

EFFECTIVE METHODS TO COMBAT TRANSNATIONAL ORGANIZED CRIME IN CRIMINAL JUSTICE PROCESSES

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I. A COMMON DEFINITION FOR "ORGANIZED CRIME"

A study on the phenomenon of organized crime aimed to a common understanding - without claiming to be exhaustive - must start from a definition of the concept of organized crime. Such a concept, indeed, logically precedes the explanation of the situation relevant to the various types of illicit activity, an explanation which I will make with respect to the Italian experience, given that any single activity necessarily implies the existence of an organisational structure.

An example can be made with regard to the international trafficking of drugs and to the laundering of the money thereof, i.e. criminal activities which need to be carried out in an associated way. By saying that, I do not intend to establish an equation between the monopoly of drugs trade and the spread of organized crime. Such an idea would be unfounded. Although drugs have provided - and still provide - criminal organisations with extraordinary possibility for enrichment, they are certainly not their one and only source of profit and, maybe, neither the most important one. On the contrary, the most developed criminal associations increasingly tend to direct and diversify their interests towards equally profitable illicit activities which they consider to be less risky because they are morally regarded as less disgusting or because they

are subjected to less heavy penalties and less investigation or because it is more difficult to find them since the finding would require the victims' co-operation which is not easy to obtain (extortion, control of public works' contracts, exploitation of prostitution, smuggling, frauds, trafficking of human beings, gambling, etc.).

According to the European Union Situation Report on organized crime delivered in Brussels on November 6th, 1998, *"Organized crime groups are known to be exploring and exploiting new areas of crime with a vigour not unlike that of legitimate business exploring and exploiting new commercial markets. Currently the trend in organized crime activity includes increased involvement in those criminal activities that generate high profits and at the same time lower risks to involved criminals in terms of lower detection rates by law enforcement - partly due to the complexity and costs of long term investigations - and/or imposed penalties. Crimes that present relatively low risks to organized crime are the smuggling and trafficking of human beings, and other economic crimes including frauds and ecological crimes. Economic crimes are therefore expected to remain on the increase both in volume and magnitude"*.

This manifest remark should suffice to destroy the argument - supported by the advocates of liberalization and legalization of drugs - according to which these would be useful to combat organized crime since this latter would be deprived of a source of enrichment. On the contrary, it is clear

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that, should the drug trafficking proceeds run out, the other illicit activities would carry on and be strengthened. Moreover, within a free market of drugs, criminal organisations currently managing it in a monopolistic system, would debar competition through such well-known discouraging methods as threats and violence, as they already do in formally licit economic sectors. For these reasons, we can no longer apply an international approach to fight organized crime considering the main types of criminal activities without attempting to define the concept of transnational organized crime.

This need is mostly felt in Italy where *Cosa Nostra* and the other Mafia-type associations - unlike the other criminal organisations - tend to be mixed in the society by means of apparently lawful business undertakings and apparently licit investments which necessarily require the control of the territory and of any licit and illicit activity carried out herein.

While the Mafia economy is taking increasingly developed and dangerous forms, the awareness that the development of criminal economy has a dreadful and irreversible impact on the legal economy has hardly spread: an impact which corrupts the financial and banking circuits, distort the markets' trend, and - resorting to instruments which are alien to the lawful entrepreneurial world - feeds the black economy and steals money to the tax revenue.

What is worse, the criminal economy brings about a kind of sharing of interests which seems to make the border between the criminal world and the society fade, establishing a steady collusive network of relations other than the traditional one linking criminals and the victims of the offence.

The breaking of the border between the "attacker" and the "victim" clearly appears, for instance, with respect to the unlawful relations between organized crime and enterprises obtaining public works' contracts; these unlawful relations were found following to various inquiries which led to know that, in many cases, the legal enterprises themselves asked the Mafia groups for funds to expand their markets.

The Mafia is focussing its interests on the public works' contracts which require - due to the afore-mentioned reasons - a close control of the territory, yet at the same time it would tend to act within the integrated criminal system more frequently as a "network" and less frequently as a structure linked to the territory: such an argument may appear as contradictory, at a superficial analysis. Actually, these two things are not incompatible, but they represent two complementary and indissolubly linked aspects of the Mafia action.

Mafia organisations will increasingly act on a transnational scale, in agreement or in competition with other international criminal organisations, namely with the new Mafias which have been operating also in Italy for a long time. Yet their establishment on the territory will still be the requirement for the control of the markets and, thus, for their existence as steady criminal structures.

Italian law four types of organized crime can be identified as a result of the whole set of criminal rules, both substantive and procedural ones:

- (i) Association for the purposes of committing offences (simple organized crime conspiracy - article 416 penal code);¹
- (ii) Association for the purposes of

- terrorism or subversion (subversive organized crime - article 270-bis penal code);²
- (iii) Mafia-type association (Mafia-type organized crime art. 416-bis penal code);³
- (iv) Association for the purposes of illicit trafficking of narcotic or psychotropic substances (Art. 74 of Presidential Decree N.o 309/1990).⁴

The differences between membership of a Mafia-type organisation and simple criminal conspiracy are summed up below.

¹ Art. 416 penal code (association for the purposes of committing of fences)

“1. When three or more persons form an association for the purpose of committing more than one offence, whoever promotes, establishes, manages, organises the association shall be liable, for that only, to imprisonment for a term of between three and seven years.

2. For the simple fact of taking part to the association, the penalty of the imprisonment shall be a term of between one and five years.

3. The bosses shall be liable to the same imprisonment settled for the promoters.

4. If the associates are armed, the shall be for a term of between five and fifteen years

5. Sentence shall be increased if the organisation consists of ten or more.

² article 270-bis penal code (association for the purposes of terrorism or subversion)

“1. Whoever promotes, establishes, organises or manages associations for the purposes of committing acts of violence aimed to the subversion of the democratic order shall be liable to imprisonment for a term of between seven and fifteen years.

2. For the simple fact of taking part in the association, the penalty of the imprisonment shall be for a term of between four and eight years.

³ Art. 416 - bis penal code (*membership of a Mafia-type organisation*)

1. Persons belonging to a Mafia-type organisation of three or more persons shall be liable to imprisonment for a term of between three and six years.

2. Persons who further the activities of or manage the organisation shall be liable to imprisonment for a term of between four and nine years for that offence alone.

3. A Mafia-type organisation is an organisation whose members use the power of intimidation deriving from the bonds of membership and the atmosphere of coercion and conspiracy of silence that it engenders to commit offences, to acquire direct or indirect control of economic activities, licences, authorisations, public procurement contracts and services or to obtain unjustified profits or advantages for itself or others, or to prevent or obstruct the free exercise of the right to vote, or to procure votes for itself or others at elections.

4. If the organisation is armed, members shall be liable to imprisonment for a term of between four and ten years in the circumstances described in the first subsection and between five and fifteen years in the circumstances described in the second subsection.

5. The organisation shall be deemed to be armed if its members have access to weapons or explosives for the purposes of furthering the aims of the organisation, even if hidden or stored.

6. If the economic activities which the members intend to acquire or maintain control over are financed in whole or in part by the proceeds of crime, the penalties set out above shall be increased by between a third and a half.

7. In the event of a conviction, articles which were used or intended to be used to commit the offence and the proceeds thereof shall be forfeited.

8. The provisions of this section are also applicable to the Camorra and any other organisations, whatever their names, that make use of the power of intimidation deriving from the bonds of membership to pursue goals typical of Mafia-type organisations.”

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While simple conspiracy only requires the creation of a stable organisation, however rudimentary, for the purposes of committing an indeterminate number of offences, membership of a Mafia-type organisation additionally requires the organisation to have acquired a genuine capacity for intimidation in their area. The members of the organisation must also exploit this power to coerce third parties

with whom the organisation enters into relations and oblige them to enter into a conspiracy of silence.

Intimidation may take various forms, from simply exploiting an atmosphere of intimidation already created by the criminal organisation to committing fresh acts of violence or making threats that reinforce the previously acquired capacity for intimidation.

⁴ Art. 76 of Presidential Decree N.o 309/ 1990
(*association for the purposes of illicit trafficking of narcotic or psychotropic substances*)

1. When three or more persons from an association for the purposes of committing more than one offence under section 73, whoever promotes, establishes, manages, organises or finances the association shall be liable to imprisonment for a term of not less than twenty years for this offence alone.

2. Any persons taking part in the activities of the organisations shall be liable to imprisonment for a term of not less than ten year.

3. The sentence shall be increased if the organisation consists of ten or more members or if any of the members are addicted to narcotic or psychotropic substances.

4. If the organisation is armed, in the circumstances described in subsections 1 and 3 above, the sentence may not be less than twenty-four years' imprisonment and twelve years' imprisonment in the case in subsection two above. The organisation shall be deemed to be armed if its members have access to weapons or explosives, even if hidden or stored.

5. The sentence shall be increased in the circumstances specified in section 80(1)(e).

6. If the organisation has been established to commit offences under subsection 5 of section 73, the first and second subsections of Section 416 of the Criminal Code shall apply.

