant to the criminal system from the point of view that their purpose is to avoid the commission of an offence by a person who demonstrates a propensity to offend in certain situations. In fact, they are described as measures *ante-delictum* precisely because they are applied in the absence of a crime being committed. They do not therefore form part of the "breach of law-responsibility-punishment" reasoning, but relate instead to a situation where it is reasonable to predict that an individual will commit an offence. In particular, it has been said that this disregards the principles of legality and finality. It should be said, however, that the provisions of Law no. 1423 of 1956 – which is still the guiding law in this respect – have on several occasions been interpreted favourably by the Constitutional Court, which has indeed confirmed its constitutional legality in accordance with the criterion that justifies the existence of preventative measures against the danger of commission of offences which might compromise the ordered and

peaceful conduct of social relations and/or put at risk the free enjoyment of essential human benefits and interests, which certainly include those of life and liberty in every form.

The Antimafia Law no. 575 of 31 May 1965 has particular relevance in the specific case of the legal campaign against the mafia and other criminal organisations having similar operational characteristics to what has been described as the ***mafia method***, involving the use of intimidation and the condition of subjugation and silence. This law provides for the application of prevention measures against persons "suspected of belonging to mafia-type associations".

The main difference between this law and Law no. 1423 of 1956 is that the latter presupposed the existence of particular requirements relating to situations[46] involving conduct, so that in order to prove that the person concerned was a danger it was necessary to identify particular situations. On the other hand, the requirement for the prevention measure according to Antimafia Law no. 575 of 1965 is solely that the person concerned is suspected of belonging to a mafia-type association, entirely irrespective of establishing the situations referred to above.

It is important to emphasise that Antimafia Law no. 575 of 1965 provides for ***property investigations*** to be carried out against persons suspected of mafia activities.

Given their precise purpose, which is to identify the reasons for the accumulation of property and create an inventory of all assets belonging to the suspected person, or to which he might ***indirectly*** have access[47], the investigation activity is fairly complex. Indeed, it generally requires patient research and investigation at the property registries, notarial archives, court offices, chambers of commerce, etc., but above all it requires access to banks, credit companies and other bodies that carry out financial activities.

In effect, ***bank investigations*** are the most effective instrument for identifying the acquisition of illegal proceeds and for reconstructing the activities and links between those who have carried them out and the concealment of criminal proceeds.

The illegal property of the suspect, whether it represents the direct result of illegal activities, or whether it derives from the reinvestment of laundered money, as in the case of property, company shares, business activities purchased by using financial means of criminal origin, is ***seized*** and, subsequently, through the application of a personal prevention measure, ***confiscated***.

The power and responsibility to carry out the property investigations in relation to mafia suspects is held by the Procurator and Chief of Police, who are able to make use of the revenue police and police investigators.

Finally, it should be mentioned that there is ***complete autonomy*** between the prevention proceedings and the criminal trial, even where the material facts and persons are identical. In this respect, it is described as a ***parallel track*** insofar as any relationship of mutual prejudice is eliminated. However, from this situation of independence there can be duplication and interference which can negatively influence the overall effectiveness of the system of penalties.

§ 1.6.

Insofar as the antimafia information released by the prefect, it should be pointed out that this relates to ***measures of an administrative nature***, whereas the prevention measures which we have referred to up until now are of jurisdictional competence[48]. The apparent nexus that relates the prefect's communications and information to the prevention measures lies in the fact that their application arises from a question of suspicion, in other words, which derives from a reasonable suspicion based on the factual circumstances, arising out of the investigation, as to the danger of the person concerned. Both, therefore, are projected into the future, in the sense that they are supported by a view based on probabilities, on what has been described as an "initial legal certainty" (the factual circumstances described). Furthermore, as soon as this negative information is released, it means that it is ***impossible for the awarding authority to conclude the contract*** with the company or firm to which the information relates. It also marks the beginning of a further series of investigations which can result in a notification to the prosecution authorities for the commencement of criminal proceedings and in the formulation by the relevant bodies of a submission to the tribunal for the application of a prevention measure.

In particular, the aspect of prevention lies in the fact that, through the communications and information, the economic and productive system is defended from attack by mafia-type organisations, in order to protect important matters of public interest, such as the constitutionally protected interest in the impartiality and proper running of the public administration, and the interest in a correct and effective management of public financial resources.

§ 2. *The system of antimafia control of Major Works*

§ 2.1.

The system of antimafia monitoring of Major Works was first established with the issue of the Ministerial Decree of 14 March 2003, which implemented article 15, sub-para 5 of the aforesaid Legislative Decree no.190

Due to the particular complexity and extent, also in territorial terms, of the functions given to the system, it appeared immediately necessary for it to be structured in the ***form of a network***, whose sensitive points are in particular:

- at central level, the ***Coordination committee for Surveillance of Major Works***. This body consists of representatives from the administrations most closely involved in the specific area; it includes in particular the Ministry of Infrastructures, the Ministry of the Economy and Finance, the National Antimafia Bureau, the Authority for Surveillance of public works contracts, services and supplies, and the Central Antimafia Investigation Bureau. The Committee meets at the offices of the Ministry of the Interior;

- at local level, the territorial offices of the government prefect, where the Ministerial Decree of 14 March 2003 has established ***Inter-force Groups***. These are mini-pools, coordinated by a deputy prefect and consisting of representatives of the police forces, of a local member of the Antimafia Investigation Bureau and of local administrative officers for public works, for employment and for national insurance.

It should be said that the Inter-force Groups are in continuous contact with the Committee and ***have also created a mutual network,*** in the sense that they exchange information and data relating to infrastructures falling within their respective territorial areas. This happens fairly frequently when one considers the extension works on the High Speed rail system alone, which is one of the Major Works that absorbs the highest number of operations by the Inter-forces Groups.

The Inter-forces Groups, which provide a continual flow of information to the Committee, represent the ***operational interface*** of the Central Antimafia Investigation Bureau.

In this respect it is particularly interesting to underline the considerable potential of this means of access in relation to the powers of the prefect. In fact, it should not be forgotten that the Inter-forces Groups represent the ***long hand*** of the prefect. In fact, it is the prefect who, on the basis of the

motivated proposals of the Inter-forces Group, orders access to the sites and it is also this authority that establishes what actions should follow the results obtained after the site visit.

§ 2.2.

The antimafia monitoring activity is governed by a special directive containing guidelines. This is a document providing initial indications to be followed during the various phases and the subsequent investigations. This detailed document, dated June 2005, provides indications which, in the area of antimafia controls carried out by prefects, represents an important new factor.

In this directive, which is addressed to prefects, attention is drawn to the ***environmental context*** in which it is proposed to carry out the work. This appears to be important because it qualifies the activity of prefects in terms of ***intelligence***, in other words of prior analysis of the risks relating to the territorial effects of the new infrastructure.

During this phase the prefect has the possibility of carrying out an incisive role in ***safeguarding the local economic fabric*** which might be threatened by the intrusive manoeuvres of organised crime, interested in taking advantage of every opportunity for gain.

Great attention must therefore be given not only to the choice of the contracting companies and firms but also to aspects of the project relating to the particular aspects of the territorial area. These aspects are more delicate in cases where the new infrastructure or the new industrial development is capable of having a notable effect on the layout and the possible future of the area.

The monitoring activity shall, during this stage, consider an element of possible infiltration, consisting of the mafia's power to penetrate and influence, exercised by criminal groups, for the purpose of ***intercepting economic funds relating to the potential expansion of public operations***. This might be, for example, the creation of a new structure on the transport network (a new railway station or a new major airport hub) and the establishment of new forms of economic production, connected with side businesses or obtained by the offer of quality services for businesses.

This stage of monitoring will therefore be carried out through a series of careful, prior controls of the area involved in the new development for the purpose of monitoring transfers of property and to investigate the new property owners, but also to carry out a series of enquiries on the various activities that might give rise to a certain suspicion as a result of the commencement of works. Once again by way of example, it might involve local companies operating in the concrete business or who manage the extraction of building materials (quarries). This is generally speaking a sector,

especially in the regions that are subject to mafia pressure, which is particularly exposed, for various reasons, to infiltration and control by criminal groups.

§ 2.3.

The infiltration techniques used by organised crime are not always the same. Above all, it should be noted that there is a diversity of practices among criminal organisations operating in the three principal regions in which there is mafia infiltration – Sicily, Calabria and Campania – with regard to the techniques for money laundering and investment of illegal profits obtained from control of public contracts.

§ 2.4.

This sometimes gives rise to the mutual convenience between businesses and criminal groups to create forms of alliance and agreement in which the businessman is guaranteed criminal protection and the possibility, through this, of considerably widening his area of business, while the criminal organisation, thanks to this interaction, is more easily able to develop a presentable image of itself over a short period of time and in a variety of different forms, accelerating a process of ***legalisation and social legitimisation***.

As recommended in the ***General guidelines for investigative operations,*** prepared by the National Antimafia Bureau, which contains useful operational suggestions to be followed in obtaining evidence, with particular regard to on-site activities carried out by police investigators, it is essential at the outset to take a sort of ***snapshot of the state of works***. For this purpose, it may be useful to identify any physical presence of ***people*** (business owners, directors or partners and their nominee, managers and technicians, workers, etc.) and ***mechanical vehicles*** traceable to businesses whose owners, managers or directors have been convicted, indicted or investigated for offences involving organised crime and/or corruption.

This presence could, in fact, be indicative of mafia infiltration and could lead to other investigations and controls which, altogether, could satisfy the investigative theory established at the outset.

Access by Inter-force Groups to the sites of Major Works are also governed by standard criteria, which are similar to those already considered, and have been drawn up by the Central Antimafia Investigation Bureau.

First of all, here also it is recommended that access should be obtained in order to 'photograph' the state of works, with particular reference to every site on which the company or business around which suspicions are concentrated is operating. For this very reason it is recommended that ***access is carried out contemporaneously*** (a condition that is necessary so that the proper significance of the results obtained can be considered, especially when the business under observation is operating in many different areas) onto sites situated in different territories, as often happens for Major Works, which are carried out in lots situated in different regions or provinces.

A further factor that is necessary to ensure that access produces interesting results is naturally the ***"surprise effect".*** For this purpose, considering the fact that access is obtained by personnel also outside the police authorities (as indicated earlier, the structure of the Inter-force Groups includes also officials from the Inspectorate of employment and public works), indications are given to proceed with the greatest caution and to keep the information as confidential as possible with regard to times of access, in order to reduce any risk of discoveries that might compromise the outcome.

During the course of the site access it may be useful to consult the OCAP databases, also in order to carry out cross-checks that are capable of corroborating the outline produced by the evidence. It may also be useful at the same time to investigate whether there have been any: a) breaches of regulations for the protection of ***safety at work*** and governing employment relationships; b) ***revenue violations and tax frauds***; c) ***false statements in public and private documents***, regarding, for example, antimafia statements and required qualification certificates made by ***SOAs***[49], invoices, delivery documents, site registers and other accounting documents.

§ 2.5.

Access can therefore have more than one outcome, in the sense that there can be various different types of consequences, including the involvement of the prosecution authorities in criminal or prevention proceedings.

It is important to emphasise here, in order to focus on one outcome that leads to the direct involvement of the prefect, that access can bring about results that indicate the need to intervene by amending the antimafia document. The outcome may then consist of a subsequent determination by the prefect which, on the basis of the results that have emerged, ***withdraws the order of permission***, stating that there are reasons which require the awarding authority to remove the person or entity in relation to whom the investigations have been carried out.

On the other hand, the antimafia legislation provides that in the case where investigations, carried out *after* the signing of the contract or *after* the approval of the subcontract, have produced elements of mafia involvement in relation to companies or businesses involved (even in part) in the execution of works, they can be ***excluded from carrying out the works***. In this case, it is provided that the awarding authority are ***entitled to terminate the contractual relationship***, paying the other party the amount due on the basis of what it has already done and within the limits in which the awarding authority has benefitted from such work (principle of *utiliter coeptum*).

In the directive on antimafia monitoring of Major Works, instructions are given to introduce into the safety protocols the provision by which the awarding authority undertakes in any case to interrupt the execution of the contract. To assist this objective, which tends to render effective the expulsion mechanism described above, all contracts and sub-contracts contain a ***satisfaction clause***. In practice, it establishes that, following new information from the prefect, of negative content, the awarding authority is entitled to exercise its unilateral right to free itself from the contractual bond, in consideration of the breach in the ***fiduciary relationship*** with the company or business with whom it is terminating.

The activity of the prefect, in the context of antimafia controls of infrastructures and strategic developments, is nowadays seen as corresponding with a requirement of ***economic intelligence***, for protecting the legality and security of public investments.

This requires a delicate transition phase, consisting of a movement, which is still taking place, from a rather static conception of "antimafia control" in public contracts, in other words linked to a case-by-case investigation, generally brought about at the request of the awarding authority, towards a more developed and incisive concept.

In this respect, the prefect's antimafia office is undergoing a change in its working method, insofar as an approach is necessary that is directed, not so much towards keeping awarding authorities immune from "mafia contagion" and preventing criminal organisations from intercepting public resources, but rather towards dealing with the phenomena of mafia infiltration, according to a conceptual category that is, in effect, much closer to the idea of monitoring as a form of dynamic control.

§ 2.6.

The work approach, which has just been described at the end of the previous paragraph, inevitably focuses attention upon those involved in economic crime, and has implications on business

relationships which can have close links, however much they are cloaked in the appearance of legality, with the criminal world, whether or not they are carried out by "white collar" operators.

Naturally, once we enter the field of corporate crime the role of the prefect develops a central importance, involving a series of activities which can be investigated in various different ways, but generally through financial investigation with possible info-investigational links with the various intelligence units that investigate money laundering in the FATF countries.

The Coordination Committee for Surveillance of Major Works, in collaboration with the Ufficio Italiano dei Cambi (Italian Exchange Office) – which, in the financial field, is the national unit for policing money laundering – has set up a system for monitoring financial operations.

This system is based on the provision that the awarding authority, the general contractor and all other entities in the operation are required to open ***special bank accounts***, to be used exclusively for financial resources used for the execution of the works, without the possibility of other funds passing through the account. Furthermore, at the same time there is a requirement for money to be moved only through on-line bank transfer, with the almost entire exclusion of cash as a means of payment (only transactions for small amounts are allowed).

Through these basic precautions it is now possible to "trace" money transfers and to identify the origin and destination of capital, thereby assisting in ***transparency of financial flow***.

Insofar as the monitoring of each transaction in and out of the ***special account***, there is no doubt that this type of control will contribute towards preventing improper ways of operating in the financial markets, but also of reducing the possibility that money which enters the financial circuit of Major Works ends up under the control of criminal organisations.

§ 3. *Case Histories*

§ 3.1.

The use of particular case histories provides a practical way of highlighting how the monitoring of Major Works tends to produce a ***network*** of principal antimafia authorities, for the purpose of making controls as effective as possible, creating the most appropriate forms of interaction and encouraging a mechanism which multiplies the effects.

Let us start with a particularly significant case:

§ 3.2.

The case was unusual in that it started from a criminal investigation carried out by the Central Antimafia Investigation Bureau into several businesses involved in carrying out work to the Salerno–Reggio Calabria Motorway, which is one of the works in the Major Works programme.

The investigation led to numerous arrests and, at the same time, led the way to a sequel of investigations of the businesses involved, in order to clarify the mass of relationships and other activities in which they were involved.

Other specialist branches of the police authorities therefore became involved – each police force has specialist central investigation units to deal with mafia-type organised crime – in order to carry out the appropriate investigations. This made it possible to ascertain that certain entities which were directly or indirectly involved in carrying out the motorway works were connected with criminal organisations operating in Calabria.

The attention of the investigators became focussed, in particular, on a ***group of businesses*** that was able to control a significant share of the construction industry through the involvement of other small and medium sized enterprises. The company at the head of this holding group was also the owner of an excavation business (quarry) and in this guise, was the usual and almost exclusive supplier of aggregate (concrete, bitumen conglomerates etc.) for local companies – contractors and sub-contractors – which normally used such materials.

The investigation strategy therefore made it necessary to intervene in different ways; on the one hand, by instigating a complex series of enquiries, also involving property holding, in order to reach the head of a complex network of relationships between the various businesses involved; and, on the other hand, intervening in order to identify the distortive effects to the market for the purchase of aggregate, where a form of ***cartel*** had been established.

In relation to the first aspect of the investigation, the Central Antimafia Investigation Bureau involved its own units in Calabria in order to investigate the company structures, and above all to identify the various legal schemes that sought to disguise the concentration of interests into a single mafia centre. With regard to the second area of action, the ***Inter-force Group for Reggio Calabria*** was instructed to proceed, on the basis of the information obtained, to carry out an overall review of the antimafia documentation relating to the various businesses involved in the investigations.

This second line of investigations quickly led to a review of antimafia certification in relation to the businesses belonging to the group and the subsequent issue of prohibition orders and the ***withdrawal of the authorisation for contract awards***. This was also accompanied by a recommendation to the police authorities to commence proceedings for the seizure and confiscation of property.

This case is emblematic because it demonstrates how certain types of mafia control can relate ***systematically*** to a section of activities and how such a control is achieved through the direct or indirect acquisition of businesses operating in the sector. At the same time, other businesses have to obtain their materials from a single supplier, who is able to achieve a parasitic control and is thus able to artificially increase the supply prices, which are generally 2-3 per cent higher.

Investigative experience has shown that towards the end of the 1980s, especially in Campania, certain businesses who found themselves under pressure from the camorra, had set up forms of partnership in order to reduce the effects of the increased costs of materials (which represented the equivalent of a percentage cut), jointly sharing the economic damage derived from this specific form of extortion.

It should also be added that an interesting initiative is currently being carried out, sponsored by the Committee for the Surveillance of Major Works in partnership with the National Antimafia Bureau, for the monitoring of quarries in the province of Reggio Calabria and in other provinces in Sicily.

Considering the high decree of mafia infiltration into the sector, the investigation seeks to examine the ownership of excavation businesses by studying information directly obtained through access to various sites by the police authorities.

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2.7. Seizure and confiscation in anti-laundering legislation

§ 1. *The criminal law against laundering*

This notion, introduced into Italian law with Law no.328/93 (ratification and execution of the Strasbourg Convention of 8.11.1990), forms the basis of article 648-*bis* Penal Code (money laundering) as well as article 648-*ter* Penal Code (using money, assets or benefits of illegal origin).

In particular:

- article 648-*bis* of the Penal Code provides for punishment with "imprisonment from 4 to 12 years and a fine from 2 to 30 million lire, for anyone who substitutes or transfers money, assets or benefits from a criminal offence, or hinders, with other operations, the identification of their criminal origin";
- article 648-*ter* of the Penal Code, which supplements and completes the conduct described under article 648-*bis*, provides the same penalties for "whoever uses in economic or financial activities money, assets or benefits from crime".

The person involved in the offence of laundering can be anyone who does not take part in the crime itself; this is the aspect which makes it more difficult to attribute responsibility for laundering, in that a launderer often moves in criminal circles and it is not easy to imagine one who is outside the criminal organisation. In other words, a member of a criminal organisation who has the task of "managing" illicit capital produced by the group (so-called internal laundering) would not be guilty of laundering but of criminal conspiracy for the purposes, for example, of drug smuggling, kidnapping, usury, blackmail, exploitation of prostitution, etc., or of involvement in a mafia organisation pursuant to article 416-*bis* Penal Code.

Therefore, the typical criminal in this case is a person who, while not being a member of a criminal organisation, voluntarily provides his services for more efficiently managing the illegal proceeds of

the organisation (so-called external laundering). Often they are real specialists in the financial and/or banking sector (professionals or investment companies) who are able to use all the most modern and sophisticated instruments in order to transfer illegal money towards those countries that have a low regulation level, poorer controls and strong protection over privacy, accompanied by low rates of taxation. These are countries where it is certainly possible to ensure the maximum protection over illegal capital.

(From here stems the need for a "common basic regulation" by all countries, as has been understood for some time by the international community, which has been actively working in this particular respect, back since the days of the Treaty of Vienna and up to the French, Swedish and Belgian proposal for approval of the principle of "reciprocal recognition" to be applied also to pre-trial orders, in such a way as to be able to proceed rapidly with seizure for evidence and the confiscation of assets in all acceding countries).

For offences of this kind, it is necessary for there to be the intention to substitute or reinvest money and other assets knowing that they were from a crime, whatever it might be.
The material subject matter of the crime is practically unlimited, given that the criminal action can extend beyond money to any type of asset or benefit. The only limitation seems to be objective, in relation to real estate.

Finally, article 648-*ter* specifically seeks to deal with the reinvestment of illegal money in economic and financial activities (company acquisitions, purchase of shares or securities, etc.), beyond those cases governed by articles 648 (receiving money and property from crime) and 648-*bis*.
The Italian framework of laws against the accumulation and consolidation of illegal profits also contains other measures which it is appropriate to mention briefly.

These include, in particular:

- the offence of receiving (article 648 Penal Code) with a penalty of imprisonment from 2 to 8 years and a fine from 1 to 20 million lire for whoever obtains, receives or conceals money or property from any crime for the purpose of procuring for himself or others an unjust profit (with dishonest intent). This provision seeks to restrict the free circulation of the proceeds of crime against property in order to assist in its recovery for the benefit of the victim, as well as to prevent the commission itself of such offences, making it difficult to find a market for the objects constituting the profit from it. This provision, following the principle of specificity, is not applicable where grounds exist for alleging the specific offence under 648-*bis* (laundering), while

compliance with article 648-*ter* (reinvestment of illegal capital) prevails, which is a closing provision and, therefore, has a residual character in comparison with the others;

- article 12 of Law no.197 of 1991 which introduced a specific criminal offence of making improper use of credit or debit cards, whether real or false (imprisonment up to 5 years and fine up to 3 million lire);
- article 12-*quinquies* of Law 356/92 (fraudulent transfer of securities) which provides a penalty of imprisonment from two to six years for anyone who falsely assigns to others ownership or use of money, assets or benefits for the purpose of evading the provides of the law relating to property restraint orders or smuggling, or assisting in the commission of offences pursuant to articles 648, 648-*bis* and 648-*ter*. This legislation seeks to stop the use of "front men", so that the mere registration of an asset or property to a nominee already in itself constitutes the basis of an offence;
- article 379 Penal Code (aiding and abetting), a provision which, although marginal and incidental for the purposes of stopping the circulation of illegal profits, punishes anyone, outside the cases provided by articles 648, 648-*bis* and 648-*ter*, who helps somebody to protect the proceeds of crime;

§ 2. *Confiscation and seizure of assets and property belonging to crime*

The Italian criminal process provides in general terms the procedures for seizure and confiscation, which both tend towards the "dispossession" of property and assets from the crime.

Confiscation, in general, consists of the permanent expropriation, by the State, of property which relates to the crime or which is in itself illegal. According to the seriousness of the case, confiscation can be discretional or compulsory (article 240 Penal Code).

Seizure (article 321 (1) & (2) Penal Procedure Code – preventative seizure), entitles the judge to make an order, on stated grounds and upon request by the public prosecutor, for the dispossession of property relating to the crime, when there is a risk that it will be dispersed or where confiscation is provided.

A procedural regulation of fundamental importance against laundering is article 12-*sexies* of Law 356/92 (confiscation of assets and securities held without justification), which is invoked upon conviction for the said crime as well as for other serious criminal offences listed by the same provision such as association with mafia-type organisations, blackmail, kidnapping, usury and drug

smuggling. This provision, in fact, provides for the obligatory confiscation of money, assets and benefits which the convicted person cannot justifiably explain and which he owns or possesses, also through the intermediary of another physical or legal person, to a degree which is disproportionate with the income declared for income tax purposes or the economic activity that he carries out.

The particular effectiveness of this provision is due to the fact that the preliminary seizure pursuant to article 321 Penal Procedure Code, by reason of the provisions of sub-paragraph 2, together with the provisions of article 12-*sexies* referred to above, can operate directly against property held by the accused "without justification" or, alternatively, which is "disproportionate" to his declared income or the business that he carries out. Furthermore, in the event of conviction, there is provision for the confiscation of the convicted person's property, in relation to which it would be even more difficult to demonstrate direct derivation from illegal activities. It is, therefore, the "unjustified or disproportionate" holding of property that is considered, in all the circumstances, to be suspect and therefore illegal.

A further important compulsory confiscation provision is governed by article 416-bis (7) Penal Code (association with a mafia-type organisation) for those convicted for the said offence. Also in this case, the subject matter of the confiscation, and therefore of the seizure, is very wide, since it extends not only to articles that were used or destined for use in the commission of crime and those which constitute the price, product or profit, but also to property into which they were invested.

Finally, reference should be made to the provisions of Law 146/06 which ratified and implemented in Italy the Palermo Convention on transnational crime. Pursuant to this law – in addition to the ordinary measures on seizure and confiscation provided under procedural law – it is provided that "For offences under article 3 of this law[100], where confiscation of property constituting the product, profit or price of the crime is not possible, the judge may order the confiscation of sums of money, assets or other property in the possession of the offender, including property held through another physical or legal person, for a value corresponding with the said product, profit or price. In the case of usury confiscation is ordered for a sum equivalent to the value of the interest or other benefits or remuneration from the usury. In such cases, the judge, on sentence of conviction, may determine the

[100] **article 3. Definition of transnational crime** 1. For the purposes of the current law, a transnational crime is one punished by imprisonment with a maximum of no less than four years, where a criminal group is involved, as well as a) its commission in more than one State, b) or its commission in one State, but a substantial part of its preparation, planning, management or control takes place in another State; c) or it is committed in one State, but implicates a organised criminal group that is involved in crimes in more than one State; d) or it is committed in one State but has substantial effects in another State

sums of money and identify the assets or benefits subject to confiscation for value corresponding to the product, profit or price of the offence".

§ 3. *International confiscation*

This is the brief outline of Italian law relating to criminal confiscation. Our legal system also has provisions in force regarding "international confiscation", governed by Law no.328 of 1993, in compliance with the Strasbourg Convention of 1990.

It is widely known that the techniques used by organised crime for laundering, concealing and reinvesting the proceeds of crime normally extend beyond national frontiers. As a result, the area of investigations must also be extended internationally.

In fact, for the purposes of international cooperation, it is necessary to link financial investigations which are carried out in the country where the organisation operates and where the crimes committed have produced wealth, with a corresponding investigation which involves the authorities in the countries into which the proceeds have been transferred and where they have undergone further transformations.

The principle that emerges from the Strasbourg Convention is, in short, to assist financial investigations in the territorial areas of the contracting States for the purposes of confiscating illegal wealth by way of criminal proceedings.

For this purpose the Italian law, with article 731 (1-*bis*) Penal Procedure Code (recognition of foreign criminal rulings in accordance with international agreements), introduced by the aforesaid Law no. 328/93, provides that the Minister of Justice, if he considers that a foreign criminal ruling must be executed in Italy in accordance with an international agreement, will request the State Prosecutor to recognise it in the competent court of appeal, "also when it relates to the execution of a confiscation and the relative order has been adopted by the foreign judicial authority with a procedure other than by sentence of conviction".

The procedure for international confiscation has only one limit, provided by article 733 (1-*bis*) (requirements for recognition) represented by the fact that "the foreign ruling cannot be recognised for the purposes of the execution of a confiscation if that has as its subject matter assets that it

would not be possible to confiscate under Italian law if there were to be proceedings for the fact in Italy".

The tendency of the Italian legislature towards a broad relationship of international cooperation, for the purposes of stopping the flow of illegal wealth, can also be seen from article 735-*bis* (confiscation consisting of imposition of payment of a sum of money), which was also introduced by Law no. 328/93. This provides for the application of financial penalties "in the case of execution of a foreign order for confiscation consisting of the imposition of payment of a sum of money corresponding to the value of the price, product or proceeds of a crime".

Of fundamental importance, once again in the direction of international cooperation and with particular reference to the investigative aspect, is article 737-*bis* Penal Procedure Code (investigations and seizure for the purposes of confiscation), which was once again introduced by Law no. 328/93. This provides, in cases of international agreements, that the Minister of Justice shall accede to the request by a foreign authority for investigations to be carried out on goods that may become the subject matter of a subsequent request for confiscation, or to proceed with their seizure.

§ 4. *Administrative procedure regarding mafia-type organisations: seizure and confiscation as preventative measures on property*

In addition to criminal law and procedure, our legal system provides a procedure, which is partly administrative and partly jurisdictional, which seek to deal, in general, with those who are regarded as "dangers" to public safety and habitual criminals. This obviously includes those who belong to mafia-type organisations.

The legislation concerns so-called preventative measures, which can relate to the person (Law no. 1423/56) or to property (Law no.575/65).
The personal measures are:
- oral warning and repatriation with compulsory written notice to the municipal area of residence, carried out by the police authorities;
- special public safety surveillance – either ordinary or with obligation or prohibition on staying in a particular municipal area, which is applied by the Court on application by the police authorities.

The property measures, which are applied to persons under investigation for belonging to mafia-type associations (and, by way of amendments pursuant to article 14 of Law no 55/90, also to those under investigation for crimes relating to drugs and those who are believed to obtain support from the proceeds of crimes of laundering, blackmail, kidnapping, usury and smuggling), are:
- seizure of assets that are "disproportionate" to declared income or to economic activity and, with the application of police Special Surveillance, confiscation of assets (articles 2-*bis* and 2-*ter*) in relation to which the person under investigation is not able to provide proof of legal ownership (note the similarity with article 12-*sexies*).

The procedure for the application of preventative measures in respect of people and property is generally independent.
However, when criminal proceedings have already been started, article 23-bis of Law 646/82 requires the Public Prosecutor in charge of the criminal proceedings to inform the authority responsible for the commencement of the restraint proceedings.

This procedural strategy, known as "two track", no doubt has an advantage where it is considered that, in the case of acquittal of defendants in criminal proceedings, with the consequent revocation of criminal seizure order for assets, the order made in relation to the proceedings for the property restraint order does not lapse. On the contrary, it will give rise to the further effects of confiscation where the competent court imposes personal preventative measures, for which – I repeat – it is sufficient for there to be "evidence of belonging to mafia-type associations" (or other grounds set out above) and the person himself is not able to demonstrate the lawful ownership of his assets.
· provisional suspension from administrating personal assets (articles 22-24 Law 152/75 in relation to article 2-*ter* Law 575/65) (X)

§ 5. *Anti-laundering measures in the financial system*

The measures against laundering cannot be based solely on the application of regulations to stop it, also due to the well-known difficulties in identification, but must be the result of a combination of criminal and administrative sanctions.

Law no 197 of 1991 is of central importance in this respect, providing "urgent provisions for limiting the use of cash and securities to those carrying out transactions and preventing the use of the finance system for the purpose of laundering". This legislation followed the recommendations of the Financial Action Task Force on Money Laundering, and was passed even before Directive 91/308/EC, adopted by the Council of the European Union of 10 June 1991.