7. The penalties provided for by subsections 1 to 6 shall be reduced by a half to two thirds if the person in question has acted effectively to obtain evidence concerning the offence or has deprived the organisation of vital resources for the commission of offences.

The “*Mafia method*” (or rather, the whole gamut of instruments on which it is based) is therefore identified under criminal law by means of three characteristics (“powers of intimidation deriving from the bonds of the organisation”, “coercion” and “conspiracy of silence”) and all three are essential and necessary aspects of this conspiracy offence.

In terms of aims, whereas a simple conspiracy aims to commit acts defined as criminal offences in law, a Mafia conspiracy can also be organized with the aim of obtaining direct or indirect control of economic activities, authorisations, public procurement contracts and services or profits or other unjustified advantages for the organisation or others or to prevent or obstruct the free exercise of the right to vote or to procure votes for itself or others at elections.

The aim of committing crimes, while inherent in Mafia-type organisations and an aspect of their structure since the organisations are characterised by the use of violence, is not, however, the final and sole aim of the organisation. In fact, the individual offences committed, such as “settling accounts” or acts against representatives of public institutions, are part of a broader strategy that seeks to acquire, increase and consolidate economic power as part of an entrepreneurial vision that makes no distinction between the

proceeds of criminal activities and legitimate profit and considers intimidation and violence to be normal tools of its trade.

This is why Mafia-type organisations attempt to acquire control of significant areas of legitimate activity as well as criminal activities, such as drugs or arms trafficking. It is important to stress that the legitimate activities are not conducted simply as a consequence of and a front for criminal activities. They are a natural outlet for criminal activities in the context of the Mafia mind-set. Crime is therefore a means to acquire economic and political power and it leads to an overall logic of continually expanding into areas of legitimate power.

This has all been clearly recognised by the legislature, which has defined the offence of membership of a Mafia-type organisation in such a way that, even if a series of offences have not been committed, it is still an offence for the organisation to intend to exploit Mafia methods to acquire a *monopoly position*, for *electoral or political* gains or to obtain an unjustified *advantage*.

The term organized crime was first used in Italy in the mid '70s when, upon the outbreak of kidnappings for ransom and the onset of terrorism, laws were amended as a result of the increasing awareness of the difference between offences committed by individuals and "organized" offences. Then, the distinction was based on two main features: the number of people involved and the steady and skilled nature of the organized criminal activity compared with the contingent and accidental nature of individual crime.

A couple of decades after those first analysis, criminal geography has completely changed. Individual crime

hardly exists. The organisation forcefully broke in the criminal world and by now any criminal activity has its own structured shape ranging from the exploitation of prostitution to the illegal immigration, trafficking of arms, illegal waste disposal, industrial or financial espionage, computer offences.

This updated notion of organized crime includes those criminal associations whose organisational structure is not only aimed at implementing the group's criminal plan, but it further reflects a global purpose which goes beyond the criminal activity and aims to achieve more power. In this respect, their common basis is founded upon the business logic of profit-gaining, of enrichment and of the illegal markets with the resulting (firm-like) highly developed organization. In this respect, the Mafia type conspiracy is regarded as prejudicial to the economic public policy.

It is known that the operational features of today's organized crime - Mafia type or not - have developed as a result of the globalization of both legal and illegal markets and of the abatement of frontiers according to a pattern based upon two guidelines:

- (i) the first one includes the increase in asset and capital inter-exchanges due to the development of computer science and the mobility of offenders on territories;
- (ii) the second one marked by interconnections among criminal aggregates which in the past were separated and unrelated.

Such a reality leads analysts to refer to an *integrated criminal system* characterised by a *transnational* nature and by its heterogeneous elements.

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The *transnationality* of organized crime is a feature other than its *internationality*. By the latter term, in fact, we mean the fact of a criminal group operating not only on the territory of the country where it arose and performing its activity also abroad. The former, instead, refers to the *co-operation* established by criminal groups among themselves so as to manage some criminal markets more profitably.

The international scientific community proposed various patterns to achieve a definition of the organized crime notion which may be agreed upon and accepted. A phrase was used, for instance - more a sociological than a legal one and exceedingly restrictive - identifying organized crime " *as the group of people steadily devoted to the commission of offences against property or of offences affecting the economy and provided with a complex organisation in which costs, profits, re-uses, investments are planned in a manager-like prospective so as to allow these groups to achieve advantages within the illegal market*" (World conference of ministries of justice on international organized crime, 1995).

By the way, I believe it is meaningful to remark that, at a European level, a discussion is still under way on this issue, i.e. the definition of a common notion of *organized crime* and the resulting identification of the behaviours expressed by it - an issue being indeed crucial with respect to the path towards the harmonisation of E.U. rules.

In fact, along with Mafia-type criminality and often intertwined with this latter, two more types of criminal activity work on a large scale, spread out in nearly all Member States, whose organisation is possibly more efficient than the Mafia's itself and also more capable to interact with governmental sectors and to affect the legal

economy: i.e. political - governmental corruption and the illegal lobbying. There is a widespread opinion that the entangled mingling of licit affairs, illicit affairs and criminal affairs is the fully-fledged element distorting the legal economy.

The first need highlighted by the Action Plan against organized crime, adopted by the European Council on April 28th 1997 - i.e. to make membership of a criminal organisation prosecutable in the legal system of each Member State - was satisfied by the adoption of a Joint Action (December 21st 1998) thanks to the efforts made by the High Level Group established within the Council General Secretariat to provide technical support with regard to the implementation of the Plan's political contents. The Joint Action provides a definition of criminal organisation and compels Member State to make it a criminal offence to participate in the criminal organisation ensuring that one or both of the types of conduct are punishable, i.e. the Italian-like pattern of participation and the common law "conspiracy" pattern.

According to the European Union situation report on organized crime, presented in Brussels on November 6th 1998, the term "organized crime" stands for " *a wide range of phenomena with many differentiations in types of activities, markets, people involved, crimes committed, levels of organisations and other aspects*". This make it difficult, if not impossible - according to the Report - to depart from a definition of organized crime that is commonly accepted and covering all its relevant manifestations.

The economic aspect, and generally the drive to accrue resources by any means, is the key aim, not to say the only one, which explains the strategic and tactical choices made by any kind of criminal organisation. Yet the possibility to make profits is not

enough by itself; it needs to be supported by a favourable environmental situation which can be defined a governmental and economic - financial vulnerability.

Economic and financial vulnerability is linked to low competitiveness and efficiency. Governmental vulnerability arises when the country's economic competitiveness and development are not ensured by the institutions and government bodies responsible for the safeguard of citizens' rights, the settlement of disputes and, in general, the compliance with laws.

In this respect, criminality paves the way for imposing its own non-economic and illegal instruments in the sectors of production and exchanges. Thus, the environmental vulnerability becomes a requirement to establish and spread out various criminal activities.

The illegal economy is on the increase, meaning by that all the exchanges and productions whose relations are disciplined by rules other than - and often opposed to - the institutional ones. The illegal economy due to the organized crime is made up by those illegal exchanges where either of the two players belongs to a criminal organisation. The illegal economy can take various aspects and concern both the "trading" and the "financial" part of the system: for instance, drugs manufacturing and trade, illicit trafficking of goods and people, loan-sharking, unauthorised credit, money laundering.

The action of the organized crime in some sectors of trading and financial economy results in the increasing distortion of the economic milieu and, inevitably, of the society and public life as well. A wicked situation is thus started: the environmental vulnerability helps the distortion caused by the organized crime

which in turn further impairs the environmental context.

In the light of the economic analysis, the equation "*economic development = legality*" proved to be out-of-date and erroneous since the ratio is to be definitively reversed: there can be no economic development without legality. Criminality, indeed, prevents the development of a healthy business and investment activity. Conversely, where private and public investments are not supported by a legal background, the risk is high for the flow of resources to be ineffective and to even feed the activities carried out by a spreading criminality. The economic principle has recently stressed the key role played by *security* and *trust* with a view to the growth and the good operation of the market economy regarded as a set of rules and processes allowing an efficient production and exchange of resources within a developed and democratic society.

Transactors' security and trust are based upon the belief that there exist complex standards ensured and monitored by governmental institutions (the judicial one mainly) which guide the behaviours, settle the conflicts of interest, and sanction unfair conducts. A threat to the ordinary development of economy is posed by the quantity, but mainly the quality of the illicit and criminal actions committed in this field. Indeed, the rejection by single individuals or complex organisations of the rules of legal economy implies two different layers of dangerousness: the mere infringement of laws; the replacement of legal processes by other illegal rules and processes which wrongdoers provide to autonomously sanction if they are not complied with.

Unfortunately, to explain (micro and macro) criminal phenomena, the sociological-criminological approach has

always prevailed over the economic approach (or at least it was useful to make it prevail), the former basically connecting the deviating behaviour to psychological or physiological features so as to blame either the single individual or the society.