Law no 197/1991 introduced:

- a ban on the transfer of cash and other anonymous forms of payment for amounts above 20 million lire in cases where the operation does not take place between authorised intermediaries (channelling obligation). Article 15 of Law no. 52/1996 later extended this ban to the transfer between private individuals of holdings in bank and postal deposit books for a sum over 20 million lire (article 1);
- the obligation to identify clients who carry out operations over the said value, even if in part payments, and to record such information into a single information file set up at company level. All authorised intermediaries are required to establish and keep a single information file; there are provisions for the only data to be transmitted to the Italian Foreign Exchange Office for purposes of carrying out research in order to identify any laundering phenomena in particular territorial areas (art.2);
- the obligation to notify any suspicious operations, which is further described below (article 3), and which has in fact transformed the passive collaboration of intermediaries into active collaboration.

Another important anti-laundering measure is Legislative Decree no. 125 of 30 April 1997 which puts into effect Law 52/1996 (Community Law 1994), implementing Directive 91/308/EC. This amended the law governing cross-frontier movement of capital and the fiscal monitoring of money and securities, under the provisions of article 3 of Legislative Decree 167/1990, altered by amendments in Law 227/1990.

The value of monitoring regulations against laundering is, in fact, clear. Even though their purpose is fiscal control of cross-frontier movement of money, they make it possible to trace any illegal operations.

In essence, Legislative Decree 125/1997 provides for:

· the free movement of cash and unregistered securities, for residents and non-residents, to and from other countries, for amounts over 20 million lire, with the obligation to present an appropriate declaration to be sent to the Italian Foreign Exchange Office, which is part of the Bank of Italy;
· the making of a declaration, for subsequently forwarding to the Italian Foreign Exchange Office, to be made at the border customs office at the time of crossing the frontier towards countries outside the European Union; and at customs offices, Revenue Police offices, post offices and banks, within 48 hours after entry or prior to exit, in the case of EU countries;
· travelling with the accompanying documentation (on entry and exit for non-EU countries, only on exit for EU countries);

· exemption of the declaration for transfers of postal orders or bills of exchange, bank cheques or bank orders drawn on or issued by resident credit intermediaries or Italian post offices, which contain the name of the beneficiary and are non-transferable;
· the possibility of the Italian Foreign Exchange Office using data contained in the declaration for anti-laundering purposes and other institutional activities, as well transmitting the same data to the financial administration or police authorities indicated in article 11 of Law 197/1991;
· the application of a financial administrative penalty from 200,000 lire up to 40% of the amount transferred in excess of the value of 20 million lire, in the event of failure to make a declaration;
· the imposition of a criminal penalty (imprisonment from 6 months to 1 year and a fine from 1 to 10 million lire) in the event of failure, in the declaration, to give details relating to the person on behalf of whom the transfer to and from abroad is made, or where the said details are false.

A further measure is that of Law no 310 of 12 August 1993, which contains "provisions for transparency in the transfer of shares and in the composition of the structure of limited companies, as well as sale of commercial businesses and transfer of ownership of land".

This measure, in fact, has the aim of achieving greater transparency in the transfer of property and the ownership of companies, as well as in the sale of business activities and the transfer of land ownership which, especially in areas on the outskirts of cities, is often used for illegal operations.
In particular, the transfer of company shares must be carried out by authenticated subscription and subsequent deposit for registration in the businesses register. Notaries public have the obligation of depositing the documents relating to the transfer of businesses in the businesses register and to transmit copies of them to the local police authorities. They are also required to transmit to the same authority essential information relating to the sale and purchase of land, indicating the contracting parties, the asset which is subject of transfer as well as the price agreed in the contract. Finally, the municipal authority issuing trading authorisations for business activities, or authorisations for businesses to be transferred to other persons, has to notify details of the authorisations to the competent police authority for that area.

Lastly, Decree no. 269 of 4 August 2000 establishes at the Ministry of the Exchequer and Economic Planning a computerised register of current and deposit accounts, pursuant to article 20 (4) of Law no. 413 of 30 December 1991. As a result of this legislation it is now possible that clearly specified figures, such as judicial authorities, the Italian Foreign Exchange Office and police authorities can request information in relation to current or deposit accounts held by physical or legal persons, or jointly held by them or to which they act in their own name or as agent.

§ 6. *Reporting of suspicious operations*

The provisions of Law 197/1991 include a separate section with regulations governing so-called "notifications of suspicious financial operations", amended by Legislative Decree 153/1997, which was also issued to implement the aforesaid Directive 91/308/EC on laundering.
Specifically, article 3 of Law 197/1991 provides that it is the obligation of financial intermediaries to notify without delay "every operation which, by its characteristics, entity, nature or any other circumstance whatsoever, having regard to the economic capacity and business carried out by the person concerned", leads to the belief that the money, assets or property subject of the operations may derive from a criminal offence.

In particular, the intermediaries have an independent and primary obligation, in brief:
· in the systematic collection of information;
· in the preliminary screening of the same;
· in notifying the administrative authority – namely the Italian Foreign Exchange Office – of suspicious movements
thus introducing the principle of "active collaboration" by the intermediaries themselves.

The Italian Foreign Exchange Office:
- examines notifications, taking account also of possible underlying economic motives;
- obtains further data and information from the intermediaries;
- uses the results of financial flow analysis;
- exchanges information with the police authorities and foreign counterparts;
- transmits, at the end of the said examination, the reports received, together with a technical report, to the Revenue Police Special Monetary Investigation Unit and to the Anti-mafia Investigation Bureau, who are competent to carry out further investigations.

A further significant development in this respect is article 3 of Law no.197/1991, amended by Legislative Decree no. 153/1991, which designates the Anti-mafia Investigation Bureau and the Revenue Police Special Monetary Investigation Unit as the bodies responsible for pursuing investigations resulting from individual notifications, also establishing that, in the case of reports relating to organised crime, the said bodies shall inform the State Anti-mafia Prosecutor.

In concrete terms, the Italian legislature – also by reason of the provisions of the Strasbourg Convention on the question of extending offences involving laundering to cover all crimes – has sought in this way to focus specific "attention" on combating laundering by mafia organisations.
The new way of dealing with reports of suspicious operations by way of financial analysis and investigations, has also been supplemented by the introduction of feedback which, if used as a further method of study and guidance, could over time also provide notable input for the entire notification system.

In fact, the fifth paragraph of the new article 3 requires that if the Anti-mafia Investigation Bureau and the Special Monetary Investigation Unit, in the light of facts obtained during police investigations, do not find elements worthy of further investigation, they must also inform the Italian Foreign Exchange Office, which will subsequently inform the intermediary who made the original notification.

Furthermore, also pursuant to the said fifth paragraph, the investigative bodies must inform the Italian Foreign Exchange Office of any information emerging from the investigation that may be useful for preventing the financial system being used for laundering.

A further important factor is that all information relating to the implementation of the anti-laundering regulations in the possession of the Italian Foreign Exchange Office and the other investigation and control bodies is protected as confidential information, also in relation to public administrations.

However, the system of protection is not absolute, in that the second paragraph of article 3-*bis* provides that the identity of the physical and/or legal person can be revealed only when the judicial authority, for stated reasons, regard it as essential for the purposes of carrying out criminal investigations.

However, the legislature has been careful to provide for the confidentiality of identity, even during specific police investigative activities, such as seizure of documents, which, by their nature, could be carried out by judicial police authorities. In this case – article 3-*bis* (3) – there is an obligation to adopt the necessary measures to assure confidentiality.

Another factor which it is appropriate to consider relates to the power "to suspend the suspicious financial operation". The amendment to the regulations by way of article 3 (6) gives the Italian Foreign Exchange Office power to do so, also on the recommendation of the Anti-mafia Investigation Bureau and/or the Special Monetary Investigation Unit.

This power, given to the control body, can be exercised, where there are reasons for suspicion and for a maximum of 48 hours, on condition that the suspension cannot give rise to prejudice:
· for the investigations in course;
· for the current operating ability of the intermediaries.

One aspect which is appropriate to emphasise is the provision in the regulations on the basis of which notifications made by intermediaries pursuant to Law no. 197/1991 do not constitute breach of the obligation of confidentiality and do not give rise to any type of liability.

Of relevance in this respect is the recent Legislative Decree no. 374 of 25 September 1999 which, for the purpose of implementing Directive 91/308/EC relating to prevention of the use of the financial system for the purpose of money laundering, extends in whole or in part the application of the provisions under Law 197/91 to those activities particularly susceptible to being used for the purposes of laundering by reason of the fact that they enable the accumulation or transfer of massive economic or financial resources or are highly exposed to infiltration from criminal organisations.

In particular, the said decree extends the area of application of the anti-laundering regulations to the following activities, whose exercise remains subject to the possession of licences, authorisations, inscription in rolls or registers, or to a prior declaration of commencement of business:
· debt recovery for third parties;
· storage and transport of cash and securities without the use of specific security guards;
· agencies dealing in property mediation;
· trading in antiques;
· business of auctions houses or art galleries;
· trading, including export and import, in gold for industrial or investment purposes;
· manufacture, mediation and trading, including export and import, in precious objects;
· management of gaming houses;
· manufacture of precious objects by craft businesses;
· loan mediation;

· investment agencies established by article 106 of Legislative Decree no. 385 of 1 September 1943.
The decree (article 4) imposes specific obligations on the said businesses with regard to identification, registration and notification of suspicious operations, providing for:
- penalties in the event of breach (article 6) of the obligations for identification and registration, as indicated in article 2 (1) of Law 197/91;
- penalties in the event of breach of the obligations of notification, as indicated in article 5 (5) of Law 197/91.

In the recently updated "Operational instructions for identification of suspicious operations", the Governor of the Bank of Italy refers to the awareness of customers as a fundamental moment in the logical series of events that leads to the evaluation of the operation for the purposes of the forwarding of the suspicious operation (as well as the areas of risk and possibilities of developing the relationship) and indicates the measures – in particular the Unified Information Archive, provided by the anti-laundering legislation – in order to improve such awareness.

§ 7. *Inquiries into economic wealth: the investigative model*

The regulations in force for combating organised crime on an economic and financial level, offer many and various investigative possibilities.

In this respect, although it is difficult to reduce inquiries to rigid and stereotypical formulae, given the inevitable variety of individual cases, nevertheless it is possible to provide, merely by way of guidance, various indications, arising from operational experience, of the investigative methods that are regarded as most fruitful in the fight against organised crime.

In particular, it has been found effective to bring together various operational modules that tend to make best use of the complementary features existing between the repressive aspects of the legislative framework and those aspects that are purely preventative and to obtain the best results by hitting the vital centres of organised crime in "policing" terms as well as economic and financial terms.

As is well known, a valid investigative instrument is that of the system of restraint measures, about which more will be said later (Law 575/65, as amended by Law 646/82) which makes it possible to launch specific inquiries and banking and property investigations, starting from the presumption of the existence of evidence indicating membership of criminal organisations. The effectiveness of

this regulation derives essentially from the possibility of making the activities of certain people the subject of various specific controls, even where the activities are being conducted in the name of another person or company.

As experience has shown, this type of investigation, which is essential for destroying the economic and financial potential of mafia-type associations and for identifying their market investments, cannot be carried out – to ensure greater effectiveness – without a parallel activity which consists entirely of policing, for the purposes of obtaining proof of the commission of offences.

A successful anti-mafia investigation must therefore have high technical and qualitative content, using first of all, as already indicated, the various possibilities offered by the legislation (undercover operations, environmental interceptions, investigative interviews, targeted bank inquiries, obtaining evidence from collaborators) in an attempt to create a sufficient amount of evidence to support subsequent criminal proceedings.

Consequently, every inquiry must operate according to a "twofold system", seeking to make best use of those complementary legal provisions of a repressive as well as preventative nature.

This type of approach makes it possible, at the end of the preliminary inquiries, and once there has been a reconstruction of the economic interests traceable to the organisation under investigation, to effectively strike the illegal wealth accumulated, by way of:

- preventative seizure pursuant to article 321 Penal Procedure Code, compulsory confiscation in the event of conviction, pursuant to article 12-*sexies* of Law 501/94, of money, moveable goods and real estate and/or other property that the defendant holds without justification and to which he holds title, even through another physical or legal person, or is entitled in any way whatsoever, whose value is disproportionate to his income or that of his business;

- at the same time, the commencement of proceedings for the application of suitable restraint measures of a personal or property nature (seizure and subsequent confiscation) in relation to all those who belong to the said mafia-type organisation that are under investigation, even on the sole basis of evidence within the meaning of article 2-*ter* (2) & (3) of Law 575/65.

The validity of this approach is, among other things, confirmed by the last paragraph of the said article 2-*ter* of Law no. 575/65, which confirms the complementary nature between restraint and confiscation measures, on the one hand, and measures of a penal nature on the other.

§ 8. *Investigations into economic wealth*

§ 8.1. *Introduction*

The activity of fighting organised crime requires the coordinated use of a series of investigative measures provided by numerous regulations, whose mastery is essential in order to ensure a significant effect.

Described below, in systematic form, are the requirements, characteristics, legitimate subjects and methods for setting up inquiries aimed in particular at reconstructing the illegal wealth accumulated by criminal organisations and identifying the channels of laundering and reinvestment in economic activities used by them.

Alongside the general procedures – which fully identify those who are lawfully entitled to operate in the sector, the requirements for making use of specific investigative powers, as well as procedures to be followed for obtaining authorisations and related requirements – there are also indications regarding methodology and practical procedures for carrying them out, taking due account of the fact that these must be regarded only as suggestions and not absolute guidelines. In fact, only through a careful study of individual situations encountered "on the ground", together with an adequate, parallel intelligence activity, will it be possible to choose and adopt the most appropriate methods of investigation for the particular case, within the proper roles and responsibilities.

This is due to the fact that the multiplicity of forms in which the illegal activities of organised crime can take, for example, in order to infiltrate into the "healthy" economic and social fabric, as well as the continuous evolution of methods used by criminal fraternities in order to make use of the wealth that they have illegally accumulated, make it difficult to pursue investigations according to rigid and stereotypical formulae.

When we talk about investigations in the sector of economic wealth, we are referring both to inquiries that are directed towards criminal procedures for seizure of moveable property and real estate that have been illegally accumulated as the proceeds of crime, as well as inquiries regarding

wealth and lifestyle, in the context of a special administrative procedure aimed at the application of restraint measures on property (seizure and confiscation) and personal measures (special surveillance, residence restrictions).

In this respect, the system of preventative measures is a particularly effective distinguishing feature of the Italian legislation against mafia-type crime, which forms part of the penal procedure, bringing forward the threshold of criminal sanctions to the moment when there is still no certainty in terms of evidence as to the illegal origin of the assets or wealth, there being a presumption of social danger (meaning membership of, or proximity to, major criminal organisations).

Danger must be adduced from elements of fact (not from mere conjecture, suspicion or inference): recent accusations of serious crimes, lifestyle disproportionate to declared income, company of people with previous convictions, evidence emerging from current or past criminal proceedings, especially when they are sufficient to support a preventative order; evidence can be adduced also from acquittals, provided that it is firm evidence.

Social danger must be currently existing. This current existence is no less in respect of those for whom it is possible to affirm their continued membership of a criminal organisation.

Preventative measures are taken in relation to:

- persons who are habitual criminal traffickers (article 1 (1) Law no. 1423/1956);
- those who by reason of their conduct or lifestyle must be regarded as living regularly, or in part, on the proceeds of crime (article 1 (2) Law no, 1423/1965);
- those who commit offences that offend or put in danger the physical or moral wellbeing of children, or public health, safety or peace (article 1 (3) Law no. 1423/1956);
evidence of belonging to mafia-type or equivalent associations (article 1 Law no. 575/65);
evidence of belonging to associations involved in drug smuggling (article 74 of Presidential Decree no. 309 of 9 October 1990);
- those in relation to whom, by reason of their conduct and lifestyle, it must be assumed, on the basis of factual elements, that they live regularly, or in part, on the proceeds of crime, when the alleged crime from which the proceeds derive is one of those specified by articles 629, 630, 644, 648-*bis* and 648-*ter* Penal Code (blackmail, kidnapping, usury, laundering, investment of illegally obtained money, assets or property) or smuggling.

Personal preventative measures are:
- oral warning (warning to behave in accordance with the law) (article 4 Law 1423/1956)
- Special police surveillance (article 3 (1) Law 1423/1956), with prohibition on staying in places other than regular place of residence (article 3 (2)) or with obligation to reside only in regular place of residence (article 3 (2)).

The oral warning enables the police authorities to impose upon persons convicted for criminal offences prohibitions on possession or use, in whole or in part, of any kind of radio transmitter, radar or night viewer, bullet-proof garments or accessories, vehicles that are armour-plated or modified in order to increase their power or offensive capacity, or designed in any way for avoid police controls, as well as computer programmes or other instruments for codifying or ciphering conversations and messages (this provision has been recently introduced by article 15 of Law no. 128/2001).

The criminal law provides punishments for breach of the preventative measures.
Possession or use of instruments, apparatuses, vehicles and programmes can, upon the application of the police authorities, give rise to confiscation and for the said articles to be used for institutional purposes.

§ 8.2. *Financial and property inquiries provided by the Antimafia legislation: article 2-bis Law no. 575 of 31.05.1965*

The legislation provides that the "State Prosecutor and the local police authority responsible for making the application of a personal preventative measure carry out inquiries as to the lifestyle and the financial and property assets available to the persons under investigation for membership of mafia-type associations in relation to whom application may be made for special surveillance measures with or without a restriction on residence".

Pursuant to article 13 of the law ratifying the Palermo Convention (Law 146/2006), entitled "Allocation of responsibilities to the District Antimafia Prosecutor" in cases involving transnational crimes "1. In relation to offences under article 3 of this law, the District Antimafia Prosecutor is also given the responsibilities attributed to the State Prosecutor and to the police authorities under article 2-*bis* (1), (4) & (6), article 2-*ter* (2), (6) & (7), article 3-*bis* (7), article 3-*quater* (1) & (5) and article 10-*quater* (2) of Law no. 575 of 31 May 1965".[101])

[101] Cf. note no.1.

These investigations into property assets constitute the first stage in a more detailed procedure which, once completed by the subsequent activity of the appropriate jurisdictional bodies, leads to the adoption of restraint measures involving seizure and confiscation of assets of illegal origin, which can be traced, directly or indirectly, to the aforementioned suspects.

Requirements. Property inquiries can be carried out in relation to:
persons suspected of belonging to mafia-type and equivalent associations;
persons suspected of belonging to associations involved in drug smuggling (article 74 of Presidential Decree no. 309 of 9 October 1990);
those in relation to whom, by reason of their conduct and lifestyle, it must assumed, on the basis of factual elements, that they live regularly, or partly, on the proceeds of crime, when the alleged crime from which the proceeds derive is one of those specified by articles 629, 630, 644, 648-*bis* and 648-*ter* Penal Code (blackmail, kidnapping, usury, laundering, investment of illegally obtained money, assets or property) or smuggling.

Obviously the concept of a person under suspicion in this case is different from that which justifies the launch of criminal proceedings, even if it can be based on the same elements.

The degree of approximation to the real request for a preventative measure is considerably lower than what is necessary in order to make an accusation of guilt in a criminal trial.

The legislative rulings on the concept of sufficiency or weight of evidence relate to the criminal trial: they do not relate to preventative measures, for whose application it is necessary not to prove that the accused is a member of the criminal association, but to prove his dangerousness arising from his proximity with such associations.

For this purpose the statements of police collaborators can be very useful, even when they are not sufficient to confirm "serious suspicions" or to prove guilt, as is required respectively for the application of a precautionary measure or for conviction in a criminal trial (the rule under article 192/3 Penal Procedure Code, according to which a statement of accusation must be considered together with the other elements of proof that confirm its reliability – the so-called "external support" – is valid today as much for the conviction as for the precautionary measures).

From the situation described it emerges that the regulations can be applied in relation to inquiries and property restraint measures provided by the anti-mafia legislation, even in relation to those who, while not suspected of belonging to mafia-type associations, nevertheless obtain or receive profit from certain types of crime that are typical of organised crime. In order to investigate fairly frequent and significant phenomena of false nominees and indirect management of economic activities, the Italian legislation has provided that property inquiries can also be carried out in relation to physical persons (spouses, children, those who have lived with the suspect during the past five years) and legal persons (companies, bodies, partnerships, associations etc.) to whose property assets the suspect has access, wholly or in part, directly or indirectly.

Legitimate authorities: in order to carry out their inquiries into property assets, the State Prosecutor or the local police authorities responsible for applying a preventative measure[102] are able to make use of the Revenue Police or Judicial authorities in order to carry out the necessary investigations.
The State Prosecutor or the Police authority also has the power to request documents that are considered to be useful in relation to the persons who are being investigated, directly or by way of officials or police agents, from every public administration office, from every credit authority, as well as from businesses, companies and authorities of every kind, information and a copy of the said documents. Furthermore, on the authorisation of the public prosecutor or trial judge, the official or judicial authorities can seize documents following the procedures set out under article 253, 254 and 255 of the Penal Procedure Code.

Subject matter of the property inquiries. In accordance with the provisions referred to above, the property inquiries relate to:

- lifestyle, which refers to the overall economic power of the suspect (income held in savings, investment of assets and purchase of goods and services) and can certainly be apparent from the outward appearances of spending capacity and financial comfort. Valid indicators of spending capacity are all those appearances that presume a "consumption" of income, such as for example: possession and/or access to private assets that are particularly costly, whether in terms of purchase or maintenance (e.g. fast and/or luxury cars, boats, aeroplanes, race horses); possession and/or access to luxury houses and second homes (e.g. villas in tourist resorts) in Italy or abroad; possession and/or access to land, hunting reserves etc.; visits to gaming houses, luxury hotels and

[102] Responsibility for prosecuting the preventative measures is determined according to the general principles of criminal procedure, so that, for example, the public prosecutor is appointed from the prosecution department in the court in the provincial capital where the accused person resides.

restaurants, nightclubs; regular purchase of precious goods, works of art, furs and other luxury items;

- financial assets consist of securities (including unregistered securities), currency, cash, credits and earnings from income on capital or from speculative operations (capital placed on mortgage, deposits and current accounts, company shares, debentures and similar securities, loans on guarantee and sureties):

- Property includes the overall assets (real estate and moveable property, including intangible assets) relating to a person or entity (houses, land, cars, licences etc.) and the inquiries must seek to reconstruct their gradual formation;

- finally, the inquiries relating to economic activity must seek to identify any income producing activities (businesses producing or marketing goods, service companies, self-employed or employed work) in order to ascertain whether these are capable of justifying the lifestyle of the property assets concerned.

In this way, it is possible to build up a complete picture of the economic condition of the person under investigation, since it is examined both from a static point of view (property held at that moment), as well as from a dynamic aspect (means of producing income through the wealth built up over time, up to their quantity and quality at the time of the investigation).

The investigations of property assets also relate to:

- any licences (e.g. police or commercial licences), authorisations, concessions (public water, public land or for excavation of quarries or mines), permissions to carry out business or commercial activities, including enrolment in professional associations (engineers, surveyors, doctors, technical experts, etc.) and public registers (registers of public contracts or public services, registers of builders);

- any benefits from contributions, funding or grants and other assistance of the same kind, however described, granted by the State, by public authorities or by the European Union.

Operating methods. Intelligence activities are of particular importance in carrying out investigations. Although they are important for any kind of investigation, they become even more

significant in inquiries of an economic nature, which generally require time, resources and a particularly high degree of professionalism due to their considerable complexity. This activity must be logically organised in various stages, including:

- acquiring a full knowledge of the environmental context, in order to provide a prompt identification of all those situations which, by reason of their methods, their proximity to certain particular contexts, etc., are anomalous in comparison with normal economic and social situations in a particular area and are therefore worthy of investigation;

- examination of municipal registers, for the purposes of a complete identification of suspects, their families and any cohabitants, as well as the targeted and discreet acquisition of information for the purpose of identifying "friends" and associates of those concerned;
- preliminary and confidential economic investigations, for obtaining data, evidence and useful information relating to sources of income, assets and property traceable to the suspects, as well as physical and legal persons who have direct or indirect contact with them.

With particular reference to these investigations, it should be emphasised that a valuable source of information is that of the various databases which can be consulted, in real time, through the information systems used by the police forces (among which the most significant are the files of the police authorities, public registers, national registers, trade registers, chambers of commerce, the tax register, the social security register, judicial records, residency files, and statistical data, etc.).
Another source from which it is possible to obtain a considerable amount of information, including potentially interesting material for operational purposes, is the Internet.

In the subsequent stage of actual investigation into property assets, the operating procedures differ, generally speaking, according to the person concerned.

In the case of a physical person – once he has been fully identified in terms of personal details, together with family and/or cohabitants – it is necessary to proceed with:

- identifying the type of income he receives, examining, at the same time, his tax position – for the purposes of income tax, VAT and other taxes – and checking whether there have been any previous tax or property inquiries and/or previous criminal investigations;

- establishing possession of real estate and moveable property registered throughout the national territory, as well as financial assets (bank deposits, current accounts, shares, debentures, investment trusts, etc.) with companies and banks, post offices and financial intermediaries;

- acquiring information from the competent authorities (police authorities, chamber of commerce, professional associations, local authorities of residence etc.), in relation to the granting of any licences, authorisations, concessions, permissions for business or commercial activities and registration with professional associations and on public registers;

- comparing the results on income with those relating to property for the purpose of examining the existence of discrepancies and inconsistencies between the actual situation and the situation as declared by the person concerned.

In the case of companies that are directly or indirectly associated with one or more persons suspected of belonging to criminal organisations, or in some way linked – as shareholders, investors, etc. – with persons who have criminal connections or are known for being involved in smuggling, or connected to such people by family or business relationships or by friendship, the investigations to be carried out are obviously more complex. In this case, save for independent inquiries carried out in relation to the specific case, the investigating authorities proceed by:

- examining the economic, property and financial situation of the business, investigating those aspects that form the basis of the assets in the accounts and carefully examining the economic and financial accounts that might be of interest, as well as accounting entries that relate to the suspicious business transactions. Among other things, specific attention should be given to investments by and payments to shareholders during the life of the business (investment of initial capital, subsequent increases in capital, etc.), also in relation to subsequent income, as well as any further investments, payments, subsidies etc., obtained from public as well as private bodies, whether physical or legal persons;

- investigating the income and assets of the shareholders, financial backers and principal investors, in order to ascertain their real investment capacity;

- carrying out banking investigations. These, as well as being the responsibility of the business under investigation and its representatives, will be carried out, where applicable, also in relation to the financial backers and, in the case of a company, in relation to shareholders who are close to

criminal circles, in order to provide a full picture of capital movements into the company as well their origin and provenance.

In particular, the investigation is carried out by:

.. identifying the companies and banks, postal administration or other intermediaries, with whom accounts or other forms of financial investment are held which are traceable to the aforementioned suspects, and subsequent notification of the order made by the competent authority as well as the acquisition of accounts, data, information and documents of interest;

.. examination of the documentation obtaining. In this respect, it is appropriate to remember that in most cases, banking transactions have objective characteristics that do not allow the possibility of identifying the underlying motivations. On the other hand, the same transactions, if compared with the person carrying them out, his conditions (e.g. income earning capacity, property owned, proximity or otherwise to specific circles etc.), or the circumstances in which they are carried out, may appear to be "normal" or they may be highly suspicious. In this respect, it is useful to refer to the so-called "indications of anomaly" in the transactions (e.g. values which are disproportionate, unjustifiable, payments in instalments, operations regularly carried out in the name of unknown third parties or ordered with indications that are obviously inexact or incomplete, especially if these relate to essential data such as, for example, the person involved in the operation, etc.)[103].

In any event, in the context of the banking investigation, the controls generally concern:

.. debit and credit operations on current accounts as well as savings deposits (of particular interest, in this respect, are unregistered transactions);

.. Additional operations provided by the bank (e.g. issuing of bank drafts, cashing of bills on behalf of third parties, bank custody of securities and currency, location of safe security boxes, etc.);

.. documentation relating to the granting of surety guarantees and security operations for third parties;

.. other operations carried out with the intermediation of operators in the financial sector;

[103] A list of the indications of anomaly in banking and financial operations is contained in the Bank of Italy manual entitled "***Operational indications for reporting suspicious operations***" (see point 3 below) recently revised also in relation to Euro exchange transactions and operations via Internet.

In this respect, the forthcoming creation of the centralised and computerised register of current and deposit accounts is an important and innovative screening instrument. [104] This register enables the investigation authorities to establish the existence of any relationships between current and deposit accounts. Relationships between current and deposit accounts (which does not include deposit certificates or similar securities) means current and deposit holder or bearer accounts, in cash or securities of any amount whatsoever, as well as every other continuing relationship forming part of the institutional business of the intermediary (administration or management of the client's property activities).

final analysis of the overall information obtained and examination of the origin, whether justified or not, of capital flowing into the company. In this context, in particular, with relation of investments by shareholders or others in favour of the company, it is necessary to ascertain whether the payments are disproportionate in relation to the income earning capacity of those who have provided them and whether the capital assets provided cannot be justified even by phenomena of tax evasion, given that, in this respect, the discrepancy could possibly be due to the setting up of a limited company of illegal, or at least doubtful, origin.

Objectives. Generally speaking, it should be remembered that as these investigations have the purpose of applying measures for seizure, the primary objectives must be:
- Identification of the goods to which the person under investigation may have direct or indirect rights of access.
The concept of "rights of access" includes not only all forms of ownership of rights over the asset, but also those other concrete forms of access which allow independent use, other than occasional or temporary use. In other words, the aforesaid rights of access need not necessarily constitute one of the bases of civil law, it being sufficient that the person under investigation may, in fact, use the assets (even if they belong to others) as if he were the lawful owner. In this respect, with regard to the property of spouses, children and cohabitants, this right of access is presumed by law without the need to make specific investigations.

It is clear, however, that the concept of right of access represents a requirement of a subsidiary nature, which is relevant only when it is not possible to establish, by ordinary means, legal title over the asset. Since the power of disposition can also be exercised indirectly, it is not necessary for the purposes of seizure to demonstrate that the person concerned is owner of the asset but it is sufficient

[104] Decree no 269 of 4 August 2000 “Regulations establishing registration of current and deposit account relations pursuant to article 20 and 20 c

to establish that he can, in some way, determine its future or the way in which it is used. The reference to indirect right of access is designed to render ineffective all those activities (simulated agreements, irrevocable mandates, fiduciary pacts) that seek to hide the legal ownership of property in an attempt to avoid the application of preventative measures. In this respect, it is possible to overcome such situations of appearance by way of strong, clear and consistent evidence, to the same standard as arises, for tax purposes, in order to demonstrate that a taxpayer is the actual owner of an asset held by a nominee;

- demonstrating that the value of the said assets is disproportionate to the lifestyle or economic activity carried out by the said person, as well as obtaining sufficient evidence to show that the assets are the proceeds of illegal activities or constitute their reinvestment. The law requires, therefore, a connection between the assets and the illegal activity, which includes not only the money directly obtained from it, but also the assets acquired from the proceeds and those obtained through subsequent operations. So far as evidence is concerned, with extreme simplification the law refers to the considerable discrepancy between lifestyle and the extent of apparent or declared income.

However, the property investigation must not be regarded as completed by the making of the precautionary order. In fact, once it has been established that there is valid and concrete evidence as to the illegal origin of the assets, even where illegal profits have been reinvested, and the judge has accepted the evidence for the purpose of issuing an order for seizure, it is necessary so far as possible to carry out further investigations and obtain more evidence.
This is necessary in order to refute arguments by the defence which seek to reduce or invalidate the evidence put forward by the prosecution and to demonstrate the legitimate origin of the assets, thereby avoiding the final confiscation order.

§ 8.2.1 *Further investigations or controls pursuant to article 3-quater of Law 575/65*

Another kind of investigation, once again involving economic activities "at risk", is one that follows the carrying out of property investigations pursuant to the aforementioned article 2-*bis* or those carried out to examine the danger of infiltration by mafia-type crime, where sufficient evidence is found to lead to the conclusion that the economic and business activity:

- is subject, directly or indirectly, to conditions of intimidation and/or subjection within the meaning of article 416-bis Penal Code;

it may, in any event, assist the business of those in respect of whom the preventative measure of special surveillance and a residence restriction has been proposed or imposed or in respect of persons involved in criminal proceedings for one of the offences provided by article 416-*bis*, 629, 630, 644, 648-*bis* and 648-*ter* of the Penal Code and where the requirements for the application of the said personal preventative measures do not arise.

In these circumstances, the public prosecutor and the police authorities can apply to the relevant court to order:
- the carrying out, also by the revenue police or by judicial police investigators, of further investigations and controls on the said economic activities;
- the obligation, in relation to those who own or have right of access, in any way, to goods or other property of value that is not proportionate to their income or economic capacity, to provide justification of lawful origin, with the adoption, where appropriate, of a temporary suspension in the administration of the assets.

In carrying out the investigations, where they relate to situations in which there is insufficient evidence of membership of mafia-type associations for preventative measures to be applied, it will not be possible to make use of the specific powers under article 2-*bis* of Law 575/65, with particular reference to paragraph 6, but only to those provided by the ordinary law. Notwithstanding such limitation arising from the said legislation, the operational methods set out in point (2) of the preceding letter (a) can still be adopted in the specific case where there are felt to be applicable and appropriate in relation to the circumstances.

§ 8.2.2 *Examination of tax position*

Article 25 of Law no.646 of 13 September 1982 enables the Revenue Police Tax Investigation Unit who are responsible for the area in which the person usually resides, to examine the tax position of certain people, also for the purposes of investigating illegal currency and company activities.
Requirements. In order to investigate the tax position of a particular person it is necessary for there to be a sentence of conviction, even where there is still a right of appeal, for the offence under

article 416-*bis*, or where a preventative order has been made, even provisionally, pursuant to Law 575/65, where there is a suspicion of membership of mafia-type or equivalent associations.

The examination can made in relation to:

- spouse, children or those who have cohabited with the person concerned during the last five years;

- physical or legal persons, companies, partnerships or authorities, to whose property the said person has the right of access either in whole or partially, directly or indirectly;

- firms, associations, companies and partnerships in which the person concerned is an administrator or, in some way, makes choices and policies.

Legitimate authorities: The tax position can be examined by the Revenue Police Tax Investigation Unit responsible for the area in which the person concerned usually resides.

The decision whether or not to carry out a tax investigation is a matter for the discretion of those in charge of the Revenue Police Tax Investigation Units on the basis of a carefully considered analysis of the facts available (outcome of previous property investigations, effect of the confiscation order on the person's wealth, any other evidence obtained during the restraint proceedings, effect of the conviction, documents acquired during the trial, etc.) in order to assess the actual benefit – with regard to the recovery of tax from illegal earnings, or of the possible discovery of currency or company offences – and the consequent cost/benefit ratio.

Examination procedures. For the purposes of carrying out the examination procedure, article 25 (3) provides that the Court office must transmit to the competent Revenue Police Tax Investigation Unit a copy of the conviction or order applying the preventative measure.

Prompt transmission by the court office is therefore essential in obtaining information about the court orders that have been made and proceeding, where appropriate, with an examination.

In order to carry out these activities, tax police officers have the powers:

- provided by general taxation legislation and by individual tax laws;

- under article 2-*bis* (6) of Law 575/65[105] which enables them to request information from every public administration office, every credit authority and also from businesses, companies and authorities of every kind, as well as to obtain copies of documentation that are deemed useful for the purposes of investigations, and also to proceed with the seizure of the said documentation following the procedures set out in articles 253, 254 and 255 Penal Procedure Code;

- given to members of the Revenue Police Special Currency Unit[106] under the combined provisions of article 6 of Law no. 159 of 30 April 1976 and articles 25, 26 and 28 of Presidential Decree no.148 of 31 March 1988 – Consolidated Text of legal provisions on currency matters.

Of particular relevance in this respect are the powers to:

.. carry out inspections in credit agencies and special credit institutions, as well as in other premises, where there is reason to believe that relevant documents are to be found, in places other than private places of residence [article 25 (1) (c)];

.. request credit agencies and institutions to produce their accounting books, documents and correspondence and to take copies [article 28 (1) (a)];

.. seize foreign currency, Italian and foreign securities, cash and unrefined gold, where they constitute the subject of breaches in currency regulations [article 28 (1) (b)].

Pursuant to article 26 of Law 646/82, the Revenue Police Tax Investigation Unit which has carried out the examination of the tax position must notify the public prosecutor and police authorities as to all evidence obtained during examinations under article 25 and of any variations in property assets exceeding 20 million lire over the previous three years, with regard to assets transferred or received.

The same information must be notified to the Department of Public Security at the Ministry of the Interior, so that it can be registered in the Inter-force Data Elaboration Centre.

§ 8.2.3. *Obligations upon persons who have been convicted or subject of preventative measures to give notification*

[105] In this respect the powers under article 2-*bis* (6) of Law 575/65, may also be exercised directly, without prior application by the state prosecutor or police authorities;

[106] The Special Unit is an authority which, together with the Anti-mafia Investigation Bureau, is responsible for carrying out investigations resulting from *reports of suspicious operations pursuant to Law 197/91*.(see point 3 below).

Article 30 of Law no.646 of 13 September 1982 places an obligation upon certain persons to notify the Police Tax Investigation Unit in the place where they usually reside of all variations in the nature and composition of property assets whose value is no less that twenty million lire.

By the 31 January each year these persons are required to notify variations that have taken place during the previous year, when they concern items worth no less than twenty million lire.

Assets used to satisfy everyday needs are excluded.

The penalty for breach of these obligations to notify is imprisonment from two to six years and a fine from 20 million to 40 million lire. Conviction is followed by confiscation of the property, however acquired, as well as the equivalent price of the property, however disposed.

Requirements. For the obligation of notification to operate, it is necessary that the persons concerned have been convicted, without possibility of appeal, of the offence of mafia-type association or made the subject of a preventative order within the meaning of Law 575/65, insofar as they are suspected of belonging to mafia-type associations.

The obligation operates for ten years from the date of the order or from the final sentence of conviction and compliance must take place within thirty days of the event determining the variation in the nature and composition of the property involving amounts worth no less than twenty million lire.

An obligations of notification ceases when the preventative measure is revoked following appeal or application to the Court of Cassation.

Legitimate authorities. Control in relation to the obligation to notify is carried out by the Revenue Police Tax Investigation Units in the area where the persons concerned regularly reside.

Examination procedures. For the purposes of observing the aforesaid obligation, the Revenue Police Taxation Investigation Units, once they have received notification pursuant to article 25 (3) of Law no. 646/82, will follow the developments:

- obtaining from the court office a copy of the final conviction or the final orders applying preventative measures;

- creating an appropriate file for each of the persons concerned in which to include the notifications made and the results of the controls on property variations that have been notified;

- carrying out, periodically, targeted investigations in order to ascertain any omissions and adopting appropriate measures where breaches are discovered.

§ 8.2.4. *Obligations to give notification pursuant to article 3-quinquies Law 575/65*

A further obligation of notification under the anti-mafia legislation is provided in the case where measures relating to the temporary suspension of the administration of property are revoked (article 3-*quater*).

In this case the court can establish an obligation of notification for a period of no less than three years in relation to the person who owns, uses or manages the property, or part of it, to be made to the police authorities and Revenue Police Taxation Investigation Unit in the area of residence or, in the case of foreign residents, in the place where the property is to be found:

- documents relating to conveyance, purchase or payments made;
- documents relating to payments received;
- professional, administrative or management appointments received;
- other documents or contracts indicated by the court, for a value of no less than 50 million lire or such value as is established by the court in relation to the property and income of the person.

The penalty for breach of the said obligation, in respect of which there must be compliance within ten days from the completion of the document or in any event by 31 January of each year for documents agreed in the previous year, is imprisonment from one to four years and subsequent obligatory confiscation of the property subject of the undeclared operations.

§ 8.3. *Anti-laundering investigations pursuant to Law no. 197/91*

In the search for possible solutions to be adopted in order to develop more effective action against laundering, the active involvement of the banking system and, more generally, that of financial intermediation, has been identified as an indispensible line of strategy to be followed. This is due to the fact that this is a necessary step for the investment of illegal capital in the legal market and can therefore be highly effective in terms of prevention, as much as the vital collaborative function of the police authorities in combating this phenomenon. Through Legislative Decree no. 143 of 3 May 1991, providing urgent provisions for limiting the use of cash and unregistered securities in money laundering transactions, converted into Law no. 197 of 5 July 1991, the Italian legislation sought to bring about the direct involvement of the banking and finance system in order to control financial movements, closely following the recommendations of the Basel Committee and the recommendations of the Financial Action Task Force.

The regulations, in particular, prescribe a series of regulations of a preventative character and policing measures that are arranged, substantially, around three fundamental mechanisms:

- the channelling of major transactions through a system of financial intermediaries;
- the processing and management of data relating to operations exceeding a preset minimum threshold through a special information archive;
- the obligation to report operations that are thought to be suspicious.

§ 8.3.1 Obligations of identification and registration

The obligations relating to registration and identification of clients by specific operators in the financial system – to be fulfilled through the unified information archive that has been set up to memorise and conserve the relative information – have the purpose of providing an apparatus controlling financial flow which is suitable for carrying out an effective preventative action and supporting investigation activities.

The said obligations are provided by article 2 of the aforesaid Law no. 197/1991, which replaced the contents of article 13 of Legislative Decree no. 625 of 15 December 1979, providing "Urgent measures for protecting the democratic system and public security", and converted, through amendments, by Law no.15/1980 as already substituted by article 30 (1) of Law no. 55/1990 providing "New provisions for the prevention of mafia-type crime and other serious forms of social danger".

Secondary legislation subsequently laid down the methods of implementation of the said provisions, together with interpretative provisions by the Minister of Finance following requests for clarification and questions about the provisions, aimed at providing a uniform application of the aforesaid legislation by those carrying out institutional roles.

§ 8.3.2 *Reporting of suspicious operations*

The reporting of suspicious operations is, without doubt, a central factor in preventing the use of the financial system being used for purposes of laundering, and the detailed provisions ensure an adequately systematic character to the control activity provided by the law.

The reporting system was reorganised by Legislative Decree no. 153/1997, on the basis of the experiences developed in the various legislative and operative procedures over the six years in which Law no. 197/1991 was in force. The regulations give a central role to the Italian Foreign Exchange Office in matters of laundering, with the task of receiving reports, analysing and investigating them from the technical and financial point of view, and transmitting them with appropriate further information to the Anti-mafia Investigation Bureau and the Revenue Police Special Foreign Exchange Unit, which notifies the State Anti-mafia Prosecutor in cases involving organised crime.

In carrying out subsequent investigations, the aforesaid investigative bodies operate on the basis of a specific "protocol agreement". This provides that the Anti-mafia Investigation Bureau, in compliance with the legal requirements, must investigate reports which relate to phenomena of mafia-type association. In other cases, however, the Revenue Police Special Unit is exclusively responsible, whose members, in carrying out their functions, also exercise powers attributed to them under the currency laws (articles 25, 26 and 28 of Presidential Decree no. 148/1988), who are expressly referred to at point 2 (c) (3) above. These powers, by reason of the amendments introduced by Legislative Decree no. 153/1997, are extended to officials of the regional and provincial Taxation Investigation Police Units, who the Special Unit can request to carry out the operations set out in the legislation.

The investigation activity carried out by the aforesaid Units, and initially examined by the administrative police, is able to use the operational methods described above at point 2 (a) (3) and has the purpose of ascertaining whether the financial operation gives rise to any criminal offence under articles 648 and 648-*ter* Penal Code. Once evidence has been found to suggest a criminal

offence, the investigation continues under the direction of the competent prosecuting authority, who has all of the investigative measures provided by the Penal Procedure Code and by special legislation.

The State Anti-mafia Prosecutor, where necessary, will coordinate the investigation activities in relation to criminal organisations.

The advent of the European Monetary Union could have various implications on monetary and financial flows relating to illegal and criminal activities. These implications give rise to entirely new problems, above all in terms of economic rather than criminal policy.[107]

The State Anti-mafia Bureau, together with the Bocconi Commercial University in Milan, has launched a research programme on the foreseeable effects that the single currency will have on criminal laundering – both in the phase of conversion of national currencies as well as the subsequent phase of circulation inside and outside the European Union – taking into account the varying actual degrees of vigilance currently existing in the eleven countries within the European Monetary Union, despite uniformity of community standards, and in particular by reason of the differences in fiscal policies and banking secrecy.

It appears necessary to develop study models that make it possible to identify conditions under which the EMU might increase the possibilities of laundering in the monetary, financial and information sector and therefore the capacity of criminal organisations to pollute the markets and the legal economy.

One of the effects that the EMU should have, in various ways, is the reduction of transaction costs, which constitute one (if only relative) obstacle to the development of the illegal economy. While the reduction of costs is to be applauded for the development of the legal economy, it is necessary to take into account that, in the absence of adequate measures, it would also favour the illegal economy.

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[107] The European Union report on the situation regarding organised crime, presented in Brussels on the 6 November 1998, states that: *"Various leading experts are discussing the fact that the forthcoming introduction of the Euro as a single currency in the European Union may provide further good opportunities for money laundering, principally due to the fact that it will not be necessary to exchange money earned in one currency into another. The future bank note denominations of 100, 200 and 500 Euros could be an attractive alternative to the dollar, capable of being spent throughout the European Union, easily exchangeable when the European currency circulates in the international markets. There are concerns about the possibilities offered by modern technology such as Internet and electronic bank cards, even if investigations have so far provided no evidence in this respect".*

From this, it follows that the member States have two essential objectives:
a) identify those particular transmission channels – on the one hand monetary and, on the other, banking and financial – which, through the EMU, might reduce transaction costs for the illegal economy;
b) carry out the appropriate regulation and monitoring of the system of payments, on the one hand, and on the banking industry on the other, in order to find solutions that balance the need to defend the system from being polluted by the criminal economy and the need for efficiency and development in the legal markets.

In monetary terms, the Euro is destined to become an important international exchange reserve currency, both legally and illegally.

There is a strong risk that, once the national currencies have disappeared, the opening of the common monetary area will itself multiply the opportunities for laundering. It will probably be the circulation of the Euro outside Europe that will most attract launderers, even though at present it is not possible to predict whether the Euro will become competitive with the dollar and the yen, or even substitute these currencies in illegal markets.

So far as the effects that might arise in the event of the Euro becoming the currency for regulating exchanges for the purposes of money laundering on illegal markets, the analysts predict that:
- The more drastic the regulations against illegal and criminal income producing activities, the more pressure will be placed on fiduciary activities (monetary, banking and investment);
- the more that laundering techniques involve the use of cash, the more this might affect demand for Euro currency, especially in large denominations.

In relation to the single currency, and the increasingly integrated banking and finance markets, it would appear however important not to overvalue the effectiveness of actions against money laundering, such as limiting the issue of large denomination Euro notes. Laundering demand could simply be the subject of a substitution effect – from the changeover stage from national currencies – which favours concealment and laundering techniques through banking and financial channels, which are considered to be more secure.
In the "Operational instructions for identifying suspicious operations", referred to earlier and recently revised by the Governor of the Bank of Italy, one of the indicators of an anomaly in cash operations is the exchange of bank notes for different denominations and/or other currencies, especially without passing through the current account, in particular:

- exchanging bank notes for significant sums in a single transaction or over a short period of time, especially with high denomination notes;
- exchanging bank notes in lire or other European currencies for the currency of a non-European country, during the transition period of the introduction of the Euro, especially frequently and for large sums;
- exchanging bank notes in lire or other European currencies for Euro currency in the transition period of the introduction of the Euro, especially frequently and for large sums.

§ 8.3.3. *Coordinating investigations*

The centralisation of the system for reporting suspicious operations to the Italian Foreign Exchange Office has certainly produced improvements in terms of collaboration, both between the intermediaries making the reports and the body to which the reports are made – which is no longer a police authority but a financial authority – as well as between this latter authority and the two investigation bodies (the Anti-mafia Investigation Bureau and the Revenue Police Currency Investigation Unit).

Convinced by the fact that laundering is, above all, a financial problem, Legislative Decree no 153/1997 reorganised the system, distinguishing the aspect of financial analysis from the investigative aspect. (It is believed that through an aseptic approach of financial analysis it is possible to find means of discovering forms of laundering that the traditional investigative method is unable to identify).

In relation to reports involving phenomena of mafia-type associations, where the investigative bodies are required to inform the State Anti-mafia Prosecutor – who is already responsible for coordination of investigations involving criminal organisations – it is also quite clear that, due to the procedure provided by the aforementioned "agreement protocol", the Anti-mafia Investigation Bureau – also by reason of its specific responsibilities – assumes a role of pre-eminence over the Currency Investigation Unit.

In fact, after the contemporaneous transmission of the reports from the Italian Foreign Exchange Office to both investigation authorities, the Anti-mafia Investigation Bureau operates autonomously, communicating the way that intends to proceed and pursuing its own line of investigation. In this case, the Currency Unit takes no further action and limits itself to informing the Taxation Investigation Unit responsible for the area concerned for administrative purposes.

Where, however, the Currency Unit or other branches of the Revenue Police are already investigating bank accounts that have been reported, they continue investigations in close collaboration with the District Anti-mafia Bureaux responsible for that area.

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2.8. International Cooperation in fighting against organised crime: search, seizure and confiscation of the proceeds from crime

§ 1.

It is not easy to summarise the area of law covered by this paper.

The subject that it covers is an extremely complex and detailed one. Due to the increased awareness of the destabilising capacity of transnational crime, it has seen precipitous developments that have sometimes accelerated the pace of change to an astonishing speed, especially over recent years. Such a situation is quite different to the traditional picture, where national sovereignty was jealously defended on matters of criminal justice and a cool distance often existed between the various national systems and cultures.

Each of the possible headings under which problems might be examined would be worthy of separate treatment.

In itself, the area of our subject offers no fewer possibilities for extended discussion than those offered to the members of the famous Fantastic Four whose extraordinary skills every cartoon fan will well remember.

Not wishing to run the risk of raising a succession of lines of discussion which are incompatible with the need to provide a single and organic representation of the system, I would regard it as more consistent with the purpose of this meeting to limit myself to proposing certain fundamental points for study.

The objective of the first observation may be banal, but it is no less important for that.

It is in fact right to bear in mind that despite every continuing element of difficulty, international criminal law is marked by a driving force in its processes of legislative harmonisation and a convergence of national policies on crime that are extremely strong and resistant to any attempt at nihilistic devaluation.

Even those, on one side or another, who look forward to or regard it as inevitable that there will be a conflict between the West and the Islamic world, cannot ignore the fact that international criminal law continues to play an extraordinary role in bringing about dialogue in relationships with countries who have a Muslim majority. This can be seen not only in relations with those who have, autonomously (as in the case of Turkey) or by reason of previous colonial influences, commenced

or consolidated processes of secularisation of their political and legal institutions, but also in relations with those countries who are a long way away from the concept of a distinction between law and religion.

Even these latter countries, in fact, are attracted into the orbit of legal processes triggered off by a sort of new *lex mercatoria*, triggered off from the extension of international humanitarian conventions and by international policies for cooperation and development.

Naturally, I fear that there will not be sufficient time to examine these considerations which arise out of the objective observation that none of those countries which are Muslim or have a Muslim majority have even attempted to reject public international law, imagining that they might be able to base their relationships with other countries on the religious precepts of the *Sharia* instead of on a gradual adaptation of their institutions to the evolution of international law.

But perhaps it may be useful to take an example.
Today, a country such as the Islamic Republic of Iran, which is one of the signatories to an important convention such as the Vienna convention of 1988 on drug smuggling as well to the subsequent UN Convention on transnational organised crime, is involved in legislative reviews and amendment processes which until not long ago would have seemed difficult to conceive.

Now there is open discussion, for example, about the possibility of introducing legislation on the question of under-cover operations, which are entirely in line, in terms of cultural approach and positive solutions, with the regulations in force in European countries, expressly providing for the possibility of operations on a trans-frontier scale and direct cooperation with police and judicial authorities in other States.
Bilateral treaties for legal mutual assistance and extradition have been signed also with non-Muslim countries, overcoming the obstacle posed by the *Sharia* principle as to the irrelevance of jurisdictions that are without religious legitimacy.
The problem of identifying an acceptable legal basis for the exchange of services that is typical of mutual assistance, which was obstructed by the traditional refusal to acknowledge the legitimacy of activities and jurisdictional demands not recognised by the *Sharia*, has been resolved in these cases through the Koranic principle of necessity, which in itself is not dissimilar to the principle of political realism which stands at the basis of international, general and conventional law.

But let us return to a more usual analytical viewpoint than those offered by observations of such a particular experience, and return to my preliminary undertaking to restrict the possible field of analysis and comparison to reasonable limits.

It is therefore appropriate to establish a method of recognising the problem which is as necessary as it is, to some extent, arbitrary.

Certain preliminary elements of general description are necessary for this purpose.

First of all, the problem under examination ("judicial cooperation") automatically excludes from our field of discussion the area of police cooperation.

This is fine for the purposes of limiting the subject matter, but with certain provisos:
In general, the distinction between police cooperation and judicial cooperation is not easy to make in all countries, if only because in many common law systems the police authorities play the same role during the preliminary investigations as the judicial authorities play in civil law countries;
The confines between one type of cooperation and the other are rendered uncertain by the progressive inclusion of rules of international law relating to activities which, though they originate within the system of police cooperation, are now attracted within the applicational orbit of the judicial assistance treaties, especially by reason of the need to strengthen guarantees in relation to the rights of individuals affected by their implementation: these include rules governing under-cover activities and the delivery of goods and cargoes under surveillance which, for collaboration to be carried out, requires the involvement of the judicial authorities (as with the case of Turkey);
The two systems are closely interconnected, not only because good cooperation between police authorities is an essential prerequisite for the best judicial assistance, but also because the two roles can overlap and ever interchange, the same outcome being achieved through one channel or through the other, revealing indeed the experience that the procedure for obtaining evidence by means of letters of request is often used far too much, and that it is possible to achieve the same result through the simpler means of activating direct relationships of cooperation between police authorities;
Finally, one or other form of cooperation is often regulated by the same sources of international law (e.g. the UN Convention of 2000, the Convention on Laundering of 1990, but remember also the policy of unification chosen by the European Constituent Assembly in Chapter IV of Title VI of the Treaty, dedicated to Union policies aimed at the creation of a single area of justice, liberty and security); this in itself gives the idea of the unitary nature of the system, and is instrumental in the

reasoning behind my decision to leave aspects of police cooperation outside the field of examination, rather than a mere requirement to concentrate the objectives of my discussion.

In the second place, we will not be talking about specific international measures relating to criminological contexts other than that described by the traditional notion of organised crime, even though it will be necessary to consider them in the abstract sense by reason of the very close connection between the criminal phenomena concerned. These measures include the conventions on terrorism and on corruption (the principle device used by organised crime, as clearly acknowledged in the UN Convention of 12 December 2000, which sets out, in article 8, a general obligation to regard corruptive practices as criminal).

Once again, it is necessary to consider, in terms of programming, that a realistic representation of the system must take into account not only formal information about international law, but also the procedures which, in any case, have an historically fundamental role to play in the processes of creating legislation. Many positive innovations are the result of developing existing procedures and using the opportunity to transform them into regulations which are capable of ensuring stability, as well as wider and uniform application.
The examination of procedures for cooperation is therefore often an essential aspect of describing the cooperation system itself.
In concrete terms, for example, the examination of procedures makes it possible, also, to ascertain that the double incrimination clause, which still formally weighs upon European judicial support and tends, naturally, to lead to rigidity due to the compulsory nature of the measures, has, nevertheless, for some time, in factual terms, had fairly limited importance in the relationships between EU member states. This is due to the fact that it has been recognised that the member states have, for some time, not applied it to requests from other member states, even in relation to search and seizure, on the undeclared but objectively recognised assumption that "searches and seizures essentially occur in investigations involving organised crime".

Or let us consider the regulation on spontaneous exchange of information. Its importance can be appreciated all the more in the light of our domestic regulations on the admissibility of documents obtained by way of letters of request if it is considered that the Strasbourg Convention has excluded the applicability of sanctions under article 729 Penal Procedure Code to evidence acquired during proceedings following the spontaneous transmission of copies of documents in proceedings in course in another country, carried out spontaneously by the competent foreign judicial authority). This regulation, resulting from the codification of procedures already in force today, has an

operational ambit that is much wider and important. However, it continues to be formally in force, from the point of view of Italy, only in relation to the 1990 Convention on Laundering and in relations with Switzerland on the basis of the 1998 bilateral agreement because all subsequent international conventions have been agreed but still not ratified by Italy (including the Map Convention of 29 May 2000, the Palermo Convention on organised crime of 2000 and the Second Additional Protocol of the European Convention on Mutual Assistance in Criminal Matters in 2001),.

The procedure in relationships of collaboration, in fact, sees the increasing development not only of the spontaneous exchange of information, but also the adoption of measures that are new and, so to speak, *extra ordinem*, which tend to rationalise and encourage these channels of exchange of information, as in the case of cooperation protocols signed by the Italian National Antimafia Bureau with the state prosecution authorities of numerous extra-European states, which I shall refer to later, if we have the time and you have the interest, though I am sure that Vigna will already have spoken about it.

With these preliminary matters established in order to limit and clarify the field and the method of observation, we can now attempt to enter a subject within which it will nevertheless be necessary to make speculations which are further limiting.

In general, I believe that it is useful to create an overview of the whole system: in building up a picture of the way that the mechanisms of international cooperation function, try to imagine a series of concentric circles that progressively extend into space.
Each of these circles corresponds with a specific area of cooperation, the intensity of which decreases gradually as we move further away from the centre, but the extension of which in space naturally and gradually becomes larger.
In practical terms, the concentric circle closest to the centre is that defined by the political surroundings of the European Union, within which cooperation is governed by regulations that are fairly strong and in which most Letters of Request are executed (three years ago it was calculated that more than 70 per cent of Letters of Request to and from Italy related to other EU member states, in addition to which has to be added those relating to mutual assistance with countries who were then candidates but are now members).
It is a system that is fairly homogeneous, insofar as this word can be used when referring to things that still reflect the different legal and institutional traditions, but the driving force of which is

destined to be ever greater, save for the various crisis factors in the effectiveness of intergovernmental cooperation policies created over recent years.

Beyond this first circle, there is another larger one, defined by the sphere of action of the Council of Europe.

This is an area of cooperation that is less intense than that of the Union, stretching out now towards the principle of mutual recognition of legal decisions and supplementary controls, but rather wider and, despite this, quite essential and significant.

Its width (47 states now form part of it, including Armenia and Azerbaijan) makes it a genuinely pan-European body, that is capable of developing a framework of cogent convention regulations for a large number of states and which carries out an attractive role even outside its confines.
Some of its conventions have, in fact, also been acceded to by non-member states (this is the case with the Strasbourg Convention on Laundering, which has been signed, for example, by Canada and Mexico). Other conventions are so important that they constitute a sort of universal model for the evolution of international convention law, such as in the case of the 1959 Convention on Mutual Assistance and its subsequent additional protocols, the last of which was adopted in October 2001.
Naturally there are strong connections between the two concentric circles.

On the one hand, the European Convention on Mutual Assistance is still the fundamental text in international law on the question of mutual assistance, so that even within the European Union the new regulations are devised as additional instruments to the Council of Europe's principal convention (in the same way, it should be said, as the relationship between the conventions relating to extradition made by member states in 1995 and 1997 and the Council of Europe's General Convention on extradition) On the other hand, progressive changes in European Union measures have become the model for the evolution of the principal convention, as can easily be seen if, for example, the essential contents of the EU convention of May 2000 are compared with those of the second additional protocol of the European Convention on Mutual Assistance made by the Council of Europe in October 2001.

The third and final great concentric circle is provided by the United Nations conventions which – along with those in relation to safety on civil transport, terrorism, drug smuggling, up to the Palermo Convention on organised crime in 2000 and its additional protocols on arms and human

trafficking – is able to encapsulate the general relationships between states, even if, naturally, the breadth of cooperation necessarily leads to a lesser degree of incisiveness in its forms

Naturally, the system of concentric circles that has just been described relates to multi-lateral sources with which Italy is concerned. Otherwise it would be necessary to shift the focus of attention to other regional systems of cooperation.

From the Italian point of view, these, by their very nature, are contractual sources that have the purpose of fixing minimum common denominators in relationships of collaboration with countries in general. They do not, therefore, have a particularly large effect on the development of domestic law, even though they can in fact provide the opportunity for initiating processes of rationalisation of specific laws and also important domestic law institutions. Recently, the Italian Senate approved, through the relevant commission, the draft law ratifying the Palermo Convention, taking the opportunity to propose two important new provisions:

1) in relation to undercover operations, through the introduction of a single discipline that is valid in removing the inconsistencies arising from the superimposition of previous laws that related to individual sectors;
2) and in relation to the rules governing compulsory confiscation and confiscation for value, also through, in that case, the choice of introducing uniform regulations for a subject that had developed inconsistently. In particular, confiscation for equivalent value, which ought to have become generally applicable in the light of the provisions of the 1990 Strasbourg Convention on Laundering, has been extended to all cases of compulsory confiscation, being applied, where it is not possible to trace and find the objects constituting the product, profit or price of the crime, to all assets and other benefits which the criminal has at his disposal (even through someone else), up to the equivalent value of the product, profit or price of the crime that it is not possible to confiscate.

But let us return to the first of the concentric circles defining possible cooperation in fighting organised crime: that defined by the cooperation regulations built up within the context of the European Union.