The economic analysis of crime, instead, takes account of individual tendencies and explains that anyone can commit a wrong on the basis of a reasonable cost-benefit assessment. The person who infringes the law expects a clear benefit out of his action. The offence (think of corruption, for instance) turns to be almost physiological and related not to genetic anomalies, personal or environmental situations, but to a range of variables outlining the opportunities and the ties upon which one decides to commit licit or illicit actions, according to convenience. These variables can be grouped in two main sets respectively connected to:

- (i) efficiency of governmental institutions, namely justice;
- (ii) efficiency and equity with regard to the production and allotment of resources and market transparency.

Governmental institutions therefore have the responsibility to ensure citizens the competitiveness of goods and services markets, the transparency of capital and employment, the efficiency of criminal jurisdiction in the fight against the offences pertaining to the economic organized crime and to the public administration, the efficiency of civil jurisdiction, the safeguard of rights and the settlement of disputes with special reference to company and bankruptcy law. Consequently the legal system's inefficiency is a cause of denial of justice, but it also hampers the development and poses considerable problems with a view to the European integration.

II. DRUG TRAFFICKING: MAIN PLAYERS AND ROUTES

The considerable availability of data on drugs trafficking allows the development of a complex discussion which makes it easier to understand the profitability of drugs production and trade and, as a result, the reasons for its spreading and steady increase. From 1980 to 1996, seizures of opiates have increased five times as much whilst the seizures of cocaine ten times as much (Data are drawn from the report of the International Narcotic Control Board - INCB - of the United Nations and they refer to 1996).

Experts generally believe that seizures affect 10% of the trafficking at best, meaning that in fifteen years the production, the trafficking and, supposedly, the abuse have increased proportionally. Three widespread types of drugs can be identified: cannabis, cocaine, heroin.

A. Cannabis

Mexico is the leading source country with 7000 tons of marijuana per year followed by the USA (3000 tons per year; huge quantities of the most valued quality - the *sensimilla* - are produced in California), Canada, Colombia and other minor countries. It is also grown in many African countries with a massive concentration in Morocco.

The retail cost of "soft" drugs in Italy ranges from 7 - 10,000 Lire per gram of marijuana to 12 - 15,000 for some good quality hashish. It can be reasonably inferred that the wholesale cost is about two million lire per kilo in the Mediterranean market. Thus, the investment's return is low: about 9 times the initial investment.

Morocco is a major supplier of cannabis resin to the Member States. Pakistan is

another source country. Albania is developing into a major source country of herbal cannabis for Hellas and Italy. Smuggling takes place in lorries, vans and campers and by sea in trawlers and yachts. Central and Eastern Europe is a transit region for cannabis destined for the Member States due, to a certain extent, to the use of the Balkan routes for cannabis trafficking from Turkey.

Over 90% of cannabis resin seized in Spain in 1997 originated from Morocco and most was in transit to other Member States. Groups from various Member States have set up bases in Spain to facilitate trafficking towards their countries and in 1997 the Spanish authorities identified criminal groups from the United Kingdom, Germany, Italy, France, the Netherlands, Belgium, Sweden, Denmark, and Austria operating within Spain.

B. Cocaine:

Main producers are Peru, Bolivia, Colombia (main producer of cocaine destined for the Member States; here the national plans to reduce the coca cultivation have not been very successful), Brazil and Ecuador covering 90% of the world exportation.

In Italy, recent data on the organisations involved in the international drugs trafficking show substantial returns, about 611 times its purchase value. This is also due to the processing of the pure substance allowing to triple the quantity of the goods (failing to comply with such a limit, the product's yield would decrease). Five hundred kilos of leaves are needed to obtain one kilo of cocaine.

To the traditional routes used for the trafficking of these drugs (such as that of the Caribbean: Bahamas - Caribs - Florida; the European route through the

Netherlands) many others have been added in progress of time towards Europe: Brazil, Argentina, Venezuela, Morocco, Tunisia, Algeria, Ghana, Nigeria.

The trend is to traffic small quantities rather than many-ton cargos although this did not result in a decrease of the cocaine seized. The transit role of Central and Eastern Europe is increasing. Colombian groups co-ordinate and monitor the arrival of cocaine in the region and the subsequent transport overland to the European Union. This has led to the tendency to either "bypass" ports in the Member States or to use them only for transit purposes with a view to unloading the drugs in ports within Central and Eastern Europe. These ports often lack qualified staff and technical equipment to carry out assessments on the cargo. Analysis shows that increasingly non-existent Central and Eastern European companies are registered as consignee of the cargo.

The Iberian peninsula is also a gateway for the transport of cocaine to the Member States. In terms of quantity most cocaine is smuggled by sea although planes are the most frequently used means of transport. There is a major difference, largely due to historic and linguistic ties, between the role of the southern part of the European Union and its Nordic Member States in respect of cocaine trafficking. Whereas the amount of cocaine seized in 1997 in the Iberian Peninsula was 21,581 kilos, the total quantity in Denmark, Sweden and Finland was only 92 kilos.

C. Heroin

Opium production has increased in the "Golden Triangle" (Myanmar, Laos and Thailand) and in the "Golden Crescent" (Afghanistan, Pakistan, Iran) as well as in Lebanon and Mexico. To the traditional routes (Bangkok - USA - Europe - Oceania; Hong Kong, Nigeria, Turkey, Greece, Italy

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- the so-called "Balkan route" i.e. former Yugoslavia and Albania) others have to be added: the Baltic route made up by some Eastern Europe countries; the African route for the transit of heroin flows originated from Asia and directed to Europe and northern America.

The profitability is exceedingly high: about 1700 times its initial value. One kilo of pure substance produces up to 15 kilos made up by 50 mg doses which are sold in Italy between 30,000 and 50,000 Lire. About 80% of all heroin seized in the European Union originates from South West Asia. Afghanistan is one of the world's leading opium-producing countries with an estimated volume of 1265 tons in 1997 resulting in 134 tons of heroin. Opium production in Colombia is some 66 tons resulting in 6 tons of heroin.

Morphine base is transported from Afghanistan via Iran to Turkey for processing into heroin which is then smuggled - by sea and overland - into the Member States increasingly through Albanian traffickers putting a great deal of emphasis on Austria as a country of entry into the European Union.

D. Synthetic Drugs

As to synthetic drugs, their abuse has increased faster than any other drug and the European Union is one of the world's major production regions of amphetamine and ecstasy type stimulants, with large-scale production being controlled by criminal groups.

Most amphetamine seized in the Member States originates from the Netherlands, Belgium, the United Kingdom and Germany whilst the Czech Republic, Poland, Bulgaria and the Baltic States are major source countries from outside the European Union. Production in Central and Eastern Europe is partly

destined for the European Union, with Germany often being used as a transit country in particular for the northern Member States.

Long-term strategic alliances between criminal organisations create a bridge to new markets, undermine the position of competitive groups and reduce the costs for investment, as well as the risks. Also they guarantee a constant supply of criminal goods to those who already have access to the market. Some alliances such as the ones between Colombia criminal groups and the Italian Mafia, and between the Italian Mafia and Russian groups, have been known for years. However, more recently a Colombian-Russian strategic alliance was identified. Colombia groups have forged links with Russian groups which supply military equipment including AK-47 assault rifles and shoulder-fired missiles in exchange for cocaine which is allegedly transported to Russia and to Member States.

One characteristic of the higher echelons of organized crime, including those involved in international organized drug trafficking, is the level of sophistication used. Criminal groups have developed, and to a large extent depend on, expertise in computer technology, financial techniques, money laundering activities and other forms of economic crime and they have gained a prominent position through maintaining a sophisticated high-tech global communication and logistics network, whilst at the same time making use of legal and financial experts.

As it results from the findings of investigations, the use of experts by the smuggling organisations is also prominent. Trafficking of cocaine towards the European Union is dominated by a small number of criminal groups from Colombia, although Bolivian criminal groups, due to

the increased production of cocaine in the country itself, are expanding their activities. In cases of the trafficking of large amounts of drugs the groups operate in a temporary "joint venture" construction. This enables them to set up logistic and transport facilities, to spread the risk and to guarantee an appropriate infrastructure for large-scale cocaine distribution. The groups have created a network of cells in several Member States which are closely inter-linked and engaged in the distribution of cocaine once the drug has entered the European Union. The cells maintain firm links with indigenous groups who are engaged in the further distribution.

The splintering of traditional large scale groups and the use of "sub-contractors" - notwithstanding the spreading of the risk - means a certain loss of control and coupled with more people being involved makes organized crime groups more vulnerable to law enforcement activity.

Transportation of drugs has always proved to be a problem to organized crime groups. Routes are ever changing recently and the cessation of the Yugoslav civil wars has allowed increased activity along the traditional "Balkan route". The close proximity of places of production of synthetic drugs to the consumer markets eases distribution problems. This allows organized crime to limit investments in resources needed to set up complex routes.

There is an emerging trend of "sub-contractors", in which criminal groups hand over part of their activities to others with a view to spreading the risks. Independent groups offer their services to any criminal group. Others who own a fleet of ships offer transport facilities, irrespective of the type of drug and country of origin or destination.

Organized crime in the countries of the former Soviet Union (the so-called Russian Mafia) is constituted by a myriad of criminal groups (over 8000) of different origins and not always linked among them. It is characterised by the urge to prevail over the countries of the Eastern Europe (Bulgaria, Hungary, Czech Republic and Poland). Some recent investigations, yet, led to the existence of a body standing above the small groups.