The importance of this area is, naturally, even more relevant in the historical moment in which the constitutional outlines of the process of European integration are defined.

It is probable that entire generations of experts on constitutional law will continue to work away on attempting to define the nature and effects of a constitutional process which frankly seems impossible to compare with any previous historical and legal experience.
Leaving these concerns to the experts, it seems to me to be sufficient, for the moment, to limit ourselves to understanding that the very idea of a European Constitution definitively sanctions the need to give life to a common sphere of public action around which to organise the complex mass of community functions and the residuary powers left to the states that are necessary in order to provide a response to common problems in relation to which, for some time, it has no longer been possible for individual states to give isolated responses.

In the political and geographical area directly concerned by what is happening in the most interesting institutional laboratory in the world, the reality of the situation is imposing not merely a different way of running international organisms that already exist or broadening areas of legal cooperation between individual states, but it is creating new political organisations, defined by the apparent paradox that it is not territory, and, therefore, space that defines the content of law, but the law which politically defines the territory, even with regard to subjects, such as those of criminal justice and security, that are traditionally jealously defended by national prerogatives.

The intimate connection between space and law at the basis of the traditional idea of territory as the exclusive domain of the nation-states, in any event, is already in crisis due to the effect of processes of globalisation – in their multiple economic social, technological and political aspects – and, so far as we are immediately concerned, by processes of aggregation of organised crime on a transnational scale, which makes it clear to us that individual states are incapable of acting in order to prevent and control it.

The facts demonstrate that the same idea of horizontal cooperation between states is broadly insufficient for the gravity and the urgency of the challenges posed by the transnational dimension of the threats to the security and liberty of citizens.

If it is already apparent that traditional cooperation measures (letters of request, extradition) are no longer effective, even the newest and most modern forms of collaboration based on the principle of mutual recognition of judicial rulings will soon be found to be insufficient.
It will soon be clear that there is a need to move towards courageous forms of vertical cooperation which will mean the abandonment of the precepts of individual national systems.

The same, though cautious, prediction contained in the project for the European Constitution, with the possibility of establishing by law a European public prosecutor's office, is sufficient to indicate clearly that, from a certain point onwards in the process of European construction, there will no longer be a difficult harmonisation of national laws to guide Giscard D'Estaing's vision of a European legal area, but there will be integration of the structures and apparatuses. This will require legal rules that tend towards uniformity, even at constitutional level, in the individual systems (as has happened in sectors which have always been the domain of community law).

Naturally, an awareness of scenarios that many people might regard as still very distant must be balanced by a carefully considered and realistic valuation of the current situation and its most practical and immediate prospects.

I would propose to start off with a specific date – 1997 the year of adoption of the Action Plan against organised crime (decided by the European Council on 28 April 1997).

I do not want, by this, to diminish the importance of the various positive (though, in fact, not numerous) aspects of the "third pillar" of Maastricht[108].
I believe, however, that there is an objective truth and validity in the widely held view that only through the 1997 Joint Action Plan was it possible to take a genuine step forward in Europe polices against organised crime. In this way it was possible to express the need, which had thus far been frustrated, of identifying a global approach strategy, which would provide a framework but, I would say, also a cohesive context, for the measures already adopted, and at the same time, for those proposed.

After only six years, and looking at the results already achieved, it seems strange to recall that this initial effort by the European Union in strategic elaboration is represented by a measure that, as has been rightly observed, was a "non measure" from the legal point of view.
The Joint Action Plan did not form part of any category of document then envisaged by article K.3. of the Treaty (conventions, joint actions and common positions) nor any of the various types of documents adopted by the Council over its history in order to overcome difficulties in adopting binding measures.

[108] I am thinking of the Convention establishing Europol and the related protocol on the powers of the Court of Justice, of the Convention on the protection of the financial interests of EU countries and related protocols, of the Conventions in relation to customs and excise.

And yet the 1997 Joint Action Plan succeeded in achieving legitimacy by force of the implementation mandate issued by the Council of Europe to the Council of Ministers and the consequent credibility of the commitment, which was entirely political, of forcing back the confines set by the old article K.1 of the Treaty to include the possibility of cooperation between member states in criminal matters.

Even a rapid and summary examination of the essential contents of the 1997 plan is sufficient to make it clear that almost all progress achieved from then onwards at European level on the road towards cooperation built around a principal of effectiveness, was originally provided for, and obtained further impulse, in that document, which was political rather than legal.

For this purpose it is sufficient to recall:

- the setting up of the multi-disciplinary group and its action in the context of joint evaluation procedures for implementing measures adopted at national level in the commitments assumed at international level in the fight against organised crime;
- the setting up of the European Judicial Network
- the new Convention on mutual assistance in criminal matters of 29 May 2000,
- the recommendations and joint actions relating to policies on corruption or laundering and confiscation of the proceeds from crime or of "best practices" in judicial cooperation,
- not least, the programmed emergence of a role by the European Union in the definition of cooperation policies in an Extra-European context, with other states, organisations and international bodies involved in the fight against organised crime: the presence of the European Union at the negotiating table set up by the United Nations prior to the Palermo Convention of 12 December 2000 on transnational organised crime constitutes a coherent development of this, along the same line as the recent (EU Council of 6 June 2004) Union agreement with the United States of America on extradition and mutual legal assistance.

The creation of Eurojust forms part of the same prospective of developing European cooperation.

But let us return to the 1997 Action Plan in order to try to establish in a few words the most obvious limitations.

In fact, with the adoption of a joint strategic line, there remained a continuing difficulty of overcoming the limits connected with the traditional weakness of the European measures available, primarily because of delays in action to adapt the individual national systems.

Suffice it to recall the outcome of the Convention on mutual support of May 2000. Even today, not all of the states have ratified it. These include Italy, which seems now to be trying to accumulate in this respect the highest negative record. Such delays are incompatible with the needs of consistency and rigour in policies for cooperation against crime and they create serious difficulties, including practical difficulties in collaboration with other states. Here are just two examples:

- the prolonged absence of a procedure governing the implementation of regulations in relation to joint investigations teams, for which a specific framework decision of 13 June 2002 specified adoption by 1st January 2003;
- the absence of a procedure governing implementation of a complex series of regulations established for the purposes of carrying out interception of telephone and computer communications in other states or whose interception in some way involves the territory of other states. The disparity in regulations caused by failure to adopt the regulations set out in the convention of May 2000 creates the risk of a serious obstacle in the conduct of transnational investigations: cf. La Greca draft and Secchi article.

A similar destiny has so far befallen the Additional Protocol of 2001, whose urgency and necessity are nevertheless accepted in principle as essential for financial investigations. Not only has there been no discussion about its ratification, but there is still a long way to go before the 1991 law is made effective. This provides for the setting up of that register of bank accounts which the protocol regards as an essential prerequisite for a collaboration against crime.

But an awareness of the serious limitations of a development of European measures that are entirely dependent during their implementation stage upon the legislative initiative of individual states, in no way reduces the importance of the methodological approach tried out for the first time in 1997:

- global analysis of risk factors connected with the activity of permanently organised criminal structures
- definition of priority objectives,
- indication of procedures that are adequate for carrying them out,
- examination of timescales for achieving the objectives,
- continuous monitoring of implementation processes.

Overall, confirmation that the road being followed has brought positive results can be found in the work of the Multi-disciplinary Group, through the subsequent document ambitiously entitled *European Union Strategy for the beginning of the new millennium for the prevention and control of*

organised crime, with which it was sought to supplement the methodology of the original action plan through clearer indications of priority in relation to the objectives to be reached and on the division of political responsibility connected to the failure or delay in their implementation.

A reading of the text published shortly afterwards in the new Report (2 June 2003) on the state of implementation of the 39 recommendations that formed the European Union Strategy for the prevention and control of organised crime at the beginning of the New Millennium, is certainly useful in helping to identify, stage by stage, sector by sector, the progress made, as well as the forms of resistance to new developments, and the possible solutions to problems that are still unresolved.

That work frees me from the need to make a detailed analysis of the subject, but perhaps there is space for certain brief observations.

The indication of clear and shared objectives in the context of a global strategy, defined with realistic rigour, to fight organised crime, helps us to identify with particular clarity the most serious limitation of European policy in fighting major crime.

We can identify these limitations clearly if we consider two essential objectives of European policies, defined in a few simple words in conclusion no.6 of the European Council meeting in Tampere on 15 and 16 October 1999: *to guarantee that criminals cannot find places of refuge nor conceal the proceeds of their crimes within the Union.*

It is no accident that these two objectives correspond with the first, important steps along the road towards mutual recognition of legal decisions.

We shall discuss the warrant of arrest later, also because of the special current significance and delicacy of the scenario arising in relation to the adaptation of our legislation to a decision already adopted in all the other states who have acceded to the Framework Decision, immediately anticipating that the proposed legislation seems inspired by logics that are incompatible with the sense of belonging to a legal community such as the European Union.

The second fundamental objective of European policies, which we have briefly indicated with the wording set out in the aforesaid conclusion no.6 of the Tampere summit (*guaranteeing that*

criminals cannot…. conceal the proceeds of their crimes within the Union) offers confirmation of what was said earlier about the risk of emphasising the progress in international cooperation.

In general, the operation of seizure and confiscation measures in jurisdictional relationships is a crucial parameter in measuring the effectiveness of international cooperation in fighting criminal phenomena, where there is an increasing tendency to locate, conceal, reinvest and preserve illegal proceeds in jurisdictions that are different to those in which the crimes are committed and identified. This, therefore, naturally poses the problem of linking together financial investigations at international level for the purposes of obtaining the actual restraint order and subsequent confiscation.

Naturally, there is not a single international document that fails to praise the strategic value of international cooperation in fighting the phenomenon of laundering, which, in economic terms, can be well described as "the very nucleus of organised crime"[109].

Nevertheless, if we compare the presumed financial dimensions of the criminal markets[110] with the results of the control action specifically aimed at searches, freezing and final confiscation of the proceeds from crimes, the result is likely to be discouraging. This is fairly probable in terms of individual national systems and quite certain when we look at the results of the international mutual cooperation system.

Some time ago I was interested in finding out what lay behind the wording contained in the report of the multi-disciplinary group set up by the European Commission at the end of the first round of evaluations of the mutual assistance systems in European Union member states, where it suggested that requests for confiscation were a "relatively rare" event in the European cooperation system. I discovered from the Ministry of Justice that, during the period between 31 May 1999 and 16 September 2001 only two requests had been received by Italy for the execution of confiscation orders made by foreign authorities (in one case German and the other Swiss) and three similar orders were sent abroad (two to Switzerland and one to France).

It should be immediately pointed out that these figures were completely unsupported.

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[109] Thus it is stated in conclusion no. 51 of the Tampere Summit of 15 and 16 October 1999.

[110] The International Monetary Fund, for example, estimates that the money flow of illegal origin varies between 590 and 1500 billion dollars, in other words between 2% and 5% of the world gross domestic product (*Financial Times*, 24 September 2000).

It was the result of research over a fairly limited period and carried out in an objectively arbitrary manner, as the research was notably and inevitably approximative.

Nevertheless, despite such reservations, these figures – which nothing leads me to regard as substantially changed in the subsequent period – are objectively eloquent.

The explanation for this disappointing, but, on closer examination, surprising result would in theory be possible, either:

by choosing the paradoxical solution of stating that the real picture would show – at least, so far as Italy is concerned – that there are no significant criminal situations with transnational dimensions or that criminal organisations of this kind do not move the proceeds from their criminal activities from the territory of one state to the another;

or alternatively, by taking a slightly less risk position, simply recognising that national jurisdictions have a sort of lower ability to intercept criminal proceeds and goods connected in some way to the crime, which nevertheless are certainly moved across national frontiers, or they are unable to transform restraint proceedings into definitive confiscation orders.

I believe, in fact, that it is realistic to note the clear discrepancy between, on the one hand, the wide range and complexity of legal measures available, including the provisions of international law, which can in theory be used to fighting money laundering and, on the other hand, the results that are actually achieved, even in individual domestic situations, in the tricky area of prevention and forfeiture of illegal financial accumulations and in stopping infiltration into the legal economy.

The mass of legal regulations would seem almost to be proportionately inverse to the effective dimension of the results actually achieved.

In these fields, in which a decisive battle is being fought against large-scale crime, the resounding news of a few successes is usually deadened by the heavy silence of innumerable defeats.

Naturally, on the negative side of this equation there are also the major difficulties and obstacles that still exist in terms of the effectiveness of investigative measures and the harmonisation of criminal legal systems, as well as the smooth operation of mechanisms for judicial cooperation.
Much has been done at international and European level (including the Strasbourg Convention of 1990, the framework decision for the freezing of assets for the purposes of confiscation or obtaining evidence, the implementation of the recommendation of the Financial Action Task Force, and the

First Additional Protocol of the Convention on judicial cooperation between European Union member states) and much else can and must still be done or rendered effective (starting with the framework decision that is still under discussion on the execution of confiscation orders and the implementation of the Additional Protocol of 16 October 2001 which is destined to include the additional provisions of the new Convention on judicial cooperation on questions of access to bank information and controlling such operations and, in general, in fighting money laundering and financial crimes, which, I believe, has not at the moment been ratified by any of the member states).

But it seems, all in all, naïve to think that the fate of European and international collaboration on money laundering depends merely upon the improvement of legislative measures that the Union is able to introduce.

There are deeper reasons for the crisis in the efficiency of the system for the penal control of laundering.

In particular, it is necessary to recognise that the willingness of the investigative and judicial systems in the individual states to effectively committed themselves, even for the purposes of domestic justice, in investigating and controlling money laundering, is erratic and unreliable.

From this point of view, there are still strong cultural resistances and organisational gaps that stand in the way of achieving in practical terms the idea that programmes for specific targeted and coordinated financial investigations must constitute the natural corollary of any significant investigation into organised crime (or "criminalité grave", according to the wide formula adopted in the preamble to the 1990 Strasbourg Convention).

If, in general, for preventative purposes, the political initiative of the individual states is decisive in regulating monitoring activities and safeguarding the openness of financial and business markets in terms of control, no less important is the cultural (more than the organisational) deficit which hinders the uniting of energies in investigative and judicial activities towards the objective of directing investigations and the judicial response towards members and relationships in criminal organisations which govern processes of accumulation and reinvestment of illegal profits.

This is an essential factor in understanding the difficulties and limits of the system for international cooperation in this respect.

But, overcoming all discouragement, it is necessary to look at the reasons for the difficulties and examine what it is nevertheless possible to do to achieve effectiveness in activities involving search, seizure and confiscation of instruments and proceeds from crime.

§ 2. *The evolution of traditional sources*

In terms of international convention law, the framework is fairly detailed. From the original and general measures offered by the European Conventions of 1957 (on seizures carried out at the time of arrest for purposes of extradition) and 1959 (on mutual assistance in criminal matters), there has been a progressive formation of a system which is increasingly more systematic and complex.

The implementation of legislative instruments has developed particularly in contexts of regional cooperation where there is greater political uniformity in regulations (above all, of the European Union, but also, progressively, of the Council of Europe), as well as in relation to specific areas of crime, identified according to the political value placed upon it by the international community (such as the 1988 Vienna Convention on drug smuggling, the Palermo Convention on transnational organised crime, the 1999 Council of Europe convention on criminal corruption, the 1997 OECD Convention on corruption in international business transactions).

It is not possible therefore to attempt just a brief description of the complex contents of the numerous and not always consistent stages in the evolution of multilateral conventional sources, but it may be interesting, nevertheless, to note that the evolution of the discipline governing the international law relating to economic investigations and seizure of goods or proceeds from crime has received a notably greater acceleration than that governing confiscation and, therefore, of the final destination of assets blocked for preventative purposes.

The essential area of difficulty in this problematic terrain is, in fact, caused by the definition of the standard of proof for purposes of confiscation, so that in the international sources, apart from the definitions that invite contracting states to consider the approach of a minimum level of proof, reducing the traditional burden of proof against the accused, the realistic approach of the various national legislations dominates[111].

And thus, even though the Vienna Convention against the smuggling of narcotic and psychotropic substances was the first to openly face up to the problem, in a multilateral situation, of what should

[111] On this point see G. Di Chiara, *Models and standards of proof on confiscation of the proceeds from crime in the "European legal jurisdiction": problems and prospects*, in *Foro it.* 2002, II, c.263 et seq.

happen to the proceeds and instruments of crime, the problem of the final destiny of goods seized was resolved in a fairly prudent way, through the indication of criteria, which all in all lacked real legal innovation, by which the confiscation measures to be adopted "*are determined and executed pursuant to the domestic law of each Party and according to the provisions of the said legislation*" (art. 5, § 7)[112], in any case without prejudice to the rights of third parties acting in good faith (art. 5. § 8).

Similar provisions are to be found in art. 12, § 7 of the UN Convention on transnational organised crime and in the 1990 Strasbourg Convention on money laundering (even though in this case, in addition to the traditional requirement by which confiscation procedures are regulated by the *lex loci*, there is also a duty upon the State where requested to investigate the facts forming the basis of the judicial decision of another State).

In general, on the subject of confiscation, the difficulties of harmonisation are such as to make it especially hard to make any significant advance in criminal international law.

This is shown also by the outcome of various less recent measures on international cooperation.

In the Treaty on mutual assistance in criminal matters between Italy and the United States of 1982, for example, the prospects for cooperation set out in the bilateral agreement previously referred to[113] were formulated in article 18, according to which "*on the basis of the procedures provided by the laws of the requested State, the latter shall have the power to order the confiscation for the benefit of the requesting State of the goods seized in application of § 2 of this article*".

The mutual ratification of the Treaty was accompanied by notes through which the two states recognised that it was appropriate to make the effectiveness of the provisions on confiscation subject to the introduction of the necessary national implementation legislation.

Although, at the same time, the signatory States made a commitment to accelerate the timescale for adapting their domestic laws and to give reciprocal notification of the occurrence of the aforesaid condition, the fact remains that, despite legislative developments in both systems, the twofold mechanism for notification which was the condition for the operation of the convention has never been activated, and in the meantime any attempt at implementation has been replaced by the search

[112] It is no surprise, then, that the ratification of the said convention could take place in Italy (Law no.328 of 5 November 1990) without the need for any amendment to domestic laws regarding seizure and confiscation or those relating to legal relations with foreign authorities.

[113] On such model of international collaboration, see. G. TURONE, *L'assistenza giudiziaria tra Italia e Stati Uniti in materia di confisca*, in *Ind. Pen.* 1987, 543 et seq.; in the same review there was information about a transfer of the Court of Naples division for the application of prevention measures to the United States (*ibid*, 618 et seq.), in relation to interesting (though premature) examinations of the operational practicability of new prospects for collaboration in the sphere of extra-judicial preventative confiscation.

for a new agreement on the question of confiscation which for years has seemed to be close to being reached but has still not been achieved.

On the 6 June 2003, as already indicated, the USA and European Union reached an agreement on mutual legal support which included new and innovative provisions on bank investigations and joint investigation teams, but there is no significant reference in it to confiscation.

In the meantime, however, the USA has drastically modified its domestic legislation and, in doing so, the powers of confiscation of assets contained therein have been placed under the legal authority of other states.

Already, in fact, the Money Laundering Act of 1986 introduced the possibility of seizing and confiscating the proceeds from a criminal offence relating to drug trafficking committed in a foreign state, through a special procedure *in rem*, namely by way of decisions of a court adopted on the basis of the belief that the connection of the asset to the criminal offence had been proved, but independently of the responsibility of the holder and of the conviction of the offender.

However, apart from such possibility, the federal laws on civil forfeitures were not applicable and it was often necessary, upon request for judicial assistance from other states, to resort to the fiction of commencing a procedure under domestic law aimed at the same result as the aim of the letters of request and in which the elements of the case forming the basis of the ruling by the foreign judge were set out.

The situation is significantly altered with the approval of the Civil Asset Forfeitures Reform Act of 23 March 2000.
One of the purposes of the reform was to provide a domestic legislative basis for international cooperation on seizure and confiscation.
Consequently, it is now provided that, if a person is accused in a foreign state of unlawful acts that would justify seizure and confiscation in the USA, the Ministry of Justice of the United States can apply to a federal judge or a district judge where the suspected asset is to be found for a restraint order which preserves its availability for 30 days, subject to further extensions in time that are justified by the need to obtain suitable evidence from abroad in order to establish a confiscation order according to the domestic law.

It is now appropriate to bring to an end this digression into extra-European law, but it would be interesting to continue the discussion by examining the opportunities offered by North American law. This is because there are various specific points of interest in this area, for example, the notion of third parties acting in good faith[114] or management of seized goods, and also because, generally speaking, the system of civil forfeitures is of great interest with regard to possible criminal policy in other states, representing an interesting model for control which is separate from the traditional guarantees of criminal law (even if the 2000 reform now requires proof that the asset can be confiscated "by preponderance of the evidence" whereas, before, it was sufficient for there to be "a probable cause")[115].

The problem of the prospects of collaboration for the purposes of a permanent deprivation of use of assets connected to the crime cannot however conceal the importance of the progress achieved so far. The crucial moment is without doubt the Strasbourg Convention of 1990.

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[114] Claims by third parties who have rights over assets seized by non-judicial procedures are always allowed within a reasonable period (fixed on the basis of the notice of seizure, or in its absence, 30 days from final publication of the notice of seizure). But the claim must not be "frivolous" and must be made on sworn oath, and as such it is subject for penal sanctions in the case of perjury.

As for the definition of the concept of "innocent owner", a person is considered to be such where he is unaware of the conduct that gave rise to the seizure, or, though aware of it, could not reasonably prevent the illegal use of the asset, there being a double parameter of control with regard to the presumption of reasonableness, on the one hand, with regard to the duty to give prompt information of his possession to an appropriate legal authority and, on the other hand, to demonstrate that he promptly withdrew or attempted to withdraw his permission for the illegal use of the property or took other reasonable steps by informing the legal authorities, without in any way carrying out acts that might lead a third party or others to feel they have been exposed to physical risk.
The notion of good faith is only used in order to decide upon rights acquired after the conduct which has given rise to the seizure; in any event it is necessary for him to prove that he was unaware of the risk of seizure and had no reasonable grounds for suspecting it.

[115] Alongside the system of civil forfeitures, the American law recognises the system of criminal forfeiture introduced in the early 1960's by federal legislation in relation to organised crime, which is conceived as a criminal offence and structured in forms that give greater guarantees to the accused, requiring the prosecution to prove the guilt of the defendant in relation of serious federal criminal offences and that the assets are connected to the crime.
Criminal forfeiture was created for the declared purpose of protecting the legal economy from the risk of criminal infiltration.
The law made it an offence to a) use or invest funds derived from racketeering in business activities; b) acquire control of a business through the activities of organised criminal groups, c) run the affairs of a business with methods that are typical of racketeering; d) conspire to commit one of the aforesaid offences.
The offence of using racketeering methods in business activity had the function of broadening the parameters for the application of antiracketeering law and with subsequent legislation there was a gradual recognition of the applicability of a whole series of other offences ranging from drug-related crimes to money laundering, smuggling pornographic material and banking offences. In addition to this, the law has extended the impact of another series of offences, including postal fraud and tax fraud, so that there has been a notable change to the physiognomy of the original system and it is also used today for fighting white collar crime, even though it has nothing to do with organised crime.
For a closer examination of the complex North American model, with a wealth of doctrinal and legal references from that experience, cf. A.M.Maugeri, *op cit.*, 51-52 & 247 et seq.

§ 3. *The Convention on money laundering, search, seizure and confiscation of the proceeds from crime*

Save for considering various further areas of bilateral cooperation (such as those well defined agreements between Italy and Australia of 28 October 1988 for mutual support on criminal matters[116] and between Italy and the United Kingdom of 16 May 1990 on mutual support on matters of illegal drug trafficking and confiscation of the proceeds[117]), the sectional arrangement and, all in all, the quite asphyxiating nature of the international convention law precedents, assist well in explaining the extent of the expectations placed upon the implementation of the Convention of the Council of Europe on laundering, search, seizure and confiscation of the proceeds from crime which was opened for signature on 8 November 1990. In the preamble, the ambitious objective of *"priver le délinquant des produits du crime"* is indicated as the purpose and at the same time the most up-to-date and effective method of fighting major crime.

Faced with an objective that was so obvious as well as extremely ambitious, in 1990, for the first time, a complex series of regulations was defined in order to build a system of international cooperation. It was programmatically supported by research into the effectiveness of criminal control and was opened up to include involvement from states who were not members of the Council of Europe.

But the importance of the Convention can be seen, above all, by observing the novelty of the notion of seizure defined by the contracting states. It was set out with a view to the confiscation of the proceeds from crime and no longer limited to objects pertaining to the crime, as had been the case with the 1959 European Convention on mutual assistance in criminal matters (article 3 of the Convention described the Letters of Request as directed, in addition to notification, to *"procuring evidence"* and *"transmission of articles to be produced in evidence")*.

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[116] The 1988 treaty between Italy and Australia dedicates various provisions specifically to the subject of confiscation in relation to the exclusive applicability of the state law for the purposes of defining the conditions and limits of confiscation, safeguarding third party rights and the obligation to adopt provisional measures, where it is urgent, that are capable of "preserving the existing situation as well as safeguarding the interest under threat and the evidence".

[117] The agreement between Italy and Great Britain – which was reached at the same time as the final stage of the Strasbourg negotiations that concluded with the signing of the Convention on laundering, search, seizure and confiscation of the proceeds from crime, but ratified (with Law no.147 of 22 February 1994) on the presumption as to the effect of internal amendment already carried out in order to implement the multilateral agreement of 8 November 1990 – sets out detailed provisions regarding the notion of proceeds of crime (described by article 2 as relating to any assets resulting from criminal activity and to the value of the same), conditions of applicability of the various crimes other than those relating to drugs (article 5, § 1 (b)), provisional seizure (art. 10), execution of criminal confiscation and, with regard to Britain, also of the forfeiture order made during criminal proceedings under Italian law (article 11)

This was not something entirely new – the 1988 Vienna Agreement had already introduced a similar concept of seizure abroad with regard to drug smuggling – but the extension of the area of application was enormous and well reveals the value of this development.

The 1990 Convention therefore sets out a system of cooperation that is not limited to searching for the tools of the crime, but extends to the proceeds from crime that were more capable of generating profit and further processes of illegal financial accumulations.
It was a system that sought to move towards the idea of compulsory assistance, not just at judicial level, but also at administrative and police level, to reduce the importance of the double incrimination clause (that cannot be invoked to refuse assistance in investigations that do not give rise to the execution of compulsory measures), and on the promotion of spontaneous exchanges of information that constitute the central force of investigative coordination in this area.
The Strasbourg Convention is still, today, the most solid and extensive basis for international cooperation in economic investigations, seizure and confiscation.

This is the nucleus around which subsequent research has been carried out for new and more effective measures.

In the context of the European Union alone, over the years following the Action Plan against organised crime adopted by the Council of European in Amsterdam on the 16-17 June 1997 (and in particular, recommendation no.26, letter b, relating to stronger powers of search and seizure for proceeds from crime), over the last few years the following measures have been approved:

- the Joint Action of 3 December 1998 on money laundering and identifying, tracing, freezing or seizing and confiscating instruments and proceeds of crime;
- the Council's framework decision of 26 June 2001 concerning organised crime[118];
- the Convention on mutual assistance in criminal matters of 29 May 2000;
- the specific provisions regarding enquiries into personal wealth during financial and bank investigations contained in the Additional Protocol to the European Union

[118] This measure provides for:
a) an obligation upon the states to remove reservations made against the 1990 Strasbourg Convention in relation to the offence of money laundering in relation to "serious" crimes (article 6 of the Convention) and the field of application of confiscation, when the offence is punishable by more than one year (article 2 of the Convention);
b) an obligation to adopt standards that tend towards standardising the discipline in terms of sanctions for money laundering;
c) an obligation for the general introduction of confiscation of value, at least in cases in which the proceeds of crime cannot be traced.

Convention on mutual assistance in criminal matters of 22 May 2000 adopted by the Council of Europe on 16 November 2001[119];

- finally, the framework decision of 22 July 2003 regarding execution in the European Union of measures blocking assets and seizure of evidence.

We will return later to the provisions set out in the last measure, but it should be noted immediately that most of these measures – a summary of the contents of each of which would involve undue attention which it is necessary to retain until later – have not been put into operation, confirming the need to overcome the *impasse* that has arisen over the current third pillar as a result of the unsuitability of the European instruments presently available (conventions, framework decisions and joint positions) in producing direct legal effects in the national laws.

Even though the Convention was generally fairly cautious in extending the powers of the Union, this has not been so in the case of justice and internal affairs. It can now be said that the former third pillar is amply included in the legal and institutional framework of the Union.
There is a general understanding of the role that the Union must carry out in questions such as judicial and police cooperation, the protection of the financial interests of the Union, the protection

[119] The protocol (which should be ratified by all member states within a fairly short space of time, according to the agreements reached), aims to improve the forms and methods of European judicial cooperation in the specific sector of economic and financial crime.
It is not possible to give a full description of the contents of this new, important measure, which has the purpose of integrating and improving the legislative framework regulating cooperation between the member states for the specific purpose of assisting the collection of evidence in criminal proceedings involving serious forms of organised and financial crime.
For the present purposes it seems sufficient to underline certain positive developments, leaving aside the limits regarding the difficulty posed in negotiating the original French project (e.g. the inapplicability of reservations and declarations formulated with reference to the General Convention of 1959):

inapplicability of banking privacy or other clauses in relation to the confidentiality of banking transactions;
impossibility of refusing to carry out requests for assistance by reason of the fiscal nature of the offence;
above all - of immediate relevance to the question under discussion - assumption of the obligation to adopt measures that make it possible to identify bank accounts to which a person has access (as account holder or agent) and to supply all other available information.

On this last point, the text is not exactly the same as the ambitious wording put forward by the French, since it sought to commit the States to establishing a sort of centralised register to which the judicial authorities in all member states had free access for the purposes of information.
The resistance by certain delegations brought about a different and more limited result, as can also be seen in the fact that the member states can make the execution of requests for information on bank accounts and transactions subject to the same conditions that regulate the execution of requests for search and seizure (and thus, in theory, of double incrimination, protection of the essential interests of the applicant state, etc.).
This is not what had been in the minds of those delegations who were more aware of the reasons for cooperation and the needs to integrate systems of justice, but it is still an important measure, as can be seen from the whole range of difficulties that the Multi-disciplinary Group reports have been able to overcome in the state of internal cooperation within the European Union with regard to the outcome of general requests for information.
The importance of this becomes clear when considering that the possibilities of seizure and confiscation ordinarily ran aground far away from the judicial assistance process, their failure being due to the disappearance of the paper trail, in other words the trail of evidence which, document by document, makes it possible to connect the assets which are apparently legal in the territory of one State with the crime committed within the borders of another.

of frontiers, immigration and asylum policies. A series of amendments have thus been achieved that are truly innovative.