The criminal organisations of the former Soviet Union have huge finances mainly acquired by means of the "privatizations" followed to the change in the domestic political scenario. Currently, the so-called Russian Mafia controls over 50% of the banks of the former Soviet Union (the thirty bankers murdered in the latest years are a clear symptom). Criminal actions committed in Italy by citizens of the former Soviet Union - which have been found at trial - are characterised by (information source: Mafia Investigations Bureau, November 1998):

- (i) availability of outstanding finances;
- (ii) seeming lack of contacts with Italian criminal organisations;
- (iii) average young age of people involved.

Links between traditional Mafia type criminal associations and the Russian Mafia were found. Namely, with reference to purchases on the black market, members of the 'Ndrangheta and Camorra and Mafia gangs purchased exceeding quantities of roubles turned into a different currency on the international markets with a view to re-investing them in the purchase of real estate and companies in Russia.

Turkish criminal groups have engaged Central and Eastern Europe groups in the trafficking of heroin towards the European

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Union, Cape Verdians in intra-EU trafficking and domestic groups in the distribution at wholesale or street level. Turkish organized crime remains an active force in the trafficking of heroin throughout most of the European Union and has been identified as operating in twelve Member States. The groups have developed strong relationships with indigenous criminal networks and the distribution of heroin is often achieved through local groups. This variance illustrates the ability of Turkish criminals to adapt to local circumstances and requirements.

The proximity to traditional opium source countries (Iran, Pakistan, Afghanistan) and the bridge position between the Christian Western world and the Islamic East marked the role played by Turkey in progress of time as a transit country in the heroin trafficking directed to Europe (to Germany, Holland, France, Austria, Belgium, the United Kingdom, Sweden, and Italy as well).

The so-called Turkish Mafia has no pyramid-like structure. It is constituted by several criminal groups, each with a high number of associates belonging to a family-based structure. Some "families" are made up by persons of Kurdish ethnic groups (Turkish, mostly Iranian, Iraqi and Syrian) and are also involved in the drugs trafficking whose proceeds are mainly used for the so-called Kurdish cause, that is the liberation of Kurdistan. Prosecutor's Offices in several towns, mainly in northern Italy, conducted many investigations which stressed the unsteady operational links between the Turkish Mafia and Italian Mafia type criminal organisations among which the ones named "*Cosa Nostra*" and "*Camorra*".

A special focus must be placed on the various Slav ethnic groups scattered throughout the national territory and

responsible for the distribution of heroin originated from Turkey and Eastern Asia and helped by an extensive availability of fellow countrymen illegally immigrated.

The trend of this new threat can also be assessed through a compared analysis of the experiences in other European countries: actually, in Germany, Austria, Slovenia, Hungary and Romania the situation seemingly outlines some patterns which can be found in northern Italy since the storage of the heroin directed to central Europe in Hungarian, Romanian, Bulgarian and Slovak cities is managed by Albanians in close connection with Turkish people and fellow-citizens responsible for the trafficking also in the destination site.

In this respect, Albanians originated from Kosovo manage and control the Balkan route, on behalf of the Turkish yet increasingly autonomously, in all steps of the trafficking. Albanian Kosovar organisations play an ever-growing role in the distribution of drugs in Italy, Switzerland, Germany and in the United States. They are also becoming established in London where about 6000 of them can be found. It is a successful criminal network which has recently prevailed over any other criminal form by peacefully settling along with indigenous traditional groups step by step, and assisting them on an equal basis.

Although these criminals adopt a predator-like approach - since they are simultaneously involved in drugs trafficking, burglaries and prostitution - the primitive and unusual nature of their attitude makes them dangerous, unforeseeable and aggressive. Moreover, the religious factor amounts to an unprecedented uniting element among Albanian associations and between them and the Turkish ones, this latter

strategically controlling the interests connected to heroin.

On the one hand, the drugs trafficking is fed by the spreading of the Indian hemp cultivation in Albania yet, on the other hand, the strong links with other criminal entities in the Balkan area and in Middle East make it increasingly dangerous. Bulgaria is a punctual example. This country has attracted international traffickers of heroin and arms who benefit from a mild legislation brought about by a recessive economic situation.

The recent upheavals in the former Yugoslavia also contributed to bring about changes in the heroin routes and in the labour used by smugglers. A frequently used route departs from Sofia to Skopje (MKD), hence it carries on towards Tirana. From Albania, the drugs reach Italy through the fast motorboats also used in the cigarette smuggling which cross the Adriatic sea in a few hours and with low risks.

With a view to assessing the skills of the Albanian criminal organisation and their capability to establish connections with Apulian organisations operating in Montenegro, it is important to consider an agreement reached by them. According to this agreement, Albanian ships carrying illegal immigrants and women destined to prostitution, as well as marijuana and arms, dock along the Apulian coast south of Brindisi in order to avoid interference with the cigarette smugglers who exploit the area north of Brindisi for ships coming from Montenegro and to avoid the strengthening of police controls and the resulting damage to the detriment of that trafficking.

Albanian organisations also traffic in home-made marijuana. In southern Albania, indeed, the *cannabis indica*

cultivation is a mass phenomenon and it is not subjected to any control. Greenhouses have been arranged where Indian hemp ripens remarkably so obtaining a very high active principle. This production achieved an "epidemic" size, to quote the words used by the Prosecutor General of Albania in a survey on the situation.

Some investigations led to find trafficking of Albanian marijuana directed to Holland in exchange for cocaine meant for the Italian market. A few years ago this circuit had a low impact, yet today the type and volume of the illicit trafficking involving single individuals and Albanian criminal groups (drugs and arms trafficking, exploitation of prostitution, kidnappings for ransom, thefts and robberies, smuggling of tobaccos processed abroad, forgeries) allow us to affirm that the Albanian organized crime can be included among the prominent criminal phenomena, also due to its international connections with partner organisations operating in Italy.

In Italy, the Colombian cartels of Cali and Medellin - which have the availability of appreciable financial resources - have logistical centres which carry out drugs businesses with Italian organisations and attempt to implement the ultimate steps of refining on our territory.

With a view to a comprehensive analysis of this phenomenon, two levels of drugs trafficking must be distinguished. When big quantities are at stake, the Colombian cartels usually perform a drugs collecting function also in other source countries dealing with the management until the requesting market. The Mafia families based on those territories ensure the performance of business operations.

The cocaine shipments basically take place by sea, along routes used for a long

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time: some of them reach the United States, Canada and part of northern Europe, namely Belgium and the Netherlands, hence the goods are distributed in the rest of Europe. Other shipments originate from harbours in Venezuela mainly directed to Spain, which is the preferred country due to the linguistic and cultural proximity and to the existence of well-rooted criminal bases where significant quantities are stored while persons living there provide to ship them overland.

As to lower quantities, the Mafia families are not interested in the mediation because of the commercial travellers - i.e. Colombian citizens belonging to structures other than the cartels - who ensure an immediate supply. In such cases, small quantities are transported from the originating countries to Italy by plane and there is an increasing use of Nigerian persons as couriers; these persons are arranging real structures located in Italy and connected to their accomplices based in Latin-American countries.

In some cases, subject to the principles of the micro-market, cocaine is bartered with heroin or arms depending on the needs of consumers. With regard to the activities carried out by the Nigerian criminality in the drugs field, their organisational framework and their spreading in Italy lead us to affirm that Nigerians have no hierarchical structure, yet they amount to a set of groups made up by cells connected among them.

On an international scale, only in the mid '80s' did Nigeria show the first alarming forms of organized crime. Since the first arrest - which goes back to 1987 - the interception of Nigerian couriers carrying drugs consignments has been dramatically increasing up to 1990. Consequently, Police forces were convinced that they worked as low-cost labour for

criminal organisations originating from other countries or that they were low-profile players in a pushing activity self-managed or controlled by local traffickers. Then a reversal of trend was recorded and other African people were increasingly arrested because Nigerians - who had developed their importance and their business volume - had started to use them as couriers in their place so as to lead the controls astray.

The impact of this new criminality on drugs trafficking was the focus of a worrisome discussion held in Abuja (Nigeria) from 18 to 22 May 1992 during the meeting of the representatives of the African drugs services (HONLEA) who were aware that the inadequate law enforcement system of local police forces had a negative impact on the international community.

Nigerian organisations are mainly made up of persons of Ibo or Yoruba ethnic groups and they are involved in the heroin and cocaine trafficking; their wide scope extends to various countries: consumer countries such as Germany, Spain, Portugal, Belgium, Romania, United Kingdom, Austria, the USA, Croatia, Slovenia, Czech Republic, Hungary, Ukraine, Poland and Russia; source countries (Pakistan and Thailand) or transit countries (Turkey, India and Brazil). In Italy, the areas mostly affected are Naples, the coasts of Campania and the area around Rome.