This includes also the more specific area of fighting organised crime.

In the prospects offered by the Project for the Constitution there will be, here also, exclusive categories of legislation and framework legislation.

In any event, without these measures, the difficult road separating us from effective implementation of the principle of reciprocal recognition of judgements and judicial rulings (identified in paragraph 1 of article III-171 as the key to judicial cooperation in criminal matters) and also from the prospects of harmonising substantial and procedural regulations, would be much longer and more tortuous and, in fact, impracticable.

Both aspects are essential.

If it is true, in fact, that a programme of legal integration cannot realistically go beyond a certain point, due to the insurmountable obstacle of diversity of national traditions and experiences, it is also true that, equally realistically, the implementation of the principle of mutual recognition of judicial rulings cannot be developed only along the line of defining the procedural regulations necessary for ensuring execution in the territory of one member state of the judicial rulings assumed by authorities in another member state.

Even a limited prospect of legislative integration is essential for the functioning of a system of cooperation based on the principle of mutual recognition, since only through the expansion of the body of shared rules of substantive and procedural law is it possible to effectively demonstrate trust towards other legal systems, which forms the basis of the principle of mutual recognition of judicial rulings.

The nexus of measures, including harmonisation of national laws and mutual recognition of minimum standards, is expressly recognised in article III-171 with regard to the requirement of minimum standards to be established through framework legislation in relation to mutual admissibility of evidence, personal rights in criminal proceedings and victims of crime.

But that nexus is also clearly apparent in the subsequent provision (article III-172) by which the Union can establish minimum requirements through framework legislation for identifying crimes and sanctions for the curbing of particularly serious forms of crime that have a transnational dimension arising from the nature and concrete implications of such crimes, or from a particular need to combat them on a joint basis.

It was preferred that the areas of crime to be included here should be set out in the Project through a detailed list of subjects, in each of which it is easy to note a sort of intrinsic vocation to contain within them the requisites of gravity and transnationality of the criminal risk to which the objective of legislative integration applies.

Here the first problems arise, which are in danger of conditioning the prospects of harmonising the national laws.

First of all, it should be pointed out that the potentially transnational "spheres of crime" are defined according to categories that are criminological rather than legal.
But this is perhaps an inevitable choice, if we consider that the lack of solid legal bases for the categories contemplated in the Project for the Constitution is compensated, at political level, by the greater guarantees offered to individual states by the adoption of the method of listing categories for which minimum shared standards can be defined through framework legislation.

The individual listed categories seem to occupy all possible fields of action in which organised crime operates and, in particular, mafia activities, since their listing coincides with that of the traditional illegal markets controlled by mafia-style organised crime or, as in the case of corruption, those areas in which the principle instrument with which mafia-style crime achieves its purposes of infiltrating into the legal economy and its obsessive search for impunity.

Therefore, the policies of harmonisation for the purposes of establishing the minimum legal bases in relation to individual spheres of serious crime are destined to produce important effects also in fighting mafia-style crime, considering the role that mafia-style organisations have (and I am thinking not so much of those of Italian origin, but in particular of criminal groups of extra-European origin which are of a similar nature in their organisation and their operating methods) in controlling the sectors of smuggling drugs, arms or human beings, in sexual exploitation of women or in the systematic channelling of their hopes of obtaining profit and impunity into money laundering and corruption.

The list is even more important since it extends as far as including the phenomenon of organised crime, considered in its own right.
This is a separate subject of the actions of legislative harmonisation, over and above the existence of joint legal bases relating to individual, concrete criminal aspects of the phenomenon.

In other words, the words "organised crime" used in article III-172, instead of being just a sort of concluding clause in the list of areas of trans-frontier crime on which to concentrate energy in harmonising national legislation, indicate a clearly defined operational area, inseparably linked to the need to criminalise the mere act of taking part in a criminal association.

Fortunately, we are quite a long way away from the sense in which an identical expression was used in article 31 of the Amsterdam Treaty, where its meaning is entirely political and therefore almost useless in legal terms.

From this very fact, it is necessary to establish the minimum elements of a clear and easily recognisable notion of organised crime, first of all with regard to mutual recognition of decisions, but also along channels of judicial and police cooperation.

In the effort to categorise a common notion of law, it is necessary to look beyond existing models, useful though they are, at European level (through the Joint Action on punishment for participation in a criminal organisation in member states of the European Union adopted on 29 December 1998) as well as in the wider context provided by the United Nations with the Convention of December 2000 on transnational organised crime.

Both models, in fact, offer limited space for an effective and far reaching operation of harmonisation, since they indicate to individual states the need to criminalise conduct, even only as an alternative, as much on the Italian model of participation in a mafia-type association as on the concept of "conspiracy" which is so dear to English law.

In order to conserve the alternative lines described (and thus, for that very reason, reaching compromises), the legislative distances between nations would be destined to remain fairly wide, with consequent difficulties in operating in the field of judicial cooperation as well as, above all, in mutual recognition of judicial rulings.

It is of essential importance, however, for the national systems to converge towards a common notion that involvement in an organised group is a criminal offence, which, upon the obvious assumption of the intentional nature of the conduct and at the same time the intention of the purpose and overall criminal activities of an organised group or of its intention to commit serious offences, makes it possible to criminalise active involvement in the criminal activities of the group as much as involvement in other activities of the group, in other words, in activities which, though not criminal in themselves, nevertheless contribute towards achieving the organisation's purposes.

The reference to activities which are not unlawful in themselves, but forming part of the general purposes of the organisation, is most clearly shown by the Italian legislative experience in relation to involvement with the mafia, which is characterised by criminal method more than by the specific purposes pursued, which indeed need not necessarily be unlawful. The purpose of the organisation may be that of achieving results which are in themselves lawful, such as obtaining public contracts or public licences and, more generally, running legal economic activities. Such purposes are legal in theory, but become significant for criminal purposes if they are pursued by exploiting the capacity for intimidation of a criminal organisation.

This is of essential importance in future policies for legal harmonisation at European level, in order to strike the central nerve systems of criminal groups - in other words the structural components which are most sophisticated and most capable of regeneration, around which are developed relationships of collusion with the economic world and with public administration, upon which the mafia places much of its hopes in order to conceal its activities and ensure impunity.

The UN Convention can be examined in particular in order to categorise the requirements of the notion of organised crime with regard to the permanency of its organised structure, with a tendency for continuity in its composition and purposes.

In any event, I would suggest that it will be fundamental for the future framework law to provide a minimum legislative basis for defining the notion of organised crime and punishable involvement in it, irrespective of the commission in the individual state of specific offences, provided that in that territory at least a part of the criminal conduct has been carried out, or an act of aiding and abetting.

In other words, the notion of organised crime set out in the project for the Constitution must be specifically defined in the subsequent framework legislation in such a way that it is irrelevant that

the organisation based in the jurisdiction of one state pursues its unlawful activities in the jurisdiction of other member states.

The drafting of a specific recommendation on this point – which relates to a problem already indicated in the 1997 Action Plan – is now being considered by the Multi-disciplinary Group.
The initiative, which was started during the semester of the Italian Presidency, will probably have a preliminary examination phase involving the complex problems of the construction of standard penal models.

The need for specific legislative harmonisation is, however, not just important but also urgent.
Experience clearly demonstrates this.

In particular, experience shows the existence of complex and well-established transnational organisations which are able, through a sophisticated dislocation of their resources and skilful commercial strategies to exploit the notable differences between the various national regulations and the difficulty in attributing individual offences to one or other national jurisdiction.

For example, tobacco smuggling is dominated by organisations which, though originating in particular national situations or having operational links with mafia-style groups based in the territory of one state, tend to transfer their decision-making centres to other states in the European Union and to conduct the illegal transactions "abroad" so that they occupy markets regulated by laws that are less rigorous than those of Italy.

But the examples could multiply, given the complex and alarming developments in mafia-style organised crime from outside Europe and the effects they are having within the territory of the European Union.

Recognising as a crime the fact that a person present in the territory of any member state is involved in a criminal organisation, irrespective of the country in the Union in which the organisation is concentrated or carrying out its criminal activities, seems, to correspond with an indispensable idea of joint responsibility of the member states of the European Union in fighting transnational organised crime.

In any event, a policy of the kind proposed is entirely consistent with the notion of transnationality provided by article III-172, whereas at present it is anchored within parameters that describe the

"character" of the crimes or their "implications" or a "particular need" to develop a repressive action "on common bases".

The "implications" that could arise from the transnational nature of a crime could relate not only to factors of a procedural nature (such as the fact that the proceedings take place in more than one member state or that the accused or the victims of the crime or the evidence are situated in the territory of two or more member states), but also to the factors that contribute towards the definition of the crime and its constituent elements.

But it is now appropriate to return to the framework provided by the Strasbourg Convention of 1990, emphasising the specific limits in Italy's process of legislative adaption and some of the more significant interpretative aspects.

Some interpretative problems connected with Law no.328 of 9 August 1993 – With regard to Italy, the ratification of the 1990 Convention has, in fact, produced results that have been partially or wholly disappointing in relation to the adaptation of the domestic legislation on financial investigations, seizure and confiscation of instrumental assets or proceeds of crime carried out abroad, as well as on requests by authorities from other states (Law no.328 of 9 August 1993).

Apart from the extremely timid approach towards the delicate question of the introduction of the practice of confiscation of value – allowed within the limited extent of the execution of requests for assistance by other states and only subsequently considered with regard to limited categories of crime – the innovations to the penal code, as a result of the ratification of that Convention, have contributed, if such is possible, in causing further rigidity to the procedural system relating to international cooperation following the codification of 1988.

In particular, they have produced results that accentuate characteristics of strong politicisation and objective rigidity by reason of a procedure built according to hybrid formulae (such as those in the procedure regarding recognition of foreign rulings or execution abroad of Italian rulings, but to which are applied the procedural regulations required for the letters of request) and such results also extend to cover procedures relating to searches for assets for seizure and confiscation which the Convention allows to take place according to the more flexible rules of police cooperation.

In fact, article 745 (2-bis) of the Penal Procedure Code provides that the Minister is *"entitled, in those cases provided by international agreements, to ask for investigations to be carried out for the*

identification of assets that are situated abroad and which may become the subject of confiscation, as well as asking for their seizure".

The regulation, in referring the initiative of search and seizure of assets to the power of political authority, reveals in objective terms a substantial reluctance by the Italian legislature to give full support to the positive developments of the system of international cooperation.

It may be useful to pause briefly in order to examine the legislative framework in which that provision is found and thus to identify the actual context of the domestic regulations governing this matter.

At the time that the new provision of the code was introduced, the cooperation procedures had already for some time developed a system of direct communications between magistrates.

Yet, even in a sector of such central importance as that dealt with by the Convention on laundering, which continuously requires fast and decisive investigative action in order to effectively combat the most serious forms of crimes, the legislature seems to make every activity of foreign search and seizure for assets for potential confiscation dependent upon the power of ministerial discretion.

Indeed, it creates a fairly complex procedural framework that seems almost constitutionally inadequate for the purposes that it claims to pursue[120].

For the legislature of 1993, it seems as if concerns about systematic organisation counted more than the functional demands of procedural mechanisms.

The Convention to be ratified related to the identification, seizure and confiscation of assets that were proceeds or instruments of crime, in other words jurisdictional activities that are not easily traceable to a single organisational model and discipline, at a time when the legislature of 1988, in laying down the new discipline for jurisdictional relations with foreign authorities, had included the problem of cooperation with regard to confiscation under a special heading in Book XI dedicated to the recognition of foreign judgements and the execution of Italian judgements abroad.

[120] On this specific question and on the prospects of reforming the codification of procedural activities for requests and offers of collaboration between states for seizure and confiscation, and for further indications on law and doctrine, see G.MELILLO, *Accertamenti patrimoniali, sequestro e confisca nel sistema della cooperazione giudiziaria internazionale: problemi e prospettive del modello applicativo italiano*, in *Documenti Giustizia* 2000, 1177 et seq.

That choice was dictated solely by legal and formal criteria: confiscation, under Italian law, is generally speaking carried out by judgement[121] and therefore this means the execution of Italian judgements abroad and the execution of foreign judgements in Italy.
From this point of view, seizure receives fairly limited attention, there being only the possibility, in passive terms, of being able to obtain prior assurance of the effects of a confiscation already ordered by the ruling of a foreign judge for which recognition is requested (article 737 Penal Procedure Code) and, in active terms, by requesting the adoption of similar measures to those laid down in the request for confiscation (article 745 (2) Penal Procedure Code).

It is emphasised that, technically speaking, the request for judicial assistance for the purpose of seizure of an asset for confiscation is not, so far as the Italian code is concerned, a letter of request in the strict sense.
It is a form of special assistance, governed by the provisions contained under a special heading, no. V, of book XI.
In both active and passive terms it is governed by *ad hoc* regulations which, substantially, indicate the possibility of adding an order for seizure on to the request for execution of a confiscation order already made, in order to anticipate and assure its effects.

The 1993 legislature chose to move in this direction, but was obliged to lay down new regulations on seizure and financial investigations.

In passive terms, it introduced a new article, no. 737-*bis*, into the penal code, with which it identifies an *ad hoc* procedure which is modelled substantially on that of the letters of request from abroad and which makes formal reference to the regulations laid down for these for the purposes of execution.

In active terms, it introduced a subsection 2-*bis* to article 745, giving the minister the powers described above.

Despite the obvious inconsistency of such a system, on the one hand, resulting from an unnatural combination, yet, and on the other, from the procedural aspect of recognising the rulings, it is nevertheless possible to find an interpretation governing the regulation of foreign activities for

[121] As a rule, since the law is now clear in the sense that it can also take place through order, if there is compulsory confiscation, and even by decree, in the case of forms of confiscation compatible with the extinction of the offence (article 240 (2 (2)) Penal Code) but also, according a recent series of precedents, also in the case where there is a discretionary right (Court of Cassation, section I, 25 September 2000, Todesco and others, in *Cassazione penale*, 2002).

searching and ensuring protection of assets traceable to the commission of the offence which is consistent with international commitments.

First of all, with reference to the question of ministerial initiative.

From this point of view, by effect of the general rule as to the prevailing nature of the provisions of international law, it is necessary, first of all, to make reference to the international conventions regulating judicial assistance in criminal matters.
The applicability of the provisions of international law cannot, in fact, be conditioned or denied by reason of the decisions of the national legislator and, therefore, as in this case, as a result of the adoption of categories of formal organisation of new provisions on cooperation that are susceptible to interpretations that conflict with the commitments assumed at international level.

The first consequences of such a line of argument can be seen in terms of relations between states, with particular regard to the conditions of application of the regulations relating to direct communication between judicial authorities.

In other words, the choice of the national legislature to make every activity abroad in relation to financial investigations and seizure for the purposes of confiscation subject to the initiative of the Minister cannot prevail over the terms of the convention which allow direct communication (to remain in the sector of multi-lateral sources already in operation: article 15, § 3 & 4, of the European Convention on Mutual Assistance, article 24, § 2, of the Strasbourg Convention on money laundering, article 53 of the Schengen Agreement)[122].

In all of the aforesaid cases, therefore, the activity aimed at searching for evidence and proceeds of the crime can take place according to the rules of direct transmission of the request for judicial assistance.
Only outside this field of application are the provisions of the code requiring the prior approval of the minister applicable.

[122] The area of cooperation defined by the principle of direct communication is, naturally, destined to expand, due to the binding effect of the provisions contained in the new Convention on judicial assistance in criminal matters adopted by the Council of the European Union on 29 May 2000, by the corresponding innovations of the second Additional Protocol to the European Convention on mutual assistance of 1959 (opened for signing by the Council of Europe on 8 November 2001), and also, finally, to a fairly wide extent by the United Nations Convention on transnational organised crime which was opened for signature in Palermo on 12 December 2000.

As for the extent and the limitations of administrative power in this respect, it would not appear easy to speak of a discretional power that can be exercised without any specific limit, it being necessary to consider the analogous provisions of article 727 of the Penal Procedure Code.
The degree of discretion granted to political authority cannot, in fact, be extended beyond the limits defined by the notion of danger to domestic security and other essential interests of the State, which are similarly set out in article 727 (2) Penal Procedure Code (also by reason of the clear requirements to protect the principle of effectiveness of the role of the criminal jurisdiction[123]).

§ 4. The Italian request for cooperation for purposes of seizure

If the Italian offer of collaboration for the purposes of seizure and confiscation is hampered by cumbersome domestic legal procedures, our own application for international cooperation for the same purposes is affected by the peculiar nature and overall muddle of domestic measures governing seizure and confiscation.

The first interpretative problem relates to ascertaining, in the light of the convention law in force, whether it is possible to activate an international claim for restraint or forfeiture on an order for seizure or confiscation made by the court called upon to apply the financial measures pursuant to the anti-mafia law.

The French Court of Cassation, by a ruling of 13 November 2003, recognised the possibility of executing in French territory the confiscation order adopted by an Italian judge pursuant to article 2-*ter* of Law 575/1965 as amended, which was requested pursuant to the Strasbourg Convention on laundering, search, seizure and confiscation of proceeds of crime, of 8 November 1990.

The question of the possibility of action at international level, as grounds for application for judicial assistance pursuant to the Convention, in relation to orders for seizure and confiscation adopted during civil proceedings, has already been considered by doctrine examining legal regulations passed with a specific view to harmonisation of national systems.
In particular, the admissibility of requesting execution abroad of the restraint order has been openly supported[124], seeing that article 14 § 2 of the aforesaid convention of the Council of Europe on

[123] G.Diotallevi, *Rapporti giurisdizionali con autorità straniere*, in *Codice di procedura penale. Esposizione di dottrina e giurisprudenza* edited by G.Lattanzi and E.Lupo, ed. Giuffrè, 1998, vol. VI, 528, recalls that the preliminary project for the penal procedure code provided, with regard to the general discipline under article 745 (2) concerning requests for execution of preventative measures, that the application for confiscation and the request for seizure were to be obligatory and that the transformation of the relative duty to an optional power arose from a precise indication put forward by the parliamentary commission that was called upon to examine the exercise of the legislative delegation.
[124] G.Turone, *Le tecniche di contrasto del riciclaggio*, in *Cassazione penale* 1993, 2973. In the same way, A.M.Maugeri, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Giuffrè, 2001, 6011 et seq. and G.De

laundering expressly established the binding nature upon a state of an application for the investigation of matters consisting not only of "*a sentence of conviction*" but also "*a judicial ruling by the requesting party*".

And indeed, in the explanatory report there are statements that seem to give further support for this view, since it has to define the nature of the measure with a view to application, which could require the collaboration of other states not just in relation to the existence of a criminal trial, but in the presence of a subject matter identified as instruments or proceeds of crime (the explanatory report makes specific reference to the provisions in rem *of United States law).*

In particular, the explanatory report specifies that:

- it is irrelevant that the confiscation is not considered as a sanction of criminal law, it being sufficient that it can be described also as a safety measure or as "of another kind", provided that it is "connected" with a criminal activity;
- it is irrelevant that the confiscation can be ordered by a judge who is not a criminal judge, provided that he is a judge;
- in general, the criminal nature of the judicial procedure which, independently of the procedural rules applicable, can constitute the applicational basis for actionable confiscation pursuant to the Convention, is dependent upon its relation to assets, an instrument or proceeds of crime (from which, in particular, arises the explicit reference to the proceedings *in rem*, in which confiscation is allowed even against persons who are not guilty of a crime).

Considering these positive indications, according to this interpretation, it is therefore suggested that what is significant is that the forfeiture is supported by a "sufficient framework of evidence" relating to the nexus with the crime, such as to make it possible to establish that the "the asset that is the subject of the order is an essential part of the consolidated criminal economy" and, in this way, complies with the essential conditions of proof established by the Convention in the regulations motivating refusal of the request for assistance (article 18 § 4).

Against this general description of the sources of relevant international criminal law, the case examined by the French Court of Cassation can be briefly summarised as follows:

The case originated with an application by the Court of Milan for execution in France of an order for seizure of property assets made during restraint proceedings taken pursuant to anti-mafia legislation against a person convicted at first instance in parallel criminal proceedings in relation to an offence of criminal conspiracy to smuggle drugs[125].

AMICIS, *Le rogatorie in materia di indagini bancarie e finanziarie*, in *Rogatorie penali e cooperazione giudiziaria internazionale*, edited by G. LA GRECA and M.R.MARCHETTI, Giapicchelli, 2003, p.213 et seq.

[125] Court of Milan, order of 13 March 1998, Crisafulli and another.

The application was formulated on the basis of the application of the aforementioned Strasbourg Treaty of 1990 as well as the Vienna Treaty of 1988 against the smuggling of narcotic drugs and psychotropic substances. The subsequent approval by the French court followed from the pragmatic acknowledgement of the sufficiency of the evidence used for the purposes of making the restraint order in the proceedings in order to demonstrate the criminal origin of the money invested in France, regardless of any theoretical difficulty relating to the legal or formal nature of the problem of title which formed the basis of the request for judicial assistance.

Subsequently, an application was made to the French authorities for execution of the confiscation order made by the Milan judge (and confirmed by the Court of Cassation on 19 March 2001), who this time relied only upon the application of the Strasbourg Convention of 8 November 1990.
The application was accepted by the French judge (judgement of the Court of Appeal of Aix-en-Provence of 19 December 2002), with a ruling which, perhaps, once again, was influenced by the unusually strong evidence, taken largely from the parallel criminal proceedings, which formed the basis of the forfeiture order. But the judgement was certainly also guided by the consideration that the parallel, definitive criminal conviction for drug smuggling, the proceeds of which were traced back to the possession of the seized property, could give rise to a sort of condition of substantial equivalence between the confiscation order made by the judge in the restraint proceedings and the confiscation which, according to French law, could only follow the criminal ruling.

With the aforesaid ruling of 13 November 2003, the French Court of Cassation rejected the appeal by the defence and upheld the judgement of the lower court.
In the concise (rather than convincing) reasoning of the said judgement, great emphasis is placed upon the obligatory nature of the assistance due from the French state, pursuant to articles 12 & 14 of the Convention on laundering, in ordering the confiscation of proceeds from drug smuggling subsequently used for speculative investment.

The delicate theoretical questions relating to the peculiar nature of the confiscation order (and the procedure provided under Italian law) were not given particular consideration and the French court resolved the problem of the necessary recognition of observing the conditions posed by the French law in ordering the confiscation of assets from crime by excluding any harm to domestic public order, on the basis of the essential importance that the French law also gives to forfeiture of the proceeds of drug smuggling and subsequent laundering activities (".. *les conditions prévues pour cette exécution par la loi du 13 mai 1996* – relating to the fight against laundering and drug

smuggling and international cooperation on seizure and confiscation of the products of crime, of adapting French law to the obligations imposed by the Strasbourg Convention of 1990, in force in France since 1 February 1997 -.. *sont réunies: qu'ils relèvent ainsi que la décision de confiscation est définitive ed exécutoire et que le bien confisqué est susceptible de l'ètre dans des circostances analogues selon la loi francaise, en ses articles 131-21 et 324-7 du Code pénal; qu'ils ajoutent enfin que l'exécution de la décision précitee ne peut porter atteinte à l'ordre public dès lors que la requète tend à la confiscation d'un immeuble acquis par le blanchiment de sommes issues d'une organisation criminelle*).

The authority of the precedent, formed in this way, can without doubt be of value in confirming the relevance of arguments that can be inferred from the wording of the convention in order to move forward the traditional limits of judicial cooperation against laundering, basing them on an important significant assertion as to the substantial irrelevance of jurisdictional differences which have no effect on establishing jurisdiction in tracing the derivation of assets subject to forfeiture back to criminal activities.

Nevertheless, it seems excessive to draw from this judgement any firm confirmation of great progress for our civil procedures in the system of international cooperation.
Indeed, the prospects of solving the problem of identifying a solid basis in international criminal law for a claim for foreign execution of a restraint or forfeiture order adopted by the court called upon to apply restraint measures would seem to involve no small degree of uncertainty and contradiction.

Apart from the interpretative efforts that rekindle hopes for harmonisation which had developed during the preparations for the Convention and in the initial, concrete signs of willingness by states to give support to their practical implementation, various positive signs, in fact, still remain.

Achievement of the more reassuring positive solution for this difficult matter of interpretation seems, in particular, to be hindered above all by the literal wording of article 1 (d) of the Strasbourg Convention, according to which confiscation is the sanction or measure (consisting of permanently depriving a person of an asset) *"ordered by a judicial authority following proceedings for one or more offences"*. It is difficult to include within this definition proceedings aimed at the application of restraint measures, which are possible (according to independent rules of evidence) even in the absence of a prior finding of criminal guilt in relation to the commission of crimes which are linked

to illegitimate financial gain (the relevance of which even the explanatory report, as we have seen, tends to cast in a different light).

But other provisions of the convention also seem difficult to apply to the case in point.

This is so, above all, for the regulations governing reasons for refusal. Both for the execution of the order for seizure as well as in view of the subsequent confiscation, there remains in the system of the convention on laundering the obstacle connected with the double incrimination clause, which normally requires that the fact to which the request refers is considered to be a crime in the legal system in which the assistance is being requested. This obviously raises delicate problems, given the nature of the restraint proceedings and the prerequisites for adoption of the relative restraint and forfeiture orders (starting with the assumption that the illegal act to which the unjustified gain is linked is represented by involvement in a mafia-type criminal conspiracy and not by specific crimes that are referable to corresponding crimes in other national legal systems).

The actual wording of article 18 (4) (a) of the Strasbourg Convention states that cooperation for the purpose of confiscation can be refused if "under the law of the requested party confiscation is not provided for in respect of the type of offence to which the request relates".

It is true that the subsequent letter (d) of the same article indicates as a type of request susceptible to cooperation not only "a previous conviction", but also "a decision of a judicial nature", thus reproducing the wording of article 14 which, as we have seen, seems to open up the way for execution of confiscations ordered outside criminal proceedings. However, the full reading of the regulation governing the reasons for refusal seem to confirm the logical need that the foreign execution of the confiscation order should take place after it has been established that a crime has been committed. Although, as has been seen, the restraint proceedings and the adoption of the relative measures are often supported by a criminal conviction, nevertheless such a conviction does not constitute, as a matter of law, an essential requirement.

In addition to this, it should be said that, unusually, our anti-mafia prevention measures have been explicitly recognised at international level. This seems to provide confirmation, in systematic terms, of the fragility of the legislative bases of international law which are identified through extensive interpretations or at least on the basis of contradictory provisions.

In particular, the aforesaid Agreement of 16 May 1990 between Italy and the United Kingdom on mutual assistance in relation of smuggling of narcotic or psychotropic substances and seizure and confiscation of the proceeds of crime provides that restraint orders made in Italian proceedings can form the basis of an execution in the British jurisdiction. In relation to this agreement, however, there are no known cases of practical application, thus confirming the condition of crisis in the operational effectiveness of the overall system of controlling illegal financial investments, in spite of a large and elaborate production of criminal international law, as well as domestic laws).

Naturally, during bilateral negotiations it is easier to proceed with a clear examination of the peculiarities of national laws and give express consideration to the differences that exist.
But in general, the problem of translating original forms of legal principle into models that can be easily used in international cooperation is not exclusive to our Italian legal system.

In this wider context, it is appropriate to note that the declared objectives of the Convention for harmonising national jurisdictions are still far from being effectively achieved, even observing the applicational procedures from the point of view of other legal systems, as can be seen from the continual problems in foreign execution of confiscation orders made in the United States according to the rules of procedure *in rem*, with the tendency of states whose assistance is requested to refuse on the traditional grounds relating to the necessity of a prior criminal conviction against the person to whom the asset of illegal origin is traced[126].

These are difficulties that are typically linked to the enormous differences in the way that the various systems of seizure and confiscation are conceived, which can be overcome only through the progressive erosion of differences between national legislations.
For example, the law of the United Kingdom recognises the possibility of issuing a restraint order on the basis of civil proceedings *in rem*[127], but this has happened because, following the introduction of the Designated Countries and Territories Order 1990 and of the Amendment Order 1993, it has become possible to use the Drug Trafficking Act of 1986 in order to carry out confiscation ordered in a foreign country of proceeds of drug smuggling (payments or other remuneration received in connection with such offences).

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[126] For an objective description of the actual approaches of various national systems, cf. *Financial Action Task Force on Money Laundering annexes of the annual report 1996-1997*, June 1997, FAFTAX97.PM5 in *http://www.ustreas.gov/fincen/fatfax97.pdf.*

[127] *Court of Appeal*, 21 June-5 July 1995, Evans, Otton and Pill L.JJ. in *The Law Reports* 1996, 272 et seq. (case also cited by A.M. MAUGERI, *op. cit*. 609). This case concerned the execution of an order made by an American judge to block access by relatives to the London bank account of a presumed drug smuggler, against whom there had been no proceedings in the United States because he was resident in Colombia, a country with which the United States had no extradition treaty.

Moreover, it is often necessary to recognise that the problem reveals a strongly pragmatic aspect. Much depends upon the similarities between the various national systems, recognisable in concrete applicational aspects, including the trust that is placed in the jurisdiction of the requesting country, the effectiveness of the measures assisting the exchange of information (not least, those possible through liaison magistrates), and above all the tendency to require a substantial evaluation of the characteristics of the case to which the specific request for assistance relates.
The Crisafulli case provides an important demonstration of this.

But, save for considering the objective value of the positive result in this single experience of application, it seems difficult to avoid the impression that the bases of international regulations usable for the purposes of the international projection of restraint measures are, on the whole, weak and uncertain, both in the case of civil forfeiture that is not preceded by a criminal conviction or, indeed, as is naturally perfectly possible, that is followed by an acquittal in criminal proceedings, as well as in relation to situations of confiscations of entire quantities of assets that have been amassed unjustifiably.

In any case, it appears to be extremely difficult to support the possibility of including, within the scenario of international cooperation on seizure and confiscation, entire quantities of assets whose formation is judged to be unjustified but in relation to which the nexus linking individual assets with the commission of particular offences is so tenuous from the legal point of view as to be non existent.
The Strasbourg Convention, in fact, requires proof of the causal nexus between a crime and the proceeds to be made subject of the seizure and confiscation, save for the admissibility of confiscation for value[128].
In this way, any possible international dimension for the confiscation provision under article 12-*sexies* of Legislative Decree 306/1992 is certainly destined to fail at the outset. Its wording is indicative of the crisis in the traditional nexus linking the subject matter of the confiscation to the crime committed, which has recently be reaffirmed by the Full Sitting of the Italian Court of Cassation.

In conclusion, it would not seem inappropriate to point out an objective fact. In the face of the current challenge of transnational crime, the Italian system of attacking criminal investments is

[128] This is recalled appropriately by A.M. Maugeri, *op. cit.*, 604, who nevertheless seems to credit in general terms the plausibility of the favourable interpretation to the execution of civil confiscation abroad.

constructed around figures who have an innate difficulty in being able to play a part in international judicial cooperation.

Even this consideration would suggest a need to rethink the whole subject[129] according to new theoretical models which solidly anchor the effect of forfeiture to the outcome of the criminal trial[130] and which encourage processes of legislative harmonisation in order to guarantee the smooth running of international cooperation mechanisms.

§ 5. *The Framework Decision on execution of orders for blocking and seizure of property in the European Union for the purposes of confiscation and evidence*

As a contribution towards demonstrating this, it is necessary also to consider the prospects for possible cooperation in the European Union on the basis of the Framework Decision on execution of orders for freezing assets for the purposes of confiscation and evidence, approved by the Council of Ministers of Justice and Internal Affairs of the members states of the European Union on 22 July 2003.

For purposes of immediate interest, it is appropriate, in fact, to point out that the new measure is to be applied to orders for seizure and freezing of assets ordered for purposes of obtaining evidence or subsequent confiscation "in the context of criminal proceedings", which seems, in itself, in formal terms as well, to block the way for the foreign execution of orders for seizure.
In the second place, it must be noted that the notion of assets capable of forming the object of restraint measures executed in the forms provided by the Framework Decision is limited to things that constitute the subject matter, the instrument or the product of crime, excluding, therefore, proceeds of subsequent reinvestment, which in itself would seem to require a review of the system of property penalties in the light of the opportunities offered by the new measures.

In general, the European Union initiative in this respect originated from a joint proposal by France, Sweden and Belgium, which was motivated by the declared awareness of delays and inadequacies in punitive action and, for this reason, from the idea, stemming from the Framework Decision, of encouraging the development of a system of cooperation in matters involving seizure and confiscation towards principles of mutual recognition of decisions.

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[129] As A.M.Maugeri, *cit.*. 604 clearly observes this is an essential reason for reviewing the Italian system on property protection.
[130] Cf. the proposal for reform put forward by A.Gialanella in *Patrimoni di mafia. La prova, il sequestro, la confisca, le garanzie*, E.S.I., 1998.

In the formulation of the framework decision, the original proposal was accepted, which made a clear distinction between the requirements of seizure and confiscation.
Objective priority is therefore given to the practical need for the seizure to be executed immediately, with a requirement for mere control of the formal regularity of the request and inexistence of special grounds of immunity (it is possible to justify delay of execution only for investigative or domestic procedural reasons).
As this is a seizure for the purposes of permanent forfeiture, the execution of the confiscation is subject to ascertaining the existence of the same requirements necessary for producing that effect according to the domestic law of the state of execution and, in general terms, a ruling by it not to invoke the grounds for refusal set out in article 18 of the Strasbourg Convention of 1990.

In practice, the system described varies widely between the level of conditions required for ordering the seizure and what is necessary for recognising the confiscation.
In this latter case, as it is necessary to overcome a screening process that is not at all dissimilar to what took place in the traditional system of cooperation based on the formal request, there tends to be a notable reduction in the utility of the mutual recognition mechanism and the practical function ends up being equivalent to the old nineteenth century style system of letters of request.

This risk, in general terms, was very clear in Europe at political level. It was raised in general terms in the recent communication to the European Council and European Parliament Commission on reciprocal recognition of definitive criminal decisions[131], but it has not been possible to reverse the tendency towards a reduction in the prospects of a confiscation order being made, and it is necessary to wait for the adoption and future implementation of the said proposed Framework Decision for the execution of confiscation orders[132], or for the opening of a season of legislative harmonisation through the more incisive measure of framework legislation that has been sought in the Project for the European Constitution.

In any case, a radically different execution procedure to one or other type of measure would be open to much greater criticism, considering the risks connected with the possibility of carrying out seizures that are subsequently unfruitful. On the one hand, it is not possible to carry out any interim

[131] Cf. the material gathered in *Il riconoscimento reciproco delle sentenze penali nell'Unione Europea*, edited by G. DI LELLO, GUE/NGL, 2001.
[132] On the initiative of the Danish Presidency, on 19 December 2002, The Council for Justice and Internal Affairs reached an initial agreement on a proposed Framework Decision for execution within the territory of the European Union of confiscation orders, having the declared purpose of extending the possibilities of cooperation between member States on the basis of mutual recognition.

control and yet, it is necessary to comply with the most rigid parameters of the conventions in force relating to mutual assistance for purposes of confiscation, in the absence also of a framework decision in this area, which is still in the negotiation stage[133].

Perhaps, the complexity of the various respective problems is reflected in the varying approaches, but perhaps it is possible also to see a further more general political tendency in the decisions taken to place greater emphasis on the symbolic aspects of punitive action and, from this point of view, to emphasise the importance of the restraint measure and to protect procedural requirements connected with reaching the final decision in respect of the final destiny of the seized asset.

The framework decision on execution of orders for freezing and seizure of assets also has an innovative importance that is difficult to deny.
It contributes towards intensifying international pressure on national procedural legislation, emphasising the urgency for their general adaptation to the model of cooperation which, despite difficulties and resistance of every kind, is already taking place in Europe.

There is no time for us to carry out a detailed examination of the contents of the Framework Decision.

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[133] During the course of negotiations, two different proposals for mediation were presented, one Italian and the other Dutch, both having the purpose of identifying the conditions for screening requests for execution of seizure and confiscation orders.
According to the Italian proposal, it would have been preferable to introduce a possibility of a standard control in relation to one or other measure linked to the criterion of the occurrence of exceptional risk for the protection of essential interests of the state of execution.
The approach of the Dutch delegation, on the other hand, sought to permit an examination of the merits of the request for execution of the seizure order, according to criteria for safeguarding the fundamental principles of the state of execution, without however in any way restricting the area of possible grounds for refusal in the final executive stage.
While the Dutch proposal aimed, when viewed in objective terms, to obstruct any possible significant advancement of the levels of cooperation, the approach of the Italian delegation had, in theory, the merit of seeking to reduce the difference between the guarantees of effective international collaboration at the restraint stage and at the subsequent stage of confiscation, even though this objective was to be achieved by making the execution of restraint orders subject to the inexistence of risks to the essential interests of the State, rather than restricting the discretional powers that currently give a wide range of motives for refusal to execute final orders, while mitigating the possible latitude in the application of this traditional provision with a reference to the exceptional nature of refusal thus motivated.
In evaluating the significance of the Italian proposal, it must also be borne in mind that the control aimed at safeguarding the so-called essential interests of the State, as a rule, would have been possible only in a political and administrative context, thus apparently conflicting with the general objective of depoliticising an area which is naturally linked with the idea of cooperation sought by the Amsterdam Treaty and by all subsequent European documents: to simplify, accelerate and facilitate cooperation between governments and between judicial authorities.
It is appropriate, in this respect, to recall that in the abovementioned final report of the Multi-disciplinary Group on Organised Crime, in analysing the information collected on the reasons for refusal to execute requests for judicial assistance for the purposes of seizure and confiscation, is it observed that "*the ambivalence between political appraisal and the investigation by the judicial authorities has been found in various assessments to be a cause of delays in execution and a source of confusion over the attribution of responsibilities*".
In any event, those opposing alternative proposals have, for the time being, been rejected and the idea has prevailed of moving forward in terms of mutual recognition for the purpose of seizure and, vice versa, not to make any substantial innovation to the regulations governing conditions for the execution of final decisions.

Perhaps it is sufficient to observe that:

1) for the purposes of execution, the double incrimination requirement is not necessary, if the order for seizure and freezing assets is made in proceedings relating to crimes that fall within 32 categories that tend to be of a trans-frontier nature and with a varying capacity for objective description (they are the same as those listed in the Framework decision on the European arrest warrant);
2) the grounds for refusal are based on fairly rigid parameters (formal irregularities of the certificate of transmission, existence of grounds of immunity or privilege, breach of the principle of *ne bis in idem* immediately identifiable);
3) execution is completely depoliticised, providing for the transmission of the request for execution directly from the judicial authority making the order to the authority that has to execute it;
4) execution is carried out according to formalities and procedures indicated by the state issuing it, in order to guarantee the validity of the evidence, save where such formalities and procedures are in conflict with fundamental principles of the legal system of the state of execution.

The tendency to abandon the principle of *lex fori* is consistent with the rule (under article 11) by which, even though the interested parties (including third parties acting in good faith) must be given the right to challenge the order – without suspensive effect – which is exercisable either in the state where it is made or where it is executed, arguments on merit in relation to the basis on which the order for seizure or freezing of property is made can be put forward only through proceedings before a court in the state issuing the order.
In relation to such a procedural mechanism it is therefore impossible make any formal legal challenge to the authority of the state of execution.
The jurisdictional power that is being implemented is that of the state requesting assistance for the purposes of execution.
The principle of mutual recognition is therefore inevitably followed by the system of guarantees being turned in the direction of the legal system of the requesting State.

The new effects of the normative construction of an institution inspired by the principle of mutual recognition of judicial decisions on forms of guarantee might assist in introducing a further area of study which has been drastically effected by a recent and fairly significant ruling of the Full Sitting of the Criminal Court of Cassation, which was called upon to consider the admissibility of an

application for review against a request for foreign execution of a seizure-for-evidence order made according to the traditional regulations of judicial assistance[134].

The judgement of the Full Sitting of the Court originated from a series of rulings that contradicted the traditional view, which had only recently been reiterated by the same Court[135], according to which, in cases of a request for seizure made to a foreign judicial authority, it would not be possible to seek remedies other that those provided by the law of that state to whom assistance was being sought, which provided the exclusive standard by which the validity of the order should be tested.
This consolidated opinion was based upon the assertion that, since, on the basis of a generally recognised rule of international law, the exercise of the jurisdiction, as manifestation of national sovereignty, cannot go beyond the territorial confines of each State, a measure valid in one jurisdiction cannot be adopted by the judicial authority of that same State in relation to the territory where it is required to be effective, because it is exclusively the law of the State of execution that must be looked at in order to consider the legitimacy of the decision.
In other words, as it is the duty of the foreign authority to ascertain that the application responds with the domestic laws of its own legal system, the order for seizure was considered to be ascribable in legal terms only to the foreign authority that had adopted it and, as such, open to challenge only according to the laws of the State to whom the request was being made.
Apart from the procedure for challenging this latter legal system, the only possible recourse in relation to the Italian authority was to apply for restitution of the property with the subsequent possibility of an appeal against refusal of the application, which naturally presupposes that the seized property has been materially transferred into Italy.

This position was upset by various rulings[136] which had stated that "competence to decide as to the need for the seizure requested and its foreign execution, as well as its pursuance for the purposes of criminal proceedings, can only be that of the requesting State, which alone has the possibility of establishing, on the basis of the offence concerned and other factors in its possession, whether or not the seizure executed by the foreign authority is useful for the proceedings and falls within one of the categories which, according to Italian legislation, allows seizure of a particular thing. This is subject to the sole limitation that the Italian judge can have no knowledge as to the regularity of the execution of the seizure carried out by the foreign court or by the police authorities appointed by

[134] Full Sitting of the Criminal Division of the Court of Cassation, 16 April 2003 (Judgment 15 May 2003), Monnier, no. 2003/21420.
[135] Section IV, 12 December 2001 Castellucci, in *Guida al diritto* 2002, issue 8, 103 et seq., with commentary by E.Calvanese. For previous rulings, see SectionVI, 19 November 1993, Palamara, in *C.e.d. Cass.* no. 198237).
[136] Section I, 23 October 1997, Russo, in *C.e.d. Cass.* no. 209890; Ibid., 20 September 2002, Monnier, *C.e.d. Cass.* no. 222864.

that court, because, as the seizure is executed according to the legislation of the requested State, only the judge in that State is competent to consider and decide all matters concerning the regularity of the acquisition, carried out according to that law".

In the face of such an objective divergence, the Full Sitting of the Court affirmed the principle according to which "the request for international judicial assistance for the execution of a seizure-for-evidence order abroad is independently challengeable by an application for review, in that it presupposes an autonomous, even if sometimes only implied, seizure order adopted by the Italian judicial authority".

In their reasons for the judgement, the Full Sitting of the Court stated that in every case it would be possible to identify, in the request procedure for the seizure, a decision stage that was ascribable solely to the Italian judicial authority, and a subsequent stage, which would be solely ascribable to the exclusive authority of the foreign authority and, as such, regulated by the law of the requested State.
On the assumption of such a structural division, between the decision and execution of the seizure, it was stated that it was impossible for there to be a lack of protection measures for the purposes of ensuring the existence of legally established conditions for imposing the order prior to the request for judicial assistance.

In other words, in the view of the Full Sitting of the Court, conservation of the traditional interpretation would lead to an intolerable gap in the defence of the accused, with an absence of traditional domestic law remedies to safeguard the need to ensure from the beginning the existence of legitimate grounds for carrying out the seizure.
It was felt necessary to fill such a gap by allowing the review of letters of request (in other words, the seizure that was implicit in the application for foreign seizure), in such a way as to provide, as an alternative, a claim solely in relation to the constitutionality of the law as hitherto interpreted (pursuant to articles 3 and 24 of the Constitution).

In order to support the view of double judicial control, however, the Court of Cassation had to use an ingenious reconstruction of the structure of the case, stating that the request for foreign seizure always presupposed an order for seizure by the Italian judicial authority which, where not separately made, must however he deemed to be implied in the letter of request. Otherwise it would not have been possible to suggest a conceptual separation between one jurisdiction on seizure (only source of the condition of unavailability of the asset on Italian territory which would be the implicit

but necessary prerequisite for the subsequent compulsory foreign order) and jurisdiction on execution, which is solely that of the legal system in which the request for assistance is made.

It is easy to see just how distant this argument is from the conceptual model that traditionally supports the system of international judicial assistance, based on the letter of request and therefore on the idea of delegating jurisdictional activities to another State which, once completed, according to the formal and procedural requirements of the country requesting collaboration, are attributable solely to the requested State. This is rather more in line with the theoretical model of mutual recognition that is today represented by the Framework Decision described earlier.

However, it may be interesting, above all, to note certain particular difficulties.

The same, fairly innovative idea of an "implied" seizure order, construed in order to justify the activation of domestic procedural remedies, must be compared with various considerations of international criminal law.

An examination of the international sources, in fact, reveals that, for executing a letter of request for the purposes of seizure, only in certain particular areas of cooperation, supported by bilateral agreements, is there a requirement – for the obvious purpose of ensuring that it is a serious request for judicial assistance – for the prior making of a seizure order by the requesting authority or the attachment of equivalent documents in order to demonstrate that there are solid investigative reasons forming the basis of the request for assistance, without however lessening the requirements under domestic law for ordering the seizure.

Apart from cases in which the domestic law of the requested State requires the attachment to the request of any seizure order made in the requesting State (such as, for example, are set out in the *Guidelines for Judges and Prosecution Authorities* in the United Kingdom), there exist, in fact, various international agreements (the bilateral agreement with Austria and with Peru) which expressly require the attachment of the judicial order for search or seizure. Other cases (bilateral agreement with Canada)[137] are limited to making a requirement of attaching to the request a declaration by the competent authority in the requesting State which declares that the seizure *"could be carried out by compulsory measures if the property were situated within the territory of the requesting State"*.

[137] In this respect, see E.CALVANESE, *La cooperazione giudiziaria in materia di sequestro*, in *Cassazione penale* (currently being published).

But these are exceptional circumstances which, in themselves, make it clear that international law generally considers it sufficient for there to be a simple request to the jurisdiction of the requested State, which has total jurisdiction over the ruling as to the requirements for making the seizure order.

However, the central point of the question under consideration concerns ascertaining the actual existence of a gap in protection as a result, according to the reasoning of the Court of Cassation, of following the more traditional interpretation.

For this purpose, it should be remembered that, apart from protection measures taken by the legal jurisdiction whose assistance is requested (which are often fairly considerable and decisive – suffice it to consider the system of exceptions under Swiss law, simplified only in the area of money laundering with centralisation of applications before federal judges, but otherwise arranged on several levels), the framework for protecting individual interests has a complexity that is the result of a combination of those remedies with other protection measures provided by domestic law.
Apart from the possibility of objecting to the execution, the party concerned can, on the one hand, activate the procedure for judicial review of any refusal by the public prosecutor of the application for the restitution of the seized property and, on the other hand, activate the control mechanism that is operated where evidence is used according to the procedural rules of the requested state and pursuant to article 729 of the Penal Procedure Code.

It has been accurately observed that the adequacy of the framework of guarantees should be judged having regard to the overall legislative framework and with regard to all stages of the procedure, so that the loss of the review stage could be compensated by using control measures provided by the *lex loci*[138].

On close examination, a gap in protection under the penal code in relation to letters of request does actually exist, but it relates not to letters of request directed abroad but to the procedure for letters of request received from abroad and, paradoxically, the above judgement of the court contributes towards justifying it, since it bases its argument on the traditional view, according to which, with regard to the activity of acquiring evidence carried out on Italian territory upon the request of a foreign authority, only the measure of opposing execution would be usable, providing further confirmation of the need to allow the judicial review procedure against foreign requests for seizure.

[138] G.DIOTALLEVI, *L'impugnabilità con istanza del riesame davanti al giudice italiano di una richiesta di sequestro probatorio all'estero. Spunti di riflessione dopo la sentenza delle Sezioni Unite*, in *Cassazione penale* (currently being published).

The absence of an express provision regarding the party concerned in carrying out the acts in the letter of request among the recipients of the notice of the hearing to be held in order to decide upon the admissibility of the letter of request stands at the legislative root of the traditional legal vision of the judgement of *exequatur* which is held *ex parte* before the Court of Appeal in order to avoid the unfavourable outcome which would otherwise only be possible through objection to execution[139].

This is a traditional view of the *exequatur* procedure. Its difficulty in being justified – although attempted by seeking to confine the relevance of the whole procedure regarding admissibility of letters of request from abroad exclusively on the level of relationships between States[140] - has been widely emphasised by legal authority[141], which has criticised the apparent nature of the guarantee function as theoretically traceable to "paternalistic" forms of conduct in cases which see the participation only of the prosecution authority[142] and the lack of a constitutional basis, in the light of article 24, to an interpretation of the discipline in the code which denies the right of the defence to take part in the hearing to examine the existence of grounds for judicial collaboration requested and also, therefore, the legal requisites of admissibility of the activities requested, which as such are destined to be admitted into a foreign procedure in which the interested party can be directly involved and, therefore, able to take a direct and immediate part in the same individual legal process and, within this, also in the constitutional protection of the assets.

For this purpose, it has been noted that there is no reference at all in the notes to the penal procedure code that assist in explaining the exclusion of the defence from the hearing in question[143].
Indeed, noting the indirect importance of the reference in the parliamentary debate to the opportunity of providing for the participation of a representative of the foreign State in the hearing, which was then excluded due to concern about introducing in this way a rule that was "capable of compromising the equilibrium of the adversarial process"[144], indirect confirmation is provided that

[139] For an overall view of the codified provisions on letters of request, see G. MELILLO, *Ruoli e forme della garanzia giurisdizionale*, in *Rogatorie penali e cooperazione*, op. cit., 265 et seq..
[140] For this view, see P. LASZLOCZKY, *La cooperazione internazionale negli atti d'istruzione penali*, Cedam, 1980, 96.
[141] On this particular question, cf.: G. CAPALDO, Under *article 724*, in *Commento al nuovo codice di procedura penale*, edited by M.CHIAVARIO, Utet, vol. VI, p. 779-780; C.VALENTINI REUTER, *Il controllo dell'autorità giudiziaria italiana sugli atti istruttori effettuati in esecuzione di rogatorie internazionali: un'eterna attesa nel deserto dei tartari*, in *Giur. It.* 1995, II, ch. 143 et seq.; G.CATELANI, *I rapporti internazionali in materia penale*, Giuffrè, 1995, p.311; C.VALENTINI, *L'acquisizione della prova fra limiti territoriali e cooperazione con autorità straniere*, Cedam, 1998, p. 143 et seq.; A.GIOVENE, under heading *Rogatoria*, in *Digesto* penale, vol. XII, p. 579; J.P.PIERINI, *Assistenza giudiziaria a favore di autorità straniere e diritto di difesa: è vera incompatibilità?* in *Cass. pen.* 2002, p. 1113 et seq.
In relation to summary procedure the problem of the constitutionality of the failure to notify the party concerned and his lawyer was raised by G.D.PISAPIA. *Compendio di procedura penale*, Cedam, V ed., 1987, p. 626.
[142] C.VALENTINI, *L'acquisizione della prova*, op. cit., p. 144.
[143] G.CAPALDO, Under *art. 724*, op. cit., p. 779; C.VALENTINI, *L'acquisizione della prova*, op. cit., p. 143-144.
[144] Thus the *parere della Commissione parlamentare,* under *art. 714*, in A.GAITO (edited by), *Il nuovo codice di procedura penale*, vol. VI, Cedam, 1990, p. 1521.

the legislature had in mind the full involvement of both parties, so as to induce it to consider the possibility of an improper imbalance in the procedural relationships by reason of another figure being called upon to represent interests programmatically in conflict with those of the figure in charge of the legal jurisdiction involved in the execution of proceedings requested.

It has also been noted that the possibility of the defence taking part in the hearing would seem logically to be assumed by the provisions of the penal code concerning the jurisdictional examination of admissibility of the request, which provides that the consent of the accused (nothing being said in relation to the methods in which it should be expressed or obtained) is sufficient to overcome the grounds for refusal to carry out execution provided by article 724 (5) (b) and (c) of the Penal Procedure Code[145], further observing[146] that the effectiveness of the said role of ascertaining those reasons (and above all as to the existence of reasons of odious discrimination provided by the second of the provisions referred to above) reasonably requires the collaboration of the party concerned.

From this, there has been a considerable effort to reduce, through interpretation, the gap that had opened up by the failure to mention the accused and his legal representative among those upon whom the proceedings are served. The importance of this can be understood also through an appreciation of the overall effect of further reduction of guarantees to the defence that arise, on the one hand, by the habitual refusal of the possibility of challenging the final ruling in the procedure before the court of appeal and, on the other hand, by the limited margins of protection ordinarily allowed through remedies against individual acts of execution[147]).

Thus, it has been stated that the gap "would be justifiable only with the observation arising from the possibility of the request for collaboration referring to proceedings where there is still no defendant"[148], it being otherwise possible to resort to the similar application of the general discipline governing court proceedings in order to include the adversarial procedure[149].

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[145] G.Capaldo, Under *art. 724*, op. cit., p. 780.

[146] C.Valentini, *L'acquisizione della prova*, op. cit., p. 145-146.

[147] The case law has once again, recently, repeated that objections to executive acts can be valid in raising, so far as the *exequatur* measure is concerned, only questions regarding the existence and validity of the right to carry out the execution order, as in the case where it had not been signed (Cassation, 14 April 1999, Acampora, in *Cass. pen.* 2000, p. 2356 et seq., with note by R.Fois, *Another ruling on unchallengeable nature of the* exequatur *order of the Court of Appeal which gives executive effect to an international letter of request and on the operational limitations of objections against execution*). In the same way, Cassation, 27 October 1994, Menegatti, *ivi*, 1996, p. 1571.

[148] G.Catelani, *I rapporti internazionali*, op. cit., p.311.

[149] G. Catelani, *op.loc.cit.* In the same way, C.Valentini, *L'acquisizione della prova*, op. cit., p. 144, as well as G.Diotallevi, Under *art. 724*, in G.Lattanzi-E.Lupo (edited by), *Codice di procedura penale. Rassegna di giurisprudenza e di dottrina*, Giuffrè, 1999, p. 425, which allows the presence of the defence lawyer in proceedings *in camera* in all circumstances where the letter of request concerns matters of evidence regarding the accused or which provide for the presence of the defence.

But the reluctance of legal doctrine to accept an interpretation of article 724 (3) Penal Procedure Code where the presence of the defence is denied[150] stands in opposition to a continuing approach by the law to undervalue claims made to provide effective defence for the defendant involved in the execution procedure in a passive letter of request, such applications being considered inconsistent with the collective expectations of an international judicial cooperation which is based upon procedural principles that must assure effectiveness and speed.

Once again, recently, the Court of Cassation has ruled that arguments as to the constitutionality of this discipline are manifestly unfounded. The case was an appeal brought by the defence against an order rejecting an application against execution, brought on the grounds that there had been a breach of the right of the defence following failure to give notification of the hearing set to decide upon the admissibility of the request for judicial assistance[151].

The weakness of the reasons for the judgement of the Full Sitting of the Court on this very question is clear, considering the paucity of the arguments used in order to rationally demonstrate a statement relating to a rule of international law and of supranational value, formulated by way of a mere indication of a general requirement to meet the requirements of "the provision set out in article 24 (2) of the Constitution … with another provision set out in article 11", as well as the objective of ensuring speed in the procedure, which is the target of international law relating to letters of request. The Court did not, however, identify the sources and the exact parameters of a specific principle of international law that actually or irredeemably conflicts with the guarantees upset by the lack of any possibility whatsoever, even subsequently, for the defence to put forward objections relating to the admissibility of the letter of request[152].

In reality, in terms of international law, it is not easy to dispute the existence, even within the limits set by the conventions, of an obligation by the Italian State to effectively assure the judicial collaboration requested by other states, and therefore (naturally, in conditions of reciprocity) not to

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[150] See C.VALENTINI, *L'acquisizione della prova*, op. cit., p. 146.

[151] Cassation 25 February 2000, Acampora, in *Cass. pen.* 2002, p. 1109, with note by J.P.PIERINI, *op.loc.cit.*. The Cassation expressed a similar view in *Cass.*, 14 April 1999, Acampora, in *Cass. pen.* 2000, p. 2356, with a note on the point by R.FOIS, *Ancora una pronuncia*, op. cit., specifying that the objection to execution can be raised only in challenging the territorial jurisdiction of the executing judge which, pursuant to article 665 Penal Procedure Code, is identified only in the order under challenge.

[152] J.P.PIERINI, *assistenza giudiziaria*, op. cit., p. 1116, who also suggests that the possibility of subsequent control by the defence is not logically excluded, not even in view of the more recent provisions of the European Union Convention of 29 Mayo 2000 (art. 4, § 2) on the question of obligation by the requested State to execute requests for assistance as quickly as possible and taking into account, so far as possible, the procedural time scales and other reasons for swift action indicated by the requesting authority.

adopt or retain domestic procedural laws which, allowing the party concerned to have prior notice of the letter of request, threaten the effective possibility of a successful execution.

This concept has been defined, in concrete terms, above all with reference to requests aimed at the execution, with the assistance of the Italian authorities, of "surprise acts", in other words all those requests for obtaining evidence (searches, seizures, interception of communications, etc.) that would have no practical effect if the interested parties were to have prior knowledge, or the possibility of knowing about them[153].

But further, analogous requirements of effectiveness of international collaboration are to be recognised in cases where there are important considerations which can be legitimately concealed from the requesting authority in order to preserve secrecy in the criminal proceedings giving rise to the needs for international cooperation and, therefore, in adopting procedures in carrying out the request for international cooperation which are appropriate for avoiding all prejudice for purposes of the investigation resulting from legal knowledge from the parties concerned of the actual, concrete conduct of the investigation activities.

Of relevance here is the request aimed at obtaining the evidence of a witness, bank statements or documents relating to the illegal mortgage activities of a person, obtaining external data relating to telephone communications or, as the investigations develop, every other investigative control or search for evidence which is possible, under Italian law, without the involvement of the accused person and with the guarantee of secrecy laid down in general terms (article 329 (1), Penal Procedure Code) to protect the public interest in the successful conduct of the search activities and to protect the evidence of a crime.

In cases of this kind, the foreign authority will be able to envisage the formal need to execute the letter of request in such ways as to avoid not only the risk of giving advance knowledge to the accused or other people involved in the specific activities for which the evidence is to be obtained, but also the risk of possible, irreparable harm to the parallel investigations being carried out according to the law of the requesting State and their subsequent developments.

As these are requests which, in themselves, do not conflict with the principles of the law of the State, since they are aimed at obtaining evidence which is entirely in keeping with the provisions of the general rules governing the preliminary investigation carried out by the Italian public prosecutor (save for the possibility of any changes to the system resulting from any declaration by Parliament of extreme interpretations of the requirements of legislative compliance deriving from the principle laid down by the new article 111 (2) of the Constitution, on the question of the right of the accused person to receive confidential information of the accusation and its reasons "in the shortest possible

[153] C.VALENTINI, *L'acquisizione della prova*, op. cit., p. 145-147; J.P.PIERINI, *Assistenza giudiziaria*, op. cit., p. 1116.

time"), that same principle of effectiveness of cooperation due from the Italian State which was previously explained on the basis of international law, is valid, under current procedural regulations, to justify, even in the hypothetical terms described above, the failure to give notice to the accused and to his lawyer about the hearing pursuant to article 724 (3) Penal Procedure Code which, as has been seen, logically follows, in relation to "surprise acts", from the mere consideration of the nature of the subject matter of the request.

But whether it comes from a consideration of the intrinsic nature of the investigative activity to be completed, or whether further procedural requirements are set out in the letter of request which impose confidentiality during the execution of the order, the value given by international law to protection for reasons of effectiveness of cooperation could well be compatible with the need not to sacrifice beyond a reasonable extent the requirements of safeguarding the defence. This leads to the view, pursuant to the aim of international protection, that the provisions of domestic procedural law preclude forms of participation or control by the defence that seek to anticipate the execution of the letters of request and, in general, to interfere with the reasons of confidentiality in the procedure of the requesting authority

In relation to the problem thus identified, therefore, there is no current obstacle in international law for the provision – capable of being achieved solely through legislation which has become urgent, by the acute risk (to be seen also in relation to the extent of modern cooperation) of harm to the principle set out in article 24 of the Constitution – of adequate forms of deferment (even in relation to the requirements of not slowing down international judicial collaboration beyond a reasonable extent) for defensive control[154], making appropriate alterations to the timescales and methods of guarantees for defendants in relation to the nature and the complexity of the investigations by the foreign authority, as well as the intrinsic value of swift collaboration.

[154] C.VALENTINI, *L'acquisizione della prova*, op. cit., p. 145-147; J.P.PIERINI, *assistenza giudiziaria*, op. cit., p. 1116. In particular, C.VALENTINI proposes, in relation to *de iure condendo*, to allow the party involved in whatever way in an international letter of request aimed at carrying out so-called "surprise" acts to make a subsequent challenge before a judge by way of a control as to the admissibility of forms of judicial assistance that constitute interference with individual liberty; the screening of the grounds for the request for collaboration that would be carried out for this purpose must arise in a stage after the execution of the letter of request which, by its nature, is incompatible with the prior knowledge of the party concerned, but before the issuing of the order transmitting the final documentation to the requesting authority in relation to the completion of the activity of obtaining evidence (p. 147).