Another foreign organisation active in Italy - although with a different degree of integration with domestic crime - is the Chinese one. The Triads, operating into the Chinese settlements in Tuscany and Lombardia, control the illegal immigration and some economic activities such as restaurants, leather and textiles processing. Chinese communities are

family-based organisations and therefore they prove to be resistant to external infiltration and dominated by the law of silence so much so that any possible control by the police is hardly feasible.

Data relevant to immigration show that in Italy the Chinese community is mainly constituted by citizens of the People's Republic, whilst Taiwanese and citizens of Hong Kong and Macao can be hardly found. Yet their limited number must not lead to under-evaluate their dangerousness due to the fact that some of the strongest "Triads" are based in Hong Kong, Taiwan and Macao. A kind of expertise in the international drugs trafficking by citizens of Hong Kong has been repeatedly reported, here the Triads have a strong presence. Reportedly, these organisations are connected to the "Golden Triangle" and have a growing influence in the southern Chinese provinces. In the Member States, Chinese ethnic groups are involved in the production of ecstasy and in the drugs trafficking towards the south east of Asia.

In the light of the aforesaid, there exist grounds to affirm the co-operation and/or the existence of business relations between them and the Chinese criminal groups in Italy. The action of the traditional criminal organisations (Mafia, Camorra, 'Ndrangheta, Apulian crime) is limited - as to the distribution in Italy - to big quantities upon the importation as mediators in the import-export activity.

In the most recent years, the mediation role played by Italian criminal groups in respect of the drugs trafficking favoured a sharp increase in the relations with similar foreign organisations skilled in the production and distribution of drugs and in the laundering of illicit proceeds. This was also brought about by the intercontinental scope of arms and drugs markets: the need to transfer outstanding

sums of money abroad in settlement of the illicit consignments. In many foreign countries, significant communities of migrants have been keeping close relationships with the originating families in progress of time which gave momentum to the management of the various Mafia interests.

Investigation conducted as of 1991 identified and affected some company-like structured organisations, mainly from Calabria, which had the availability of the primary supply channels and skilfully led - together with the producing Colombian cartels and the mediation of other Mafia groups - the import, transport, clearance through Customs and distribution by exploiting an extensive network of complicity while carrying out skilled transactions to launder the proceeds through the banks.

Recent inquiries conducted by the District Antimafia Prosecutor's Office in Naples found that the Camorra groups which traffic the drugs are the same as those which traffic trade mark-forged clothes (the so-called "*magliari*") by means of the same distribution channels, especially towards Germany and the Eastern European countries.

Apulia is the natural destination for the sea traffic originating from the Balkans and the Middle East and can be regarded as a meeting point of the Mafias due to its traditional willingness to provide criminal services to the benefit of non-regional and non-national Mafia organisations - it frequently was a reference point for illicit trades among Serbia, Albania, Macedonia and Montenegro aimed at by-passing the embargo ordered to the detriment of Serbia.

The Apulian coasts, the core function performed in respect of the routes of the

trafficking of drugs and arms originated from Eastern Europe, the mediation between the Italian and the Albanian crime - which by now have established interactive and systematic contacts - led to a fast development of the Apulian crime according to a pattern which include gangster-like and Mafia features.

Mafia's estimated all-embracing capability throughout our territory undoubtedly delayed a full awareness of the problem related to the infiltration in Italy by foreign criminal groups (Slavs, Turks, Colombians, Nigerians). Actually, in the originating areas, the traditional Mafia organisations still keep a full control of the territory and there is no room for others, save for co-operative and subordinate roles.

Yet in northern Italy, namely in Lombardia and Piedmont - major centres for illegal activities on a national and international scale, mainly in respect of the drugs trafficking and the resulting laundering of the proceeds - the integrated criminal pattern I was referring to is asserting itself. A pattern in which the various Mafia groupings peacefully share common interests and prefer economic interests to the traditional control of the territory and lay the foundations to host non-national organisations.

At first the Slav, Turk, Colombian and Nigerian logistical centres was aimed at an operational agreement with the Italian groups for the drugs trafficking, yet by now it represents the embryo of a more rational and systematic penetration into the Italian illegal market. The strong criminal repression implemented in the latest years to the detriment of Sicilian and Calabrian organisations - this latter detaining a nearly monopolistic power on the drugs trafficking - left unexpected room to foreign groups which in the past were restricted in a subordinate position. The overall

outline is therefore exceedingly unstable. The competitiveness to conquer new spaces brings about steady unrest among criminal groups resulting in uninterrupted clashes, slaughters and new alliances.

III. INSTRUMENTS AND COUNTER-MESURES

The seriousness of the criminal phenomenon of the international drug trafficking poses the priority need for an effective unitary international strategy divided into five areas of action already clearly indicated by the Convention of Vienna of 1998 as supplementary and indispensable:

- (i) action against the production sources and the first rings of the organized crime chain running this trafficking;
- (ii) fight to the smuggling of the so-called "precursors", i.e. those substances needed in the chemical processes to manufacture drugs;
- (iii) action against retailer consumption;
- (iv) international mutual legal assistance
- (v) fight to the money laundering of the drug trafficking proceeds.

In Italy the debate on the drug problem is hot, namely with reference to the treatment of the consumer (swinging from repression to rehabilitation) and to the possible amendments of the current legal system. Italy is one of the leading countries in the pursuit of such unitary international strategy which is unfortunately a long way from being implemented notwithstanding the efforts and the steady contacts among judges, prosecutors and judicial personnel.

I will focus my discussion on the criminal repressive system regarding the offences of drug manufacturing and trafficking and

I will leave out the current regulation of the consumer treatment. Following to a repealing referendum held in 1993, drug possession for personal use is no longer a criminal offence, it is a wrong punished by administrative sanctions applied by the prefect (suspension of driving licence, of licence to carry firearms, of passport, etc.).

Notwithstanding the repeal of 1993 - which partly resumes the principle of *differentiated strategy* which characterised the old law of 1975 based upon the distinction between trafficker, petty pusher and consumer - the current legislation mainly referring to the D.P.R. no. 309/90 has strongly repressive features. The base principle in force after the referendum of 1993 is the following: irrespective of the quantity, drug possession for the purposes of pushing is a criminal offence whilst drug possession for personal use is an administrative wrong.

Criminal repression of drugs can be divided into two major crime categories:

- (i) the offences of drugs manufacturing and trade;
- (ii) the offences of assistance or incitement to drugs use.

The system is made up by two criminal categories distinguished by the individual nature (article 73 D.P.R. 309/90) or the conspiracy nature (art. 74 D.P.R. 309/90) of the criminal conducts. Each of these sub-groups provides for different sanctions based upon the nature of the controlled substance depending on whether it is a heavy drug or a soft drug (this differentiation had been previously identified by the law-maker in appropriate tables attached to the law which can be amended or supplemented in progress of time). Sanctions punishing the conducts pertaining to the heavy drugs are considerably more severe.

Within the individual category, two types of criminal conducts can be listed:

- (i) the activity of drugs manufacturing and trade without governmental authorisation;
- (ii) the same activity performed having obtained the governmental authorisation but infringing its provisions.

The core rule set out under article 73 DPR 309/90 covers the individual conducts liable to criminal sanctions under a single provision. They pertain to alternative criminal model situations and thus to autonomous offences possibly committed in complicity and possibly linked by continuation (the pursuit of the same criminal design). The law provides for the following unlawful conducts:

- (i) growing
- (ii) production, manufacturing, extraction, refining
- (iii) offer or placement on sale (the mere affirmation to be able to procure drugs is punished)
- (iv) giving or sale (as to the former, a consignment for free is punished)
- (v) distribution
- (vi) trade
- (vii) procuring to others (mediation)
- (viii) import and export
- (ix) passing or shipping in transit
- (x) possession, not for personal use of course (material availability). Such sanctionative provision operates as a common element within the repressive system.

In applying this law, a special problem is posed by a common behaviour that is the group use of drugs. Prevailing court decisions held, in such cases, the complicity of all participants in the action of possessing the drugs purchased by either of them. Recently, yet, court decisions have

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held that the personal use of the quantity of drug consumed by each of them amounts to a mere administrative wrong save for the criminal liability of the person who procured the drugs for the common or group consumption.

Article 74 of DPR 309/90 sanctions the conspiracy for the purposes of drug trafficking. Within the framework of the varied approach arranged by the Italian law-maker in order to adjust penalties to the various degrees of seriousness of the offences involved, the conspiracy ranks at the highest level (promoters are liable to a term of imprisonment not less than twenty years; participants are liable to a term of imprisonment not less than ten years).

Such sanction was made mandatory for Member States by the Convention of Vienna of 1988, it covers any kind of conspiracy and is meant to repress any form of intervention and participation in the drug trafficking. It proved to be particularly effective with regard to the repression of the drugs production and trade, mainly to the detriment of criminal organisations operating at international level and it is frequently combined to other crimes such as the Mafia type conspiracy set out under article 416 *bis* of the Italian Criminal Code.

Within this association the following roles can be distinguished:

- (i) promoter (initiates the criminal association);
- (ii) establisher or founder (participates in the setting up);
- (iii) arranger (co-ordinates the activity of associates and ensures the operation of the structure);
- (iv) backer (invests capitals in the criminal association); this role is considered similar to the investment counsel and to the

person who works for the purpose of laundering illicit proceeds with a stable position within the organisation;

- (v) participant (generic membership).