UNICRI – Seminar in Tirana, 15 March 2007

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2.9. The seizure and confiscation of illegal assets in Albania, from the point of view of international cooperation

§ 1. *The meaning of seizure according to the Penal Procedure Code*

Seizure, as we know, is a concept which operates not only in the area of civil law but also in criminal law. By reason of this double relationship, this concept has left, and continues to leave,

room for certain ambiguity. Depending upon its nature – whether civil or penal – the functions, bodies and procedures to be followed in order to apply a seizure order are different in nature.

As a general principle, seizure is a provisional definition relating to the property rights of a person over a given asset, which gives rise to a given procedure indicated expressly by the law. It takes the form of an acquisition of objects or sums of money by a public body which means that their owner or persons without permission from the public authorities do not have the possibility of using them.

The Penal Code provides for certain types of seizure which are notable above all for the purpose of these measures:

- Seizure for purposes of proof. This type of seizure, provided by articles 208 - 220 of the Penal Procedure Code, serves as a means available to the Prosecution authority during the preliminary investigation stage in searching for proof.
- Seizure as a precautionary measure. This type of seizure is provided by articles 270 – 276 of the Penal Procedure Code, and includes preservative seizure (articles 270-283 Penal Procedure Code) and preventative seizure (articles 274-276 of the Penal Procedure Code).
- However, apart from the provisions of the Penal Procedure Code to assist the prosecution authorities, there is provision for a further type of seizure under the "Law for the Prevention and Repression of Organised Crime". This type of seizure has a specific nature and is new to our system of criminal law. Apart from the fact that it has a different procedure to those seizures provided by the Penal Procedure Code, it can be said that, of the two groups of seizure, it resembles more the precautionary measure.

Seizure, therefore, in terms of criminal law, has two principal forms, according to the purpose being pursued. However, what they share in common is the fact that, in any event, the seizure is a measure ordered on a specific asset which gives rise to the impossibility of the person enjoying and being able to use these assets for a particular period of time. As such, they do not represent a definitive end to the right of ownership over the assets in respect of which they are made.

§ 2. *Seizure for purposes of proof*

Seizure provided specifically by articles 208-220 of the Penal Procedure Code is a measure used for searching for evidence. It is used for obtaining and preserving the objects indicated so that, through them, the prosecution authorities can investigate the facts on which the allegations are based. The

authorities authorised by the Penal Procedure Code to make such a measure, by an order supported by reasons, are the Court or the Prosecution authority. But where there is a danger of the evidence represented by particular objects being modified or lost and when there is no practical possibility of waiting for the issue of an order by the public minister without such evidence being compromised, the seizure can be carried out also by an Investigating Police Officer. But in this case he must inform the investigating magistrate of the seizure within the next 48 hours, who shall validate the seizure carried out by the Investigating police Officer or order the immediate termination of such a measure, according to whether or not the measure corresponds with the necessary requirements for obtaining evidence.

This is the general rule followed where seizure is necessary for obtaining evidence. Due to the sensitivity of certain rights, such as the protection of confidentiality, the Code provides various specific regulations governing seizure of correspondence (article 209), the seizure of bank documents (article 210) or seizure at the office of the defence lawyer. In the case of seizure of correspondence, the Investigating Police Officer has no power for making such a measure, even in cases of emergency, and can only suspend the sending of correspondence until such time as the Prosecution authority has made a decision on the making of the said seizure order or revokes the suspension of the original sending of the correspondence to its destination.

Seizure from banks, on the other hand, is ordered exclusively by a judge. Only in exceptional circumstances and only where there are reasons for acting urgently can such seizure from the banks be carried out also by the investigating magistrate. It can be seen therefore that seizure from the banks cannot be carried out by an Investigating Police Officer in any circumstances. Furthermore, the Police Investigator has no power to order the seizure of assets situated in the office of the defence lawyer. Seizure in this case is ordered personally by the judge, whereas during the investigation stage it is ordered by the investigating magistrate on the basis of a ruling issued by the judge.

§ 3. *Seizure as a precautionary measure*

Seizure, provided as a precautionary measure by the Penal Procedure Code, has another purpose that is different from that of seizure for obtaining evidence. In this sense, seizure is not sought to be used on articles or assets that constitute in themselves pointers or evidence necessary for investigating offences before the court. For this reason, the articles or assets that are subject to this form of seizure do not relate to an offence and are not required for proving an offence or

circumstances relating to it. Within this group of acts of seizure for the purposes of pre-trial evidence, there are two kinds of seizure: pre-judgement seizure and preventative seizure.

A. Preservative seizure is measure which ensures that the owner or holder of an asset is temporarily prevented from exercising his rights over the property seized, so that any obligations placed upon a person committing a crime can be satisfied through the asset which is subject of the seizure. The purpose of the preservative seizure is simply as a means of "preserving" the asset until the obligations placed upon the person committing the offence have been satisfied. Moreover, it can be ordered only when there exist reasonable grounds for believing that the person committing the offence is unlikely to pay the fine, the costs of court proceedings and any other costs in relation to public property.

B. Preventative seizure, on the other hand, serves as a precautionary measure made in relation to things which by their very nature, may be used by the accused and, consequently, their free availability may assist in the commission of crimes.

It is precisely this link that exists between things that can be the object of preventative seizure and the offence; they are such, therefore, that they can be used for committing the offence. It is therefore not a relationship in terms of evidence, as in the case of seizure for the purpose of obtaining evidence, even though it can happen that the objects under preventative seizure can serve as evidence. In other words, if an object is under preventative seizure, this does not in fact prevent it from being regarded as evidence of the crime, even though it has not been seized for the purposes of obtaining evidence. On the other hand, where something is subject to seizure as a means for seeking evidence, it is not necessary for there also to be a second seizure as a precautionary measure of a preventative nature. The preventative seizure can therefore be applied only in cases in which there has been no seizure as a means for seeking evidence, due to lack of grounds for concluding that the objects concerned can be assistance in obtaining evidence.

Preventative seizure – provided by Law no.9284 of 30.09.2004, "For the prevention and repression of organised crime". According to this law, preventative seizure seeks to deprive the owner or administrator of assets in relation to which there are suspicions that they might be, directly or indirectly, in the possession of a person in relation to which there is a reasonable belief that he has committed a certain number of offences. This means a number of serious offences which are regarded as typical of the criminal activity of organised crime.

Therefore, in the above case of preservative seizure as well as in the case of preventative seizure, pursuant to Law no. 9284, this measure has the purpose of preserving the property of the person suspected of having committed an offence, so that it cannot be concealed, moved or lost.

Preventative seizure pursuant to Law no.9284 has certain specific characteristics relating essentially to the circumstances in which it is to be considered.

In the first place, in the application of preventative seizure, the burden of proving the lawful origin of the property is upon the accused.

In the second place, seizure pursuant to Law no. 9284 can, in principle, be applied irrespective of whether criminal proceedings have been commenced against the person holding the property, even though a reasonable certainty is required in relation to the commission of a given category of offences, set out in article 3 of Law no. 9284.

In the third place, seizure is applied not only in relation to those persons upon whom there is reasonable certainty, but also in relation to a spouse, children, close relatives or in relation to physical or legal persons in relation to whom there is sufficient evidence to show that their property is held in the possession, directly or indirectly, of persons under suspicion of committing the aforesaid offences.

Finally, seizure carried out pursuant to Law no. 9284 is subject to certain terms indicated by law, which are specific to this type of seizure alone.

§ 4. *Confiscation*

Confiscation is provided under the provisions of the Penal Procedure Code as well as Law no. 9284. In both cases it is a measure ordered by the court. However, these forms of confiscation have characteristics that are such that it is possible to distinguish between them.

In the case of confiscation provided by the Penal Procedure Code, this measure is carried through the issue of a sentence of conviction. On the other hand, confiscation pursuant to Law no. 9284, even though it is ordered upon the application of the prosecutor, is made outside criminal

proceedings. In this sense, it can be made irrespective of whether or not the Prosecuting authority has commenced criminal proceedings.

Confiscation pursuant to article 36 of the Penal Code takes the form of a sort of conviction. It is a type of confiscation *ad personam*, in the sense that it is carried out on the basis of being *beyond all reasonable doubt*, which is also the necessary requirement for the accused to be convicted of an offence. On the other hand, confiscation pursuant to Law no. 9284 is a confiscation *in rem*. It is made on the basis of the burden of proof operated in judging civil cases, namely upon the *balance of probabilities*. Confiscation pursuant to article 36 of the Penal Code is a compulsory confiscation. This means that such confiscation is not necessarily preceded by an order for seizure issued beforehand on the basis of the request made by the prosecutor. On the other hand, confiscation pursuant to Law no. 9284 is always preceded by an order for seizure, and therefore it can only be ordered after the property has been made the subject of proceedings for seizure, on the basis of the request by the prosecutor and according to the requirements set out for this purpose by this law.

Not all countries, in fact, have the same approach in relation to preventative confiscation. Some apply this type of confiscation as a procedure to be applied following a conviction. Others apply this type of confiscation irrespective of whether or not there are criminal proceedings, as if it is a parallel procedure to the criminal trial. The increasing tendency is to favour the procedure of confiscation *in rem*, applying therefore the civil burden of proof. This procedure is also more attractive and considerably helps the fight against organised crime. However, this procedure still remains the subject of debate with regard to the risks that accompany it insofar as observance of the fundamental rights of the individual. It has often been criticised insofar as it is also possible to deprive third parties of their title to property, simply on the basis of an objective nexus that might exist between the asset and criminal activities, without there being complete evidence of aiding or abetting the offence. Due to the lower standard of proof, many guarantees that safeguard the criminal process are not present in the procedures for confiscation *in rem* of assets of criminal origin.

A study of compulsory confiscation pursuant to article 36 of the Penal Code shows that this type of confiscation takes the form, not just of confiscation based on the illegal nature of the property, but also of confiscation based on the value of the property or equivalent value in relation to the proceeds of the crime. This means that compulsory confiscation pursuant to the Penal Procedure Code could also be extended to property lawfully held by the convicted person up to the amount corresponding with the value of the proceeds of the offence.

There is also debate over the provision for confiscation of property promised as remuneration for the commission of an offence. In this case, it could happen that the promise of remuneration is made fraudulently. It could be that the convicted person is promised, by way of remuneration, a house which in fact does not exist. Irrespective of this, article 36 (c) of the Penal Code provides that the court is obliged to order the confiscation of remuneration that is promised, even though it does not actually exist and, moreover, does not form the proceeds of the crime.

The application of the civil law requirements of evidence in preventative confiscation, thus the change in the burden of proof, renders the system more efficient. This change in the burden of proof can also be considered as effective, given that the owner of an asset, as a matter of principle, could demonstrate the non-criminal origin of the said asset more easily than the authorities.

§ 5. *International legislative framework*

At present, preventative measures are being applied increasingly widely, both in practical terms as well is the theoretical debate about modern strategies in the fight against organised crime, corruption, money laundering and the funding of terrorism. Efforts are being focussed above all on bringing legal systems closer to a legal framework operated at international level in order to strengthen international cooperation and more effectively combat transnational organised crime.

In this sense, the efforts carried out by the international community can be briefly summarised as follows:

In the first place, mention should be made of the United Nations Convention against Illegal Trafficking in Narcotics and Psychotropic Substances, 1988.

This Convention provides that States have the obligation to adopt measures for confiscating proceeds derived from crimes relating to narcotics or assets corresponding to the value of these proceeds.

Secondly, the Convention of the European Council "For combating money laundering, concealment and identification of the proceeds of crime, 1990. The Convention also provides that every party State undertakes to adopt legislation and other necessary measures that are such as to enable the instruments and proceeds of crime to be confiscated.

Thirdly, the United Nations Convention "Against Transnational Organised Crime" and its two Additional Protocols.

The Convention provides the further possibility of assisting the process of proving the origin of the property with a requirement that this is demonstrated by the accused (burden of proof). Articles 13 and 14 of this Convention also provide other regulations regarding international cooperation in relation to confiscation, or in the disposal of proceeds of a crime or confiscation of property.

Fourthly, the Council of Europe Convention "For combating Money Laundering, Identifying and Confiscating the Proceeds of Crime and Funding for Terrorism", of 2005.

This convention deals at the same time with the investigation, identification and confiscation of proceeds of crime, as well as combating the funding of terrorism. This Convention also provides legislative measures that are to be adopted at national level authorising the confiscation of instruments and proceeds or property coming from criminal activity.

The aforesaid international measures have been adopted also by the state of Albania. Confiscation and seizure provided under Law no. 9284 of 30.09.2004 "For the Prevention and Repression of Organised Crime", brings Albanian law in line with international legislation and with the intentions of all member states in combating organised crime and confiscating the proceeds of criminal activities.

§ 6. *Law no.9284. Problems*

As can be seen even from the above description of the types of seizure and confiscation operating in criminal law, seizure and confiscation within the meaning of Law no.9284 of 30.09.2004 "For the prevention and repression of organised crime" is something new in our legal system. Various problems of application and interpretation have arisen. The concept of preventative seizure, in relation to seizure itself and the burden of proof, was equally vague in this law. Due to these, and other questions of interpretation, this Law has become the subject of study by the Joint Panels of the Supreme Court. According to the ruling of the Joint Panels (no.1 of 25.01.2007), the judicial procedure takes the following form:

1. The court with jurisdiction to examine the applications for seizure and also to decide upon confiscation of property for the purposes of Law no.9284 shall be the Assize Court. The judgement at first instance of the ordinary court is taken by a single judge, whereas the Assize Court consists of three judges.

   However, it remains fairly unclear how it is necessary to act where there is a reasonable doubt in relation to offences under articles 230/C and 230/ç of the Penal Code, provided by

article 3 of Law no. 9284. It remains unclear which Prosecution authority has to present the application for seizure before the Assize Court, when the reasonable doubt relates precisely to these two offences.

2. The respective procedures for seizure and subsequently for confiscation of the property pursuant to Law no.9284 are autonomous in nature in comparison with the criminal proceedings, despite the fact that, generally speaking, the criminal proceedings have already been commenced.
3. In the procedure for deciding upon the making of a seizure or confiscation order pursuant to this Law, the burden of proof in ascertaining the existence of "a reasonable doubt" in relation to the commission of one of the offences under this Law is upon the Prosecution. On the other hand, for establishing the lawful origin of the property subject of the seizure or confiscation, the burden of proof is upon the person against whom the proceedings are brought.
4. An order for seizure and confiscation cannot be made only on the basis of a difference between lawful earnings and the property created. It is also necessary to establish the existence of a causal nexus between the property whose lawful origin has not been established and the criminal activity which the accused is suspected of having committed.

It is true that through the failure to establish the lawful origin of property subject to seizure there is no direct nexus with the alleged offence, on which basis proceedings have commenced for seizure and confiscation under the provisions of the Law.

Examining the type of seizure and confiscation, within the meaning of Law no. 9284, it can be seen that it relates exclusively to seizure and confiscation of property. In other words, if there is evidence that a person suspected of taking part in organised crime possesses property of illegal origin and, for various objective reasons, it is not possible to confiscate it, this Law does not provide for the possibility of confiscating money or an equivalent value. I would say that this represents a point of weakness in the Law, given that seizure and confiscation extends only to property and not to its equivalent value.

I would also like to emphasise that it should be remembered that seizure and confiscation, within the meaning of Law no. 9284, are not considered to be a form of conviction, as in the case of confiscation provided by article 36 of the Penal Code. Its application is therefore effective even

when a reasonable doubt exists in relation to offences committed prior to the entry into force of this Law. In other words, its application does not depend upon when it is suspected that the offence was committed. It would be sufficient that the reasonable doubt exists for offences that are expressly provided by article 3 of the said Law.

§ 7. *Difficulties in investigation activities and international cooperation*

With regard to international cooperation, our domestic legislation has certain gaps and anomalies which, in practical terms, give rise to difficulties in carrying out measures for seizure and confiscation.

The legislative framework which, in reality guarantees the carrying out of investigations for identifying and locating property situated abroad, during criminal proceedings in Albania, it complete, given that it is regulated by the Penal Procedure Code as well as by the Convention "For mutual assistance and judicial cooperation".

In specific terms, when a seizure order is made during the preliminary investigations as a means for searching for evidence or as a precautionary measure of a preventative or preservative nature, the Penal Procedure Code does not provide any possibility for the said orders of the Albanian judicial authorities to be recognised and therefore executed abroad. No request can be made to the foreign judicial authorities to decide such measures by way of letters of request given that, under the terms of article 505 of the Penal Procedure Code, letters of request relate only to the notification and obtaining of evidence but do not include the making of restrictive measures over the rights of ownership to property situated abroad.

In relation to the execution of foreign orders for seizure or confiscation, which do not have the character of a conviction but have been ordered as preventative measures pursuant to the obligations provided by the Convention "For combating money laundering" the Albanian legislation is not a suitable means of application. This is due to the fact that, by reason of Law no. 9284 and the ruling of the Joint Panels of the Court of Appeal, it is clear that in these circumstances the competent court is the Assize Court. The procedure to be followed in these cases would be that provided by article 393 of the Civil Procedure Code, given that, as indicated above, Law no. 9284 provides in this respect for the application of a civil procedure.

However, the difficulty arise in cases involving recognition of confiscation orders on property situated abroad, made by an Albanian court pursuant to Law no.9284. In specific terms, article 393 provides only the procedure for recognition of foreign civil rulings, but not the procedure for

foreign recognition of Albanian criminal rulings. In such a case it cannot be stated that the Court which has made the order can directly apply the Convention against Funding of Terrorism, or the Convention against Transnational Organised Crime, given that these conventions provide only an obligation upon the States to amend their domestic law in such a way as to assist international cooperation in relation to seizure and confiscation of property. Without effective amendments to domestic law, and without therefore also making provision in such legislation for the recognition of Albanian civil rulings abroad, we cannot, in my view, expect our courts to directly apply the Convention.

Meanwhile, for cases of confiscation carried out following the ruling of an Albanian or foreign court which has the nature of a conviction – therefore convictions within the meaning of article 36 of the Penal Code – the procedure for their execution is clear. What might be an obstacle to cooperation in this sense is the provision in the Penal Procedure Code of an obligation that the property confiscated in execution of a foreign criminal ruling can be delivered to the State which has made the confiscation ruling only if this State acts in the same way, in the same circumstances. This provision means that, according to our Albanian criminal legislation, in order for there to be a delivery of property confiscated in Albania following a foreign criminal court ruling, it is necessary for there to be a cooperation agreement reached with the respective State which expressly provides for reciprocal terms. So far as I am aware, these cooperation agreements do not exist, at least not with countries close to Albania. This has led to a rather ineffective cooperation in this respect.

A further problem that could give rise to difficulties in international cooperation in the future is the fact that in our domestic legislation, in particular in Law no. 9284, seizure and confiscation do not include also the seizure or confiscation of lawful property corresponding to the value of the proceeds of the crime. In these circumstances, foreign court rulings which relate to confiscation orders converted into value could be executed only in circumstances where the confiscation is in the nature of a confiscation ordered after criminal conviction, as in the case of confiscations under article 36 (ç) of the Penal Code. In order for a foreign confiscation order for an equivalent value to be recognized within the terms of the Convention "For combating money laundering", it is necessary inevitably that this possibility be provided in our legislation, and specifically in Law no. 9284, which covers cases set out in the Convention but where, as stated above, there is at present no provision.

UNICRI – Seminar in Tirana, 15 March 2007

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3.1. The use of systems and technologies in the indictment. Principles of evidence, rules on the evaluation and admissibility of evidence, and the prosecution submissions

§ 1. *Principle of the 'free convincement' of the judge and regulations governing the procedure for establishing proof*

In 1988. the Italian legislation, in redesigning the whole procedural system – according to the adversarial 'style' – indicated a clear preference towards 'regulationalisation' of the procedure for producing and evaluating evidence.

There has been a **reaffirmation of the principle of 'free convincement' of the judge**, so that there has been an exclusion of approaches seeking to predetermine – in abstract terms – the value of individual elements of proof, but at the same time, a network of regulations has been provided in order, on the one hand, to guarantee:

- the use, for decision-making purposes, only of evidence obtained according to the rules of adversarial proceedings. These are rules in which it is established "what to use for the decision";
- the use, for decision-making purposes, of rules of logic and consistency in considering the evidence, which the judge must take into account in his reasoning. These are rules in which it is established "how to reach the decision";

There is, therefore, first of all, a series of regulations regarding the selection of the evidence which the judge can use as a basis for the decision:

In this respect, the following provisions are relevant:

- article 191 Penal Procedure Code, prohibiting the use of improperly obtained evidence;
- article 526 Penal Procedure Code on evidence that may be used for the decision;
- article 606 (1) (c) Penal Procedure Code which provides the possibility of appeal to the Court of Cassation for failure to observe procedural rules, on risk of nullification, inadmissibility or debarment;

There are also the basic provisions that govern the formation of evidence, inspired by the adversarial approach to the formation of evidence, which has become a Constitutional principle (article 111 (3) of the Constitution).

There are also provisions that require the judge to adopt legal criteria in his decision:

- The use of criteria that are transparent and verifiable (*cf.* article 192 (1) by which the judge evaluates the evidence taking into account, in reaching his findings, the results produced and criteria adopted; article 546 (1) (e) by which the judgement must contain a concise

description of the findings of fact and law on which the decision is based, with the indication of the evidence forming the basis of the decision and a statement of the reasons for which he does not regard the contrary evidence to be reliable; article 606 (1) (e) Penal Procedure Code),

- The use of evaluation criteria that are 'modelled' on the *differing nature* (and therefore on the varying 'demonstrative capacity') of the individual elements of evidence that are the subject of dispute (*cf.* article 192 (2), 192 (3), as well as, with regard to obtaining of evidence, article 500 (4) & (5) Penal Procedure Code).

- The significance of this development in the introduction of regulations is now clear: this does not mean pre-determining the outcome of an evaluation, which remains the responsibility of the judge to reconstruct, through his perceptive experience and the application of normal logical and empirical criteria of attributing *significance* to each individual factor, but rather to provide:
- -'criteria of method' (adversarial principles) for the formation of the evidence;
- formal rules for the introduction and full admissibility of an approach that is 'appropriate' to justify the legal decision;
- 'minimum evaluative criteria', which are the fruit of the crystallisation of principles of experience, and which seek to direct the exercise of reconstructive power, according to a parameter of *natural prudence* in the acceptance by the judge of particular 'basic categories' of evidence.

§ 2. *Characteristics and evaluation of circumstantial evidence in particular*

A primary distinction, in terms of reliability of elements of evidence, is that between 'historical' (or 'direct') evidence and 'circumstantial' (or 'indirect') evidence.

It is well known that this distinction does not relate to the 'type' of source of evidence (the evidence of a witness can, for example, contain both 'classes' of element), but rather the relationship existing between the *'demonstrative capacity'* of the individual element under consideration and the *'fact to be proved*' in its objective form, as described in the allegation. In this sense, circumstantial evidence can be defined as every piece of evidence which, while not directly representing the fact to be

proved, helps towards revealing it, on the basis of an operation of logical connection between the circumstances and events (from the known fact it is possible to reach what is unknown).

- Definition: evidence is a certain fact from which, by logical inference based on solid and reliable rules of experience, it is possible to demonstrate an uncertain fact which is proved according to a process of legal syllogism.

The evidence, therefore, has its own independent representative capacity, which however, by reason of its partiality – or due to the occurrence of a circumstance that is different (but connected) to the fact to be proved – makes it possible to activate – in the mind of the person called upon to make the reconstruction – a mechanism of logical deduction that is capable of leading to an acceptable state of understanding, in legal terms, as to what has happened.
It is precisely because of this **structural 'deficit'** and this demonstrative capacity that the legislation requires particular caution on the evaluation of circumstantial evidence, anchoring the 'evidential result' upon the existence of particular characteristics forming the basis of the aforesaid inference (*weight, precision, corroboration).*

-It is possible that only one logical conclusion can be drawn from a proven fact (the so-called necessary conclusion), but, generally speaking, the fact can have a number of unknown significances. In other words, the single piece of evidence can be relatively ambiguous and any single significance – save in cases of the so-called necessary conclusion, from which only one conclusion can be drawn – is only one possible explanation;

The requirements of evidence:

- the element providing 'indirect' knowledge must be certain, in other words deriving from an objective fact and not the result of mere supposition (see, in this respect the Court of Cassation 13.12.1991, defendant Grillo: *the circumstance admissible as evidence must be certain before the existence of a fact can be deduced from it. This requirement, although not expressly indicated by article 192 is to be regarded as implicit in the provision of this precept. The certainty of the evidence, in fact, is an essential aspect in ascertaining the real existence of the fact itself during the trial, given that it cannot be permitted to base circumstantial evidence on a fact that probably occurred, or is supposed or inferred, using*

the inadmissible evidence of personal impressions or the imaginations of the decider, which are contrary to indisputable concepts of legal principle..);

- The application of the principle of experience which makes it possible to place 'evidential' significance upon individual elements, in addition to being explicit and verifiable, is based on weighty evidence: 'weighty' evidence is consistent – i.e. resistant to objections – and therefore which already has in itself a reliable and convincing content (requirement of *weight*);
- it must be evidence that is not generic, and directed solely towards a particular conclusion (requirement of *precision*);
- it must not be capable of being contradicted by other elements of a similar kind, or of another nature (requirement of *corroboration*).

The acceptance of circumstantial evidence through logical proof is not indicative of evidence that is less acceptable than direct or historical evidence, provided that it is carried out rigorously, in such a way as to justify and substantiate the principle of 'free convincement' on the part of the judge. (cf. Full Sitting of the Criminal Section of the Court of Cassation, 04. 06. 1992 no. 6682, Musumeci and others).

- The aforementioned ambiguity of individual pieces of evidence can be overcome by applying the method established in article 192 (2) Penal Procedure Code, in other words, through a global evaluation of the same, in order to ascertain whether the ambiguous significance of each can be resolved when the evidence is considered as a whole. It is therefore incorrect to carry out a separate examination of each individual piece of evidence;

-the acceptance of the evidence as a whole in order to ascertain that it points towards a single conclusion, which leads to a logical certainty about the existence of the fact to be proven, is a logical operation which assumes the prior evaluation of each fact individually, in order to test the individual qualitative value according to the parameters of weight (i.e. consistency), precision (i.e. not generic) and concordance (i.e. not conflicting with each other or with other firm evidence);

- It follows from this that every piece of evidence is first of all to be considered in its own right, as independent evidence in order then to enable a systematic reconstruction of the fabric of the "story" contained within the accusations.

These principles were established in the judgement of the Full Sitting of the Criminal Court of Cassation of 04.06.1992 no. 6682 and confirmed by the judgement of the Full Sitting of the Criminal Court of Cassation no. 33748 in 2005 (the Maninno judgement).

The motive: in considering the evidence, particular relevance is placed on the **motive**, in other words ascertaining the underlying cause of the crime. In this kind of proceedings, the search for motive must be carefully carried out with specific concern for the logical assessment and coordination of the results of the trial in order for the judge to form a view with reasoned certainty about the guilt of the accused (cf. Criminal Court of Cassation 1st section 07.02.1996 no.1428).

In cases involving circumstantial evidence, establishing the motive of the crime does not constitute further evidence, but it is that element which links and strengthens the efficiency of the individual pieces of evidence (Criminal Court of Cassation Section I, 15.12.1995 no.12422).

Once again, in assessing the evidence obtained, it is necessary to consider some other legal rules. For example, many elements of proof are obtained from the contents of telephone and environmental interception. In this respect, it is necessary to recall that the provisions of articles 62 and 63 Penal Procedure Code do not apply in the case of interceptions, in that admissions made spontaneously by the accused in a conversation, by telephone or otherwise, whose interception has been formally authorised, do not have the same evidential value as declarations made during the police interview, nor do the recordings provide support for the transcripts of the said declarations, where they produce the content in immediate and unambiguous form.

Nevertheless, they constitute or are capable of constituting direct proof of the facts that are documented by them. Many rulings of the Supreme Court of Cassation have established the principles in question.

Once these requirements have been satisfied, circumstantial evidence (whether as an element to *complete* a reconstruction that is based on sources of another kind, or as a 'single' element to support

the decision) has equal value to the so-called direct evidence, which is itself also subject to 'natural' caution (see on this point the case of Calò, Cassation 5.3.1991, as well as, among others, the case of Cosseddu, Cassation 21.19.1991).

It should, in fact, be recalled that even where the judge has 'direct' evidence of the fact that has to be proven (e.g. an account by an eye-witness who has seen the crime being committed and recognises the perpetrator), despite this, the 'source' of evidence, far from being merely 'translated' into a conviction, still has to be subjected to ordinary tests of reliability (on the basis of logical consistency, the possibility of being able to witness the event, etc.). This is even more so where the person 'describing' the event has an interest in the outcome of the decision (see, of example, the rules relating to the statement of a victim who is also claiming compensation, in the ruling of the Constitutional Court no.115 of 1992, where it is emphasised that it is absolutely necessary for an assessment of the evidence to be based on a prudent and critical approach).

§ 3. *Statements and the evaluation of evidence made by accomplices*

A large part of evidence obtained during the investigations often consists of statements made by people who are **do not fall within the legal category of ordinary witnesses**, in that they are involved, either directly or indirectly, in the events under investigation (persons who are *incompatible* with the definition of witness within the meaning of article 197 Penal Procedure Code). This inevitably gives rise to the need to describe the extent of the rules governing evaluation of evidence set out in article 192 (3) Penal Procedure Code (regarding statements by the co-defendant or defendant in connected proceedings) and article 192 (4) (which extends the need for caution to statements made by a person accused of a connected offence).

§ 3.1. *The basis for evaluating such statements: the absence of objectivity*

Generally, speaking, such statements, for the very fact that they come from people who – according to the prosecution – are the perpetrators or accomplices of the offences concerned, (and thus capable of being viewed as evidence for the prosecution), more often than not directly concern the crime and therefore belong to the **'basic category' of direct, historical or representative evidence.** However, the legislation explicitly makes its probative validity conditional upon the

existence of "*..other elements of proof, which confirm its reliability*..", according to the principle of corroboration, which places such evidence into a legal state of 'insufficiency alone' in enabling a decision to be reached, with a requirement on the judge to find – in the absence of support – that the allegation has not been proven.

The reasons for such 'probative caution', of particular importance, is to be found, as we have seen, in the 'presumption' of an *interest* (*cf.* Cassation 30.1.1997, Barcella case) that the person making the statement clearly has (precisely because he is 'involved', though to a different extent, in the alleged events):

-an interest which gives rise to the theoretical possibility of needing to increase the responsibility of another and the tendency to reduce his own.

-the possibility of using the trial as a means of settling disputes that have developed elsewhere;

-the possible need to obtain benefits of a procedural or substantial nature.

There is therefore a 'partial deficit' in reliability, which can be satisfied by the presentation of independent evidence that is capable of confirming the truth of the evidence. **It is therefore the 'subjective quality' of the witness, in this case,** that influences the probative mechanism, through the provision of an instrument of 'judicial control of reliability which, it should be noted, **is not the same (either in principle or method) as that provided for circumstantial evidence**.

§ 3.2. *Testimony of a person implicated in criminal activities and testimony of an accomplice*

In the case of allegations made by accomplices, the reason for caution in accepting the evidence cannot be found in the 'innate partiality' of the evidence, as in the case of circumstantial evidence, and it therefore has a general validity – governed entirely by principles of law – for the judge, based on principles of previous rulings and regulations, which also have the purpose of ensuring uniformity of application in a sector of such delicacy.

There is therefore a fundamental difference between circumstantial evidence and testimony of the accomplice and, once that difference is clear, it should also be pointed out that, though the provisions of article 192 (3) & (4) Penal Procedure Code are generally concerned with governing the evaluation of *any* statements from the persons indicated therein, the law has drawn necessary

distinctions between the 'content' of statements and the 'methods of acquiring' and 'transmitting' the relevant evidence.

In fact, one can talk about the ***'testimony of an accomplice'*** only where the person making the statement acknowledges *in primis* his own direct involvement (in whatever role) in the criminal conduct concerned, with subsequent accusations *against others* as accomplices.

If the person does not acknowledge his participation, then his declaration is regarded as the 'testimony of a person involved in criminal activities' and generally relates to another person, given that the witness, while having clearly understood the circumstances referred to in a wider context of 'belonging' to a criminal group (otherwise he would assume the role of an ordinary witness, without the need to adopt any caution), and while evidently acknowledging involvement in various offences, not having participated in the specific offence it 'changes' his own conception of the criminal conduct of others (generally by the same defendants or by persons who are aware of what has occurred).

The testimony of an accomplice, being concerned with the co-participation of the witness, contains a primary and fundamental 'indication' as to reliability, which is found in his own admission of responsibility (confession) in relation to the specific accusation, with an acceptance of the adverse legal consequences of such a declaration. His evidence, by providing a direct account of the commission of the offence, makes it possible to carry out further searches for supporting evidence, in terms of material and other participants.

On the other hand, the testimony of a person implicated in criminal activities, tending to relate to others (at least on the specific fact disputed), other than not containing the said intrinsic characteristics, contains in itself all the 'risks' implicit in the transmission of a piece of information from one person to another (logical risk of inaccuracy, a risk that the original witness has a tendency to exaggerate, difference between the 'actual account' and the 'story' and the consequences of mnemonic abilities…).

This does not, obviously, prevent the testimony of a person implicated in criminal activities from forming the basis for a conviction, once it has overcome the test of intrinsic reliability as well as being corroborated by specific external evidence.

§ 3.3. *Ascertaining the reliability of the evidence*

The first aspect relates to examining the **intrinsic reliability**, in the form of the **'credibility' of the witness** (also in relation to his personality, his economic and family circumstances, his past, his relationships with the co-defendants, and the past and recent background relating to his decision to confess and accuse his co-defendants and accomplices);

this is followed by examining the **intrinsic consistency and characteristics of the evidence** (according to parameters of precision, coherent logic, consistency and spontaneity);

- after this comes an examination of the extrinsic support, or evidence that is independent and different from the testimony, and relating to each accused person and each offence.

(*cf*. on the last point, Cassation Section VI, hearing of 6.3.2000 (Fortugno appeal), according to which : *.. support can be obtained from evidence of widely varying kinds and origin, relating also to secondary facts, from which it is possible to obtain support for the accusation, but in every case such elements must come from a source other than that of the collaborator and must relate to facts, and not to analysis and arguments of a logical nature.."* as well as Cassation 16.4.1998 (Craxi case), according to which *during the legal submissions phase the objective support for the declarations given by accomplices must necessarily relate to the individual defendants and offences*).

It should also be said that insofar as **examining the intrinsic reliability of the witness**, the fact cannot be ignored that the 'ordinary' parameters of witness reliability are to be applied to the particular conditions of the witness concerned, who is not 'extraneous', but – by definition – a person involved in criminal activities from which the commission of the offence developed.

This means that the ordinary hierarchy of values used to judge a person are all 'turned upside down' (especially in relation to trials involving organised crime), given that knowledge of criminal matters is much deeper according to the 'level' of involvement of the witness in the events themselves (see, in this respect Cassation 17.2.1996 (Cariboni case) according to which ".. *a negative view of the personality of the witness giving evidence against an accomplice is not sufficient, in itself, to exclude its intrinsic credibility. Indeed this situation is common to almost all persons accused of the same offence or connected offences, a situation that is taken into account by the legislation in*

making the relevance of this source of evidence subject to careful examination as to the intrinsic reliability of the testimony and the presence of external support.. ").

Moreover, in examining the contents of the account – once the parameters of intrinsic logical consistency, mnemonic capacity, breadth of content, reiteration, etc.., have been met – of 'decisive' importance is the judgement as to the 'demonstrative capacity' of the alleged 'supporting elements', whether simply in terms of an evaluation that is not 'piecemeal' but which constitutes a cohesive and overall view of the whole body of evidence obtained. It is therefore appropriate to pause, in particular, to consider the notion of 'support', given the central importance of the matter concerned.

§ 3.4. *The notion of support and the principle of divisibility*

It has already been stated that the reconstruction of the evidence in the specific case, according to a widely held interpretation of article 192 Penal Procedure Code, cannot be based on a general view of the 'reliability of the witness', but must necessarily relate to the existence of independent external elements, which are specifically suitable to confirm the witness's evidence, involving the individual defendants to whom the evidence relates. This, obviously, does not mean that there must *necessarily* **exist independent 'evidence' of guilt** in relation **to each person** to which the evidence relates, but more simply, that the 'positive' support in relation to a 'part' of the witness statement or in relation to one or more of the accused – while increasing the overall value of the source of evidence – cannot automatically be applied to other circumstances and other defendants, at the risk of there being a substantial frustration of the legal principle which is to be regarded as 'directed' towards the protection of each individual defendant (bearing in mind the constitutional principles of the presumption of innocence and the personal nature of criminal responsibility).

On the other hand, the absence of 'external support' relating to one or more defendants or accusations, does not frustrate – in itself – the probative value of the 'basic' allegations, which cannot, in that part, constitute the basis of a conviction, but which can be used, where the legal regulations are met, and in the part where there is support, against others (*cf*. Cassation, 30.1.1992 (Altadonna case): " .. *it is perfectly legitimate to divide an evaluation of the accusations made against the persons indicated in article 192 (3) and (4), therefore attributing full reliability and probative value to all and only those parts that are suitably supported by other evidence…",* as well as more broadly in Cassation 8.1.1997 (Consoli case) : " … *it cannot be regarded as acceptable, in the case of several accusations brought by the same person in the same criminal proceedings, to use the same supporting evidence – established against one defendant – in order to support*

accusations against another defendant. Therefore, if the witness is making allegations against various co-defendants for various offences and if support is found for some or most of the allegations from the confessions of the accused or from other evidence, that is considered only for the purposes of judging the intrinsic reliability of the witness, but cannot be used as another element of proof in order to confirm the testimony of the accomplice against another defendant where there is no support, which would thus constitute a clear breach of the principle set out in article 192 with regard to the evaluation of evidence. Therefore full reliability and probative value must be placed on all and only those parts of the allegations that are properly supported..").

In other words, the principle of 'divisibility' – always where there is a positive evaluation of intrinsic reliability of the witness and a coherent logic in the account – is a direct consequence of the existence of the regulation that makes the 'full' probative effectiveness of the statement conditional on the existence of external support, with the natural result that it is possible for there to be *partial or total* 'confirmation' of the account. But there is a risk that the considerations set out so far do not properly describe the true approach to evaluating evidence, in the absence of an acceptable indication (if only by way of outline) of what kind of 'external support' can be effectively used in reaching the decision.

§ 3.5. *The discretion of the judge in evaluating supporting evidence*

The provisions of Italian law open the way to a wide discretion on the part of the judge, as in any event seems unavoidable in a system that is still inspired by the principle of 'free convincement', and based on the obligation to provide a motivation for decisions. This leads to the consideration that the *other* elements of proof, indicated by the legislation, *can be of any type or nature* (Full Sitting of the Court of Cassation in the case of Scala, 6.12.1991), and can therefore consist of circumstantial evidence (such as, for example, confirmation of the existence of the motive indicated by the accomplice in the Pesca case, Cassation 3.4.1991), of 'direct' evidence, or even further testimony by an accomplice, provided that the requirements are satisfied with regard to *corroboration* and the so-called 'innate independence' between various sources, so as to exclude suspicion of reciprocal influence (*cf*., among other, the case of D'Amora, Cassation 31.3.1998). This, in effect, is a direct consequence of the legislative formulation, to the extent to which it is accepted that the *other* element, on which the validating mechanism is dependant, is different and independent of the source of evidence **but does not imply a different type**, and this makes it possible to include – therefore – elements that are 'different' but which belong to the same basic category (other 'testimony', provided that there is a sufficient level of reliability). Nevertheless, it

should be pointed out that the legislation, in requiring the presence of 'other elements of proof' that are capable of increasing the reliability of the statement, uses however a 'technical' notion which cannot be compared with:

- the 'typical' rules of evaluation of evidence used in support, which are however applicable, even if only out of the need for 'harmonisation' with the 'principle of proof' required for the testimony of accomplices;
- The principle of relevance of each 'element of proof' to the alleged offence (article 187), and therefore of 'support' – even indirect – cannot be limited to increasing the intrinsic reliability of the witness, but must relate (if only exclusively by way of logic or implication) to the allegations against the defendant.

Obviously, such suitability of proof in supporting evidence is not to be considered in terms of 'self-sufficiency', as it is required to function as a 'necessary completion' of the account under examination (*cf*. among others, the case of Dominante, Cassation, 22.1.1997, in the passage in which it is stated that: " … *the procedural role of the 'other elements of proof' is that of confirming the reliability of the allegations, which means that these elements are in a subordinate and accessory position compared with the evidence obtained from the testimony of the accomplice, as these have to be suitable for supporting the allegation not in their own right but in relation to the testimony. Otherwise, where there is evidence demonstrating the guilt of the accused, the provisions of article 192 (3) are not relevant, but rather the general principle regarding the plurality of evidence and its free evaluation by the judge .."*).

The judge, when assessing the evidence, should establish whether or not there is a relationship between:

a) the account against the defendant provided in the testimony ;

b) the element capable of 'increasing' its contribution in an understanding of the case, with positive effect in terms of reliability;

c) the ingredients of the allegation against the defendant.

§ 4. *Police informers, statements and evaluation of the testimony of accomplices*

§ 4.1. *Introduction*

It is worth dealing separately with the implications of evidence obtained from police informers, due to the many peculiarities from the point of view of legal provisions and, as a consequence, from the effect that it has when used as evidence. One of the principal instruments in fighting mafia-type

organised crime is the evidence obtained from police informers, or from those who, although they have taken part in dangerous criminal organisations and committed serious offences, decide to reveal all that they know to the police authorities and to collaborate. Italian legal experience, and various criticisms of the system previously laid down by Legal Decree no.8/91, gave rise to new regulations introduced with Law no. 45/2001.

§ 4.2. *Purpose of the new law*

-to guarantee a suitable system of protection for the police informer;

-to separate the evidence from the benefits obtained;

-to provide different treatment for police informers, compared with persons involved in the criminal activity.

With regard to the first aspect, the law provides a system of protection with a series of measures to be applied, including:

-ordinary measures, adopted by the police authority;

-special protection measures, adopted by a central commission (with the possibility of transfer away from their place of origin, economic assistance and other measures for purposes of social integration)

- a social protection programme (including other special measures necessary to help reintegration and to protect the informer).

The choice of special measures and programme does not depend upon the extent of the contribution but upon the situation of danger and its extent.

§ 4.3. *Evaluation of the situations of danger*

Account is taken of the seriousness of the allegations, also with regard to the type of intimidation that the criminal group might use as a reaction. The special protection measures can also be applied to those who permanently live with the informers as well as to non-cohabitees, by reason of the

relationship that they have with the informers. However, a mere family relationship without permanent cohabitation is not sufficient for the application of the special protection measures.

§ 4.4. *Requirements for access to special protection measures or to the programme*

-Only for certain types of offence (but this does not apply to prosecution witnesses): these are applicable only for assistance relating to crimes which involve terrorism or connected with the mafia and organised crime in general and subsequently, by reason of Law no.228/2003, also to crimes involving reduction to slavery and human trafficking;

- the assistance given must take the form of reliable evidence which also provides new or more complete information or other evidence of notable importance:
a) for the development of the investigation in the individual case but assisting their ability to break down criminal organisations;
b) for trial purposes;
c) for investigation activities into the structural implications of the organisations or into their supplies of arms, explosives or assets.

§ 4.5. *The statement setting out the contents of the collaboration: a requirement for the application of protection measures*

The statement is the central feature of the new law and replaces the old declaration of intent provided by the previous legislation. It must contain all the information that the declarer has in his possession and other facts of major importance about which he has knowledge, as well as information necessary for identifying and arresting the offenders, the assets and all other assistance relating to the declarer or other members of the organisation.
The statement is therefore a document that is relevant to the proceedings, as well as to the investigation, and the collaborator must declare at the end that he is not in possession of evidence or information that can be used in other cases or circumstances.
In order to safeguard the truth of the declarations, **they must be completed within 180 days from the expression of willingness to collaborate.** The informer must also describe any investigative interviews carried out previously. Declarations made after a period of six months cannot be used.
As well as being a document forming part of the investigation, it can also contain matters that are useful for other investigations in other proceedings, and the legislation therefore provides a

mechanism for including the statement in a special file held by the public prosecutor, from which evidence is extracted which relates to individual criminal proceedings.

On the other hand, within the same period, the person must make the declarations required by the law, including the abovementioned declaration, and the protection measures cannot be granted or, if already granted, they must be revoked where the said declarations have not been made within that period.

It follows from this that the making of the statement setting out the nature of the collaboration, in the absence of circumstances of danger for the informer, does not in itself give rise to the application of the protection measures, but where such a situation does exist it is the statement itself and its completion that gives rise to the possibility of making use of the protection measures and, where granted, the measures must be revoked if the person to whom it relates does not complete the statement.

§ **4.6.** ***Other benefits resulting from the collaboration: granting of mitigation***

Article 8 of Law no. 203/1991 provides for a special reduction in sentence in relation to mafia-type criminal offences for those who dissociate themselves from others in order to prevent the criminal activity from having further consequences, also providing substantial assistance to the police or judicial authorities in obtaining decisive evidence in order to reconstruct the events and identify or arrest those who committed the crime. Life imprisonment is replaced by imprisonment from 12 to 20 years, while other sentences are reduced by between a third and a half. This special concession, and other concessions granted by the penal code, can be granted only to those who have signed the statement. If, however, a willingness to collaborate emerges during the trial, the judge can allow the mitigating factors, subject to the signing of the necessary declarations within the required period.

§ **4.7.** ***Other benefits resulting from the collaboration: prison benefits***

The statement by the informer also gives rise to prison benefits on the basis of the provisions of article 16-*nonies* of the legislation. In these cases, conditional parole (provided for those who have expressed remorse and have served at least half of the sentence), granting of day release and home detention, without surveillance by the social services, can be permitted:

-even in derogation of the current law, including those provisions relating to the limits on sentence (with the single limitation that at least ¼ of the sentence has been served or, in the case of life imprisonment, ten years);

-once again subject to the signing of the statement within the period required;
-provided also that there are no reasons to believe that the person has links with criminal or subversive organisations.

§ 4.8.*The seriousness of the commitment by the informer*

A series of provisions are set out in article 16-*septies* of Law no.45/2001, which ensure that the collaboration is genuine and to remind the collaborator as to the seriousness of the commitment that he is making through his declarations.

§ 4.8.1. *The first provision: restitution of sentence*

It is provided in article 16-*septies* (6), which provides that where situations emerge in which it is ascertained that the declarations are false, or that the informer who has benefited from the mitigating circumstances commits an offence in relation to which there is immediate compulsory arrest, within 10 years from the final sentence, the documents that establish such conduct are sent to the public prosecutor and the judge who passed the sentence or the judge who now has to decide the matter, who, within 30 days, can ask to rehear the case in order to review the sentence to the extent only of the ruling regarding mitigating circumstances.

§ 4.8.2. *The second provision: review of sentence*

New categories of review have been introduced:
- for the discovery of false or incomplete declarations;
- for the failure to comply with the obligations provided by law and other agreed obligations.

§ 4.9. *Effects on precautionary measures*

The preventative arrest measure cannot be revoked or replaced with another less serious measure by reason of the fact that the person in respect of whom it is made is providing or has provided assistance. In such cases, it is only possible to revoke or replace the order where, during investigations, it is possible to ascertain that the informer no longer has links with organised crime and has complied with all of the undertakings given.

§ 5. *Evaluation criteria provided by article 238-bis Penal Procedure Code*

Remaining on the question of evaluation criteria, in general terms, it is appropriate – given the quantity and nature of the cases in question – to refer to the criteria used for evaluating the content of final judgements in other proceedings. These judgements, in fact, represent not just the final outcome (conviction or acquittal) of an earlier investigation, but incorporate – in their motivation –

the results of preliminary hearings that have provided support for the specific decision, though 'filtered' by the reasoning set out by the judge. It is therefore necessary to establish, in the light of the legislation *(... judgements .. can be used in evidence for the purposes of proving the fact established in them and are evaluated pursuant to articles 187 and 192 (3)..*) whether their use as evidence relates to the mere 'historical fact' (allegation + sentence) or whether it can be the object of an evaluation (if only by the standards set out in article 192 (3)) with regard to the factual content of the motivation, in relation to the preliminary results (relevant re. article 187) that emerge in other proceedings.

And indeed, in order to support such an approach, it should also be observed that:
- by reason of article 431 (1) (g) and article 236 (1) (g) Penal Procedure Code it is already permitted, for the purposes of judging the character of the defendant, of the victim or of the witness, to obtain a certificate of general previous convictions or of a final judgement; this means that acquisition under article 238-*bis*, also by reason of the specific positioning of the provision, appears to be clearly aimed at introducing a 'knowledge element' into the trial;
- this particular 'element' (the final judgement) can only be considered in its totality, given that the order represents the final outcome of a decision which is – by definition – influenced by whether the allegations have been *proven or not*, and the *extent* of the evidence obtained in that specific case;
- only the examination of the judgement together with the factual background to the decision makes it possible therefore to understand the effective reasons for the conviction or acquittal of the defendant in the other trial.

This does not alter the fact, obviously, that particular caution must be observed when examining the **preliminary evidence that has emerged** in other proceedings (and in particular in cases where that trial did *not* see the participation of the current defendants), given that – save in cases involving acquisition of statements of evidence pursuant to article 238 – of facts 'represented' in that context by the evaluation, as indicated earlier, cannot include the 'reasons' for the decision, at the risk of giving rise to a significant logical and legal flaw. And, in fact, it is the very absence of any kind of restriction relating to 'criminal prejudice' that requires the judge in the present proceedings (with the sole limit of not being able to judge the same facts twice) to carry out a careful evaluation of the 'representative' nature of the contents used for the final decision, with due critical spirit and the possibility (insofar as his own case is concerned) of reaching different conclusions, also in relation to the existence of new and additional pieces of evidence. See, on this point, the case of Archinà, Court of Cassation, Section I, 2.12.1998 : " .. *it is legitimate to carry out an independent evaluation*

of the evidence obtained in other proceedings which ended in a final acquittal, insofar as the preclusion of a new ruling prevents only the exercise of criminal action in relation to the allegations which have already been decided, but this does not prevent a further evaluation of the said circumstances, once it has been established that they can be used in order to examine allegations that are different to those which have already been judged..", as well as the case of Priebke, Court of Cassation 16.11.1998: " … *the acquisition of evidence contained in final judgements does not have any automatic effect in the way in which it is received and used in deciding the facts of the later case, nor likewise do the rulings of fact contained in the arguments motivating the aforesaid judgements have any automatic effect. On the contrary, the judge in the later case must be held to retain full autonomy and liberty in the logical operation of investigations and formulating the judgement which is institutionally reserved to him* .." . Therefore it can be said that a conviction (in previous proceedings) is not binding in any absolute extent on the later proceedings – due to the need to evaluate the evidence obtained in the meantime, and to be regarded as mere 'elements of proof' (if and insofar as relevant in the later case) – while an acquittal does not prevent, in other proceedings, the reassessment of preliminary evidence which led to the acquittal. The judge who receives evidence regarding the result of the other judgement has not option but to proceed – following also the submissions of both parties – by giving logical consideration to the judgement and motivation, with a subsequent evaluation of the relevant facts, according to the procedure indicated by the legislation (article 192(3)).

The reasons for caution in evaluation: it is clear that, in this respect, the reasons for 'evaluative caution' are different to those described when considering 'statements by accomplices', given that they arise, on the one hand, from the principle of 'autonomy' in reaching judgements (absence of prejudice) and, on the other hand, from the consideration that the evidence which emerged in the earlier proceedings (and which must however be examined according to its own particular characteristics) is subject to elaboration and, therefore, the evaluation operation requires a 'sterilisation' that is capable of removing the evidence, as such, from its original context.

§ 6. *Grounds for the judgement and persuasive capacity relating to the quality of the evidence obtained*

The reasons put forward by the judge are closely connected to the type of evidence heard during the proceedings, and these are *inevitably* linked to the particular facts of the case in hand. When there are allegations relating to an offence of organised crime it is inevitable that the investigations will be based on the use of 'particular' sources (e.g. statements by police informers, who are often

involved in various ways in the events of the case) and, therefore, it will be necessary to adopt *special* rules in order to evaluate the evidence obtained.
At the same time, the judge should follow 'general' rules of law in examining the evidence, expressing, with the maximum intellectual honesty, the **effective logical criteria** adopted in that particular case and 'respecting' the submissions made by the parties during the trial (taking account of why he accepts the submission of one party or the other).
He must convict the defendant if he forms the view that he is guilty beyond all reasonable doubt (article 533 (1)).
The judge must deliver the final sentence where there is a lack, or insufficiency, or inconsistency in the evidence as to guilt, where the defendant is guilty, where the fact constitutes an offence or where the offence has been committed by a person who is not criminally responsible (article 539 Penal Procedure Code).

The underlying reason behind the constitutional importance of the obligation to provide grounds for a judgement is, and remains, not only that of giving an 'internal' method to the law (I decide in a certain way **whether and to what extent** I can correctly set out the *grounds* for that decision on a logical/legal basis) but above all, it provides an 'external' and 'collective' possibility to examine the activity of the judge through a comprehensible examination of what led him to reach his decision. And the extent to which it is necessary to provide transparency and clarity in decisions is, I believe, entirely beyond discussion (this can be seen, in particular, in the sensational reversals between first instance, appeal and cassation in some recent cases of major national importance).
The problem in reconstructing a 'past' event, in which (by definition) the judge was not a participant, is (and remains) that of deciding **the correct attribution of 'persuasive value'** to the individual piece of evidence in relation to the fact to be proven. In this respect, it should be recalled that:

A) of considerable relevance is the METHOD OF OBTAINING the evidence, given that only through effective cross-examination is it possible to ascertain the true 'degree' of reliability of the source of information (this is now a part of the Constitution, to be found in article 111 of the amended Constitution);

B) it is essential to use LOGIC as an 'antidote' to the risks that are implicit in every evaluative operation. This means always seeking to ascertain whether that evidence is open to alternative explanations;

C) it is necessary to make an OVERALL AND JOINT evaluation of the elements in the case, whether they are of an 'historical and descriptive' nature or an 'evidential' nature.

On the basis of experience we can indicate the most frequent **'evaluative risks'** relating to the various elements in the case (which are statistically most frequent) :

§ 7. *Type of source – type of risk*

Statement (testimony)
Eye witness and/or victim of a crime which is alleged against a person who is **NOT known** to the witness. Having overcome the test of 'general reliability' of the source (logical, consistent account, etc.) the **risk** is in the error of 'perception' (attributing a *different* and 'exaggerated' significance to the action of another person) or in the 'representative' error, often in the physical characteristics of the offender (an error which suggests the *good faith* of the witness). This gives rise, also in legal terms, to the need to test the 'general' reliability and the 'complexity' of the process of personal identification (formal recognition).

Witness and/or victim of the crime who makes accusations against a **known** person. Having overcome the test of general reliability of the source (logical and consistent account, absence of 'exaggeration' etc), the **risk** stems from the false attribution of unlawful conduct to the person against whom there are motives of resentment for other reasons (often in family/emotional relationships or where personal interests are involved). The witness here is acting in *bad faith*.

Statement against others by a person involved in some way (as co-defendant or accused of connected offences) in the illegal activity which the case concerns:
having overcome the test of 'general reliability' of the source (logical, consistent account, reiteration of the evidence, personal history of the witness, etc.), the **risk** lies in the declarations being made for ulterior purposes (much more frequently than the 'common' witness), in order to damage people where there are strong grounds for resentment, or for the purpose of 'minimising' their own level of involvement in the case (or to 'protect' other friends), or for the purpose of obtaining the possible benefits (preventative, custodial and economic) to be gained from the status of informer.

'Straightforward' confession (without accusations against others). Here, the assumption of reliability is based upon the general rule of experience that 'no one in their right mind makes statements against their own interests where the admissions are not true'. However, in this case, the

presumption can be false, for example, where the person, in order to obtain protection from the true perpetrator of the crime (e.g. a member of the same family), assumes personal responsibility for a crime committed by another.

Telephone or other conversation that is intercepted.
Having overcome the problem of ascertaining the identity of the persons in conversation, the **risk** lies in misconstruing the meaning of the words used during the conversation, given that the language used is often cryptic or, alternatively, it cannot be excluded that the contents are false because the speaker is exaggerating. Each conversation, therefore, has to be related to its 'historical' context and to the persons speaking. Therefore, there has to be a careful examination of the genuine nature of the situations in which the conversations are taking place and any knowledge on the part of the persons talking that their conversation is being intercepted.

Video-recorded pictures of illegal activity.
Here the risk is of a technological nature, in relation to any manipulation of the information (to be excluded, if applicable, by expert evidence) or erroneous identification made on the basis of comparison with other pictures (even though the level of reliability for such tests is now very high).

Testing of blood, biological stains, etc. Here, apart from the 'structural' partiality of the evidence, in terms of its logical significance (with a possible 'alternative explanation' to the evidence), the **risk**, in technical terms, stems from the possibility of error in 'obtaining' or 'analysis' of the evidence (even if the processing techniques, which are now extremely sophisticated, guarantee the reliability of the results, provided that the samples are well conserved).

Printed documents. Their effectiveness as evidence depends on ascertaining their 'origin' and the absence of manipulation. Obviously, in such cases, it can be necessary to obtain suitable expert evidence in order to exclude the risk of falsification. It would appear obvious, therefore, that the decision-making activity, which seeks to establish the facts of the case, implies a continuous series of 'incidental tests' (as to the reliability of a source, the methods of obtaining certain information, etc.) which, when operated in relation to all of the material obtained, together forms a 'picture' that is sufficient for enabling the judge to reach his decision in accordance with the legal principles of **method** (above all, the need to resolve any reasonable doubt in favour of the accused, pursuant to article 530 (2) Penal Procedure Code), whether or not to accept the case put forward by the prosecution (*or more correctly* to find it proven), after it has been tested through cross-examination.

This is the task of the judge, who also has to demonstrate, through clear and justifiable evaluations, that he is 'worthy' of the 'trust' that society has placed in him.

§ 8. *The need for the public prosecutor to make a well structured presentation of the evidence in order to convince the judge*

Although the adversarial system operates in the **formation of the evidence**, arising from the dignity of the constitutional principle – but perhaps already inherent to the system, as is apparent from article 24 of the Constitution – there is also **adversarial debate**, where the parties make their submissions in relation to the evidence that has already been formed, in order to persuade the judge in relation to the significance of each element. It is therefore a point in the proceedings which does not relate to the demonstration of the evidence as such, but rather to the capacity of the parties to persuade the judge:

- about the evidence that they have produced;
- about their nexus and the conclusions that can be inferred;
- about their capability of proving the questions arising, taking into account that the facts to be proven are facts that relate to the allegations, conviction and sentence, or the safety measures to be adopted.

In the trial, therefore, there is a clear duty upon the party to demonstrate and persuade, notwithstanding the principle of 'free convincement' on the part of the judge in evaluating the evidence produced, taking into account that the judge, in evaluating the evidence, is guided and regulated by clear rules on admissibility, production and evaluation of evidence.

The public prosecutor has a clear duty to argue the case, which is also to be carried out jointly with the other parties in the trial, who look to the judge in order to answer any question of law.

The public minister and defence lawyers are all necessary parts of the trial, with public and private roles. However, there is a fundamental distinction, which I like to emphasise, because the public prosecutor cannot become "partisan" in carrying out his duties. If the private party, the defence lawyer, is convinced of the guilt of his client, he must nevertheless argue for the defendant's acquittal. If the public prosecutor is convinced of the innocence of the defendant, he should not ask for a conviction but for an acquittal, precisely because of the public nature that distinguishes his role. His position is not (nor can it be) one of **condemnation to the bitter end, but he must ensure a result that is consistent with justice**. This is why a public prosecutor should not be worried about an acquittal, if that is consistent with justice, indeed he himself must ask for it.

In trials of particular complexity, it can be particularly useful to present, at the same time as the oral opening speech, a written presentation which can become an important means of reference for the judge when, at the end of the case, he has to prepare his decision, taking into account the evidence

produced, but mindful of the submissions made by the parties. This will be all the more useful in relation to the following matters in the trial:

- seriousness and number of allegations;
- number of defendants;
- Type of evidence produced, it being clear that written submissions will be particularly useful where there is circumstantial evidence in the trial.

These are some practical suggestions for drafting written submissions:

- a complete description of the evidence presupposes a full understanding of all that has been presented before the judge during the hearing;
- this presupposes that the submissions are drafted by the public prosecutor himself, who has taken part in the presentation of the evidence and in the legal argument;
- it is preferable therefore that the submissions are drafted during the trial, avoiding a tiring and less useful reading only at the end of the trial;
- a progressive reading of the trial documents, which follows the developments in the proceedings, must be accompanied, immediately after each hearing, with summaries or statements of the evidence as it is produced;
- the evidence in the proceedings must be produced in accordance with a clear line of strategy which corresponds with the way in which the public prosecutor wishes to present the evidence;
- this strategy must be in line not only with the order in which the evidence is produced, but also with the overall reasoning that it is sought to place before the judge at the end of the case;
- it is useful therefore to organise the "structure" or the basic points of argument which it is intended to develop. This will be useful also in material terms, in organising the subdivision of the evidence to be presented;
- it will be quite useful to subdivide the evidence produced according to the suggested order, not only in physical (paper) form, but also through computer programmes that organise the documentary evidence into files, in such a way as to provide a final computerised document for these specific purposes.
- Here below is a demonstration of a written presentation that has been structured in this way, using a Power Point programme