Sanctions do not take into account the type of drugs involved in the trafficking operated by the criminal organisation and therefore it is the same with respect to both "heavy" drugs and "soft" ones. An extenuating circumstance is merely provided for in the - unlikely - case that the association is directed to commit "unimportant" actions. Special aggravating circumstances are provided when:

- (i) the association is made up by 10 or more persons;
- (ii) persons abusing drugs or psychotropic substances participate in it;
- (iii) availability of arms;
- (iv) adulterated or dangerously cut drugs are involved in the illegal trafficking.

A special extenuating circumstance bears significance rewarding the one who made efforts to avoid that the criminal action results in further consequences or to provide evidence of the offence. This provision is meant to encourage the person to repent after the commission of the offence and it can be applied to the conducts listed under article 73 as well as to the conspiracy under article 74. According to the law-maker's intent, such extenuating circumstance is directed to obtain a greater effectiveness in the repression of the activities connected to the drug trafficking and assumes that a considerable reduction of penalty may favour a helpful co-operation so undermining the structure of the criminal organisation which is difficult to attack from outside.

Implementation practices relevant to the offence of conspiracy for the purposes of drugs trafficking posed a significant problem in the identification of the court having local jurisdiction. The choice made by the law-maker to connect the local jurisdiction on uninterrupted offences (such as the conspiracy ones) to the location where the commission of the offence was initiated seemingly creates problems with regard to the association offences. In such cases the identification of the jurisdiction is no easy task due to the operational structure - which is not always restricted to a limited territory, but it frequently branches across various territories - and due to the "open" nature of these associations, always ready to receive new contributions and memberships.

In the search of ways to reduce the risk of different interpretation by judges, court decisions have seemingly disregarded the traditional standpoint according to which the commission of the conspiracy offence initiated when the agreement among the participants was reached, the achievement of the association purpose being unnecessary.

By now, court decisions have steadily held to favour the location of where the established structure is deeply rooted - the site where each offence committed in pursuance of the association's criminal design being unimportant - and the location where the association's strengthening and development was achieved. These arguments are certainly valid with regard to the Mafia type conspiracy - which is strongly linked to the territory - but they are hardly useful with regard to the conspiracy set out under article 74 of DPR 309/90. Here the decisions of the courts vary significantly.

On this point, it is worth considering a judgement recently pronounced by the

Italian Supreme Court with reference to a prominent organisation involved in drugs and arms trafficking at international level whose leaders always met in different countries to arrange their criminal strategy, neither location prevailing over the others as main site for the association's activities. The Supreme Court held the principle according to which - where a criminal organisation is made up by various groups operating on a wide domestic and foreign territory whose connections to achieve the association's purposes are not related to the territory - the main rule providing "the location where the commission was initiated" and if necessary the one referring to the "deeply rooted activity" shall be disregarded. Instead the supplementary rules set out under article 9 of the Italian Code of Criminal Procedure shall be considered (the ultimate site where part of the action occurred, the defendant's residence or domicile, the venue of the prosecutor's office which initiated the investigation).

IV. UNDERCOVER OPERATIONS IN RESPECT OF DRUGS AND ARMS TRAFFICKING AND MONEY LAUNDERING

Along with the substantive criminal legislation, the law-maker also provided a set of procedural provisions on drugs offences capable to enhance the effectiveness of prevention and repression of the illicit activities connected to the drugs trafficking. Such provisions concern the investigative activity of law enforcement forces, namely the law enforcement national services (State Police, *Carabinieri*, *Guardia di Finanza*, Mafia Investigations Bureau) responsible for carrying out co-ordinated inquiries on organized crime.

Article 97 of DPR 309/90 introduces in our legal system the *undercover agent* so

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allowing law enforcement forces to secretly infiltrate inside the illicit circuit and also provides the possibility of a simulated drugs purchase in order to obtain evidence as to the drugs offences without being liable to criminal sanctions. This provision was later extended -in 1992- to include investigations on money laundering and the result was a new legal excuse in respect of the undercover agent to facilitate the finding at trial of money laundering and of the re-investment of illicit capitals; with a view to this, the undercover agent favours, if needed, the replacement and re-use of money or other illicitly obtained goods or benefits and is involved in the sale of arms, ammunitions and explosives also in the capacity of middleman.

The execution of such activities shall be immediately reported to the competent prosecutor who - by way of a grounded decision - is entitled to postpone the seizure of the money, property or other benefits or of the arms, ammunitions and explosives as long as the investigation is completed also issuing orders to keep them, if needed. For the same investigative and evidential purposes, article 98 of DPR 309/90 provides the possibility to *delay or forbear such actions as the apprehension, arrest or seizure* so as to facilitate the identification of the drugs trafficking main units. The lawmaker took account of the great obstacles faced in the investigations aimed at finding this type of offences and identifying their authors.

An active role of the law enforcement forces has been cautiously provided in respect of the functioning of specific operations on matter of drugs and arms trafficking and money laundering with a view to acquire evidence. In substance, law enforcement officers are allowed not to interfere with the traffickers claiming to be purchasers, until the illicit transaction has been materially executed.

This situation cannot be included in the scope of the undercover agent although this behaviour - which is not liable to punishment - has some common features with it. After lots of uncertainties, Italian court decisions adapted to this matter the general principles adopted on the issue of the undercover agent. Under the former principles on the *agent provocateur*, the undercover agent's exception of criminal liability would require that he should not go so far as to causally contribute by his behaviour to the commission of the criminal action which should not be caused by him and should be conceived and executed by the will of the trafficker or the launderer.

The role played by the undercover agent, yet, cannot be limited to an activity of control, surveillance and restraint of the illicit action of others; it must necessarily involve the infiltration in a criminal organisation, the enticement to sell and, if necessary for the purposes of the successful operation, in a range of other illicit activities aimed at gaining the trust of the criminal organisation and closely connected to the trafficking for which the infiltration is allowed. Therefore, the purchase of drugs and arms as well as the use of forged cover documents or the carrying of unlawful arms cannot be punished.

Because the introduction into the unlawful drugs and arms market and the contact with the people involved imply many risks - in terms of the agent's possible involvement and of his safety - the law provides for a range of precautionary requirements. The lack of either of these requirements results in the loss of the legal excuse.

First of all, agents are required to be highly and specifically trained. The undercover investigation shall concern

offences listed by the law. In case of concurrence of crimes, of course, the operation can legitimately take place provided that the offences which are being committed include a violation of law on drugs, arms or money laundering.

In respect of money laundering operations, the responsible officers are allowed to receive and replace money, goods or other benefits originated from Mafia crimes as well as to act in such a way as to hamper the identification of their origin or as to allow their use.

The power to order the delay in the execution of apprehensions, arrests or seizures falls into the jurisdiction of the prosecutor who co-ordinates the inquiries and who authorized the undercover operation. This provision can be applied to the drugs and arms trafficking as well as to the action against money laundering. In urgent cases, this decision can be taken by the police officers involved who shall give immediate notice, also by phone, to the prosecutor - who can validate the decision or take different measures - and send him a grounded report within 48 hours. In respect of drugs, similar notice shall be sent to the *Direzione Centrale Servizi Antidroga* (National Drugs Services Bureau) which is responsible for the co-ordination of operations with police bodies from other countries interested in the trafficking.

The two notices have different purposes. The information sent to the prosecutor ensures an immediate control on the operation and can result in the adoption of different measures, if any, also in connection with other prosecutors. In fact, the prosecutor responsible for the supervision on the operation shall give notice to his partners of the measures adopted by him, in respect of the in-coming and transit sites on the domestic territory and of the site where the operation is

expected to be carried out so that they may be able to control and take action in their turn.

The information sent to the National Drugs Services Bureau allows the adoption of co-ordination measures among the activities of the various bodies responsible for control and investigation. These activities are absolutely necessary, above all in case of transnational controlled delivery operations. The controlled delivery was introduced in international legislation by article 11 of the UN Convention on drugs trafficking adopted in Vienna on 20 December 1988, ratified in Italy in 1990⁵.

The judicial acts which can be delayed are rigorously indicated by the law and include the apprehension, the arrest, the seizure of the *corpus delicti* and of the things pertaining to the offence. The reason for this postponement lies in the need to acquire significant evidence or to identify and apprehend the authors of the offence. The reference to the need and significance of evidence highlights the exceptional nature of this provision, which shall be applied only when any other investigative activity already carried out proved to be unsuccessful or insufficient.

Moreover, the law allows police officers to forbear or delay judicial acts falling into their own jurisdiction other than the

⁵ With regard to the exact notion of "controlled delivery", reference must be made to the definition included in the Convention of Vienna (art. 1 G) where it is indicated that the expression means "*the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences*"

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apprehension and the arrest - i.e. searches - provided that immediate notice be sent to the prosecutor. This power is also vested in the Customs authorities that play a major role in the control of the international illicit trafficking at frontiers, ports and airports.

While the execution of such measures as apprehensions, arrests or seizures can merely be delayed, in the cases listed above the "forbearance" is also provided for. The difference is explained by the fact that judicial acts are necessary procedural activities which can only be delayed, whilst some police or customs acts can be forborne without prejudice to the procedure.

Article 99 of DPR 309/90 regulates the *search and apprehension of ships and aircrafts* suspected to be used in drugs trafficking. Under this rule, the Italian warship or patrol boat crossing in territorial waters or on the high seas a domestic ship (even a pleasure craft) suspected to carry drugs is allowed to stop it, visit and search its cargo, apprehend and lead it to an Italian harbour or to the closest foreign harbour where a consular authority can be found. The same powers can be exercised on board non-national ships in territorial waters and, in compliance with the international law regulation, also outside the territorial waters. The provision concerns aircrafts as well. The reason for this significant enhancement of the controlling powers vested in the law enforcement forces lies in the fact that Italy imports drugs and that vessels and aircrafts are the most frequently used means of transport in this illicit trafficking.

Article 103 of DPR 309/90 extends to the *Guardia di Finanza* the power to control and inspect in the premises subjected to customs control, a power which at first was only vested in the customs authority; moreover, it entrusts any law enforcement

force with outstanding powers to control, inspect and search with respect to the activities for the prevention and repression of illicit drug trafficking also outside the customs areas. These provisions undoubtedly increase the powers vested in the law enforcement forces as to the prevention activity aimed at the detection of drugs quantities.

Along with these specific provisions, with regard to the drugs offences – and to the other organized crime offences alike - the rules contained in the code of criminal procedure provide more extensive limitations as to the admissibility and the duration of telephone or computer tapping and electronic surveillance; it also provides longer time-limits in the conduct of pre-trial investigations and in the enforcement of precautionary measures on the person, if compared with other offences.

In respect of procedural instruments, moreover, it is worth noting the provisions directed to enhance the prosecutor's investigating powers. The Italian legal system entrusts the prosecutor with autonomous investigative powers combined to those of law enforcement in the search of the report of offence as well as the power to direct law enforcement forces in the investigations. A special propelling activity as to the intelligence and investigations in the field of the fight against *international drugs trafficking* is performed by the *Procura Nazionale Antimafia* (National Antimafia Bureau).

Starting from information on the arrest of Italian citizens in foreign countries on account of drugs offences, this Bureau acquires any possible information relevant to the investigations under way in the foreign countries where the arrests have been made in order to take the appropriate steps to propel and co-ordinate the inquiries in Italy on the persons arrested

and on the criminal organisations they belong to, if any. In this respect, the Bureau acquires the records originated in the foreign authority on the basis of which reports had been made.

On the basis of these records, the National Antimafia Bureau first makes a survey of the overall information available so as to obtain a comprehensive outline of the facts and then possibly undertakes to propel and co-ordinate the investigation in Italy. Investigations are specially initiated to find out:

- (i) whether the person is currently in custody or has been released;
- (ii) which is the prosecuting foreign judicial authority or law enforcement office;
- (iii) which is the object and the stage of the relevant proceedings;
- (iv) whether there exist documents already obtained as to the facts;
- (v) whether some features can be detected being directly or indirectly connected to money laundering;
- (vi) any useful datum on the person arrested.

Information obtained are entered into the databank of the National Antimafia Bureau and a control is simultaneously made to find whether the reported persons can already be found in the judicial records previously entered into the computer system so as to obtain a comprehensive outline pertaining to each person.

This undertaking is bound to be enhanced since the *Direzione Nazionale Antimafia* - which plays a leading role in the co-ordination of investigations and prosecutions in the Italian procedural system - has been identified by the Ministry of Justice as the *central point of contact* within the European Judicial Network

established by the Council of the European Union through the Joint Action of 29 June 1998 in order to promote the judicial co-operation among Member States

V. CORRECTIONAL MEASURES

Subject to the sacred rights of the person who is in custody, the Italian experience shows the importance of the legislation relevant to the correctional field with a view to the fight against organized crime.

In the last decade, this system has undergone multi-functional changes, a distinction has been made between ordinary in-mates and in-mates linked to organized crime and, within them, between those who cut such ties (possibly co-operating with justice) and those who still keep them.

Briefly, the Italian correctional system is currently based upon three principles corresponding to the three purposes of the sentence: punishment, re-education, benefits. This multi-faceted system allows a strategic approach in view of the needs in the fight against organized crime based on a standard implying the individualisation of the sentence depending on the specific personal conditions of in-mates.

It is necessary to prevent the most dangerous people from keeping on directing and managing the illicit activities also from the jail by way of contacts with the outside criminal environment. In this respect, in 1992 - following to the Mafia massacres - a rule was introduced into the Italian correctional system - Article 41 bis of the Penitentiary Law - aimed at efficiently marking the differentiation among in-mates referred to above.

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A class of special in-mates was introduced, in respect of whom the law allows to discontinue the ordinary standards of treatment (periodical talks with relatives, "social" activities inside the jail, contacts with other in-mates) due to serious public order and safety reasons allegedly connectable to a close link between those in-mates and the criminal organisations they belong to.

Yet, the enforcement of this separate treatment - which has a six-month duration and can be extended - is not left to the discretion of the Correctional department and therefore requires a necessary computer-based co-ordination between the Ministry of Justice and the prosecutors so that the measures enforcing the special correctional regime be adopted on grounds of established and adequately justified reasons.

One of the typical traits of a Mafia type conspiracy is the persistence of the association bonds even under custody. Indeed, the subject under custody still keeps the role played within the organisation. This factual element was unanimously and indisputably reported by any co-operating witness and highlights that - failing a clear choice to opt out of the conspiracy - the in-mate's decision-making power on the organisation's action remains unchanged. Moreover, when some of the in-mate's tasks are temporarily assigned to a person who is free to move, this is anyhow insignificant since the in-mate is constantly informed of what happens outside the prison and can fully and actively resume his role whenever he is allowed to by external conditions.

Indeed, it is proved that these links have an operational nature and, vis-à-vis the heads of the criminal association who are in custody, they constitute a necessary requirement to keep the control over the

illicit activities and, often, to preserve the criminal structure itself. To the member of the *Camorra* organisation, keeping contacts with the outside criminal world is a rule which has no exceptions, a rule applied on the occasion of meetings at recreation times as well as during the talks with relatives; they also use other in-mates' talks with a view to a faster exchange of information from the inside to the outside of the prison.

Providing the grounds for the initial proposal to apply the special detention regime is undoubtedly simpler than providing the grounds to extend it: this is because, for the purposes of the first application of the special custodial regime, an adequate indication of the charges, precautionary measures and convictions imposed is sufficient since these measures usually mention the role played by the inmate which shows his present social dangerousness and the one he could possibly exert inside the prison. For the purposes of the special regime effectiveness, it shall be restricted to the following categories of in-mates:

- (i) heads, arrangers, promoters, heads of the organisations set out under article 416 bis of the Italian Criminal Code and article 74 of DPR 309/90;
- (ii) principals, arrangers, financiers in respect of murders, massacres, etc. committed by the use of the association bond;
- (iii) arrangers of the offences set out under article 630 Criminal Code, aggravated extortion;
- (vi) authors of the above-mentioned crimes when such a role is played uninterruptedly and in a professional way;
- (v) *liason* members with governmental corrupted areas, masonry, subversive or terrorist

organisations, with foreign military or political groupings involved in subversive or terrorist activities;

- (vi) subjects involved in the international laundering of illicit proceeds at high-ranking levels or playing prominent roles.

The grounds provided to justify the requests and opinions on the extension of the regimes already applied shall undoubtedly be stricter because the more the need for the persistence of the special custody regime is stressed, the stricter the grounds accompanying such a request.

In these cases, in addition to the elements listed above, other different elements shall also be indicated not depending on the former. Mention shall be made about these latter, an indication which shall not be comprehensive yet useful as an explanation. Namely, the following criteria shall be stressed:

- (i) carrying on of the criminal activities, the control of the territory, the operational connections by the organisation the subject belongs to (which can be inferred from police investigations);
- (ii) presence of prominent fugitives belonging to the said organisation, with the resulting danger of exchange of messages and information between the associated members inside the prison and those outside;
- (iii) persistence of leading roles, or anyhow outstanding roles, within the organisations also following to the onset of custody (which can be inferred from co-operating witnesses' statements, from the leading role played and/or acknowledged at trials in courts);

- (iv) carrying on of supporting activity also inside the prison which can be inferred from new affiliation ceremonies, promotions, etc (as resulting from co-operating witnesses' statements, electronic surveillance even inside prisons, and so on);
- (v) established activity of tampering of evidence or attempts;
- (vi) any pending criminal proceedings versus the in-mate and, if this is the case, the court venues dealing with them so as to verify the possibility of transfer from a correctional institution to another with the consequent possibility to have contacts with other in-mates in custody in other places or with the external environment;
- (vii) the occurrence of facts outside the prison (Mafia murders or massacres, kidnappings for ransom, tampering of evidence, etc) from which it can be inferred, also on the basis of circumstantial evidence, that they were ordered by in-mates.

These elements, of course, shall not always bear a real evidential worth - since in this case we would be faced with the finding of criminal events - the mere proofs, even simple ones, are sufficient and adequate to ground administrative measures.

In-mates still linked to organized crime - yet not subjected to any special custody regime - receive a correctional treatment whose function is to severely punish by restricting personal freedom, compared to the one envisaged for ordinary in-mates, whose function is to re-educate and socially rehabilitate them.

Finally, an exception to this strict regime is only provided in respect of in-mates that

co-operate with justice, a circumstance that - by itself - shows that the previous links with the criminal organisations have been overcome. Prisoner witnesses benefit from a *rewarding* treatment mainly constituted by "softer" prisons and by non-custodial punishments which are usually granted to ordinary in-mates (external employment, reward leaves, placement under the supervision of a social worker, probation).

The worsening of the correctional regime in respect of the *hard-liners*, and the simultaneous extension of the ordinary benefit regime to co-operating witnesses, produced remarkable positive effects with regard to the safety and order inside and outside prisons (prohibition to the exercise of power by the most dangerous in-mates inside prison and in the external criminal environment) and with regard to the investigative and procedural aspects (increased co-operation with justice).

Furthermore, a special *extenuating circumstance* (reduction by a half to two thirds of the penalty) bears significance rewarding the one who made efforts to avoid that the criminal action results in further consequences or to provide evidence of the offence. This provision is meant to encourage the person to repent after the commission of the offence and it can be applied to the conducts to a Mafia-type organization or expressive of organized crime. According to the law-maker's intent, such extenuating circumstance is directed to obtain a greater effectiveness in the repression of serious offences and assumes that a considerable reduction of penalty may favour a helpful co-operation so undermining the structure of the criminal organisation which is difficult to attack from outside.

VI. THE IMMUNITY SYSTEM AND THE WITNESS PROTECTION PROGRAMME

The matter of co-operating witness is reputedly exposed to tension and diverse assessments. Some of them are connected to the protection system and, in this respect, there is concern that it might collapse due to the significant number of subjects protected. Other ones can be related to the procedural aspects of the statements made by these subjects and, namely, to the nature of the checks that shall corroborate them and to their outcome, in case they are made during the stage of pre-trial investigations and cannot be verified during the examination at trial. Witnesses who co-operate with justice constitute a necessary and irreplaceable tool in respect of organized crime proceedings. Their contribution has been precious with a view to the knowledge of the deep Mafia world and mainly to the final conviction of countless organized crime members.

In Italy, the use of the statements made by a co-operating co-defendant at trial goes back to thirty years ago, yet only in 1991 was the need to arrange a protection programme for these persons - as well as for non-criminal witnesses - regulated by a legislation at the very same time when the procedural system was reformed on the wake of the adversary system in force in common law.

The new procedure, indeed, stressed the need for a serious protection and assistance programme in respect of co-operating witnesses considering that the basic principle at its foundations is that evidence is formed in a contentious proceeding between opposing parties. Thus, the accusing statements made during the pre-trial investigations have no evidential value if they are not confirmed at trial.

Hence, the need to protect and assist those who make significant statements for the purposes of the investigation and the following trial in result of which they - and their relatives as well - are exposed to a serious and present danger of violence or threats aimed at preventing them from witnessing at trial or compelling them to withdraw the charges.

The responsibility to subject a person (and his family members) to the protection programme - and to keep them as long as it is necessary and possible - is vested by the law in a range of bodies and authorities including the Chief Prosecutors or the Head of the Police (who have the power to recommend and propose); the National Commission of the Ministry of the Interiors which adopts the measures related to the special protection programme; the National Protection Service which deals with the special programs decided by the Commission and manages the material execution of the programme by its own branches - the Protection Operational Units - throughout the domestic territory.

Prior to any recognition of the co-operating witness *status*, the statements are deeply analysed (or at least they should be) and immediately subjected to a first check including the interactive comparison between the judicial information and the overall data owned by the police forces and the National Antimafia Prosecutor. This system has been in force for a decade (the law on co-operating witnesses goes back to 1991) and I could talk for many hours of countless experiences I made. Yet, I believe it is more useful to draw some lessons with reference to the most urgent problems relevant to this system which is going to be dramatically amended very soon.

Sensibility and legality shall be always applied in respect of the system's implementation practice on the basis of

four chief guidelines: 1) personal safety of the co-operating witness; 2) psychological safety of the co-operating witness; 3) security of investigations; 4) third-party position in the management of the collaboration, which is essential to prevent an instance where the police may suggest the answers to the suspect (principle of separation between protection and investigative agencies).

The physical safety of the one who declares to be willing to co-operate with justice shall be safeguarded, as a rule, by restricting the person in suitable correctional institutions purposely identified and equipped by the Correctional Department; non-correctional institutions should only be used in those cases where this is absolutely impossible and there exist serious, urgent and grounded safety reasons.

In conditions of "differentiated" custody in jail, the co-operating witness shall be granted the best possible conditions to ensure the psychological safety necessary to carry on the co-operation. In this framework, the safeguard and assistance - also on an economic level - of the family are essential, although exceeding requests - compared to the objectives and limits of the protection - shall not be granted.

The certainty of the investigations may actually originate from these two requirements since the gathering of statements and the necessary checks will be possibly carried out in due course, resulting in a positive evaluation of the collaboration's truthfulness and reliability, which is the necessary requirement for the application of the special protection programme. Such an approach, finally, implies a total third-party position in the management of the co-operating witness and separates the protection responsibility from the investigation responsibility right

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from the beginning, to the benefit of either one and of a correct exercise of jurisdiction.

The reform of the legislation on co-operating witnesses' protection and punishment - which is going to be passed by the Italian Parliament - introduces significant amendments without radically changing the major role played by co-operating witnesses in the fight against organized crime and aims at a more sensible protection system, on the basis of the said guidelines, and of operational needs felt by the practice for a long time. In short, the new legislation is founded upon the following further principles:

- (i) security of the co-operating witness;
- (ii) guarantee for the accused;
- (iii) truthfulness of evidence;
- (iv) separation between the protection and the benefit;
- (v) different treatment for witnesses in respect of subjects originating from the criminal milieu.

The first aspect radically affected by the bill involves the admission to protection. This is limited to subjects making statements on terrorist or Mafia offences. The new law outlines the quality aspect of the co-operation more precisely than it does in the current legislation.

The co-operation shall be marked by its significant importance in respect of the stage of pre-trial investigations and the trial stage. The concept of significant importance is linked to the inner features of the statements made, which shall be reliable and comprehensive. For the purposes of the assessment of the dangers run by the person, the law-maker also indicated such standards, as the worth of the collaboration and the intimidation capacity at local level of the criminal groups accused.

From this point of view, a kind of "two-way" protection measure is introduced. The special protection system is basically granted in those cases where the statements made are indispensable for investigations on the functioning, strategies and branches of Mafia type or terrorist-subversive criminal organisations, as well as on their equipment and properties.

In other cases, reinforced common measures are applied which ensure the co-operating witnesses' safety and provide, if necessary, to support them although they do not amount to a real "life style" as in the case of the special protection programme. The latter is linked to its original nature of exceptional legal protection tool which, in addition to the co-operating witness protection, promotes his prospective social rehabilitation by means of a set of administrative and financial measures.

The "reinforced" common ordinary measures should consist of temporary safeguard services in respect of the co-operating witness and the family members. They are not disciplined in detail by the bill since it is understood that this function might be accomplished by a later regulation. This regulation shall be absolutely necessary if we consider that the crisis of the current system was indeed brought about by the malfunctioning of the ordinary protection measures which determined the remarkable increase in the number of special protection programs. The entry into force of the new legislation should allow a stricter selection of collaborations and the special programme (whose implementation starts a complex mechanism) would only be applied to cases which cannot be dealt with differently.

The second aspect, dramatically affected by the bill, is the procedural and beneficial

treatment of co-operating witnesses. The bill is based on the principle according to which the entitlement to the special protection programme does not automatically bring about the granting of punishment benefits - as it occurs today - which instead shall be linked to the conduct.

In the past years, the admission to the special programme and the granting of the benefits were marked by a nearly automatic cause and effect relation. This trend may bring about a malfunction in the legal safeguard mechanism due to two factors. The first one includes the submission of proposals for admission into the protection programme aimed at obtaining non custodial punishments which, in respect of co-operating witnesses, are granted in derogation to the current provisions on the limits of sentence; the second one includes the increasing difficulty in the surveillance of the co-operating defendants admitted to the said non-custodial measures, as a result of the camouflage mechanisms adopted to protect them (today the system does not even allow the prosecutor or the judge to know whether the co-operating witness has had contacts with other co-operating witnesses, when the protection takes place outside prisons).

The bill is aimed at diminishing such risks by clearly separating the admission to the protection programme from the benefits. This latter can be granted after service of at least one-fourth of the sentence imposed or after 10 years in case of life imprisonment. This provision favours the largely felt need that the liability for serious offences should not be annulled due to the collaboration and the need to grant benefits exclusively to those subjects whose collaboration is validated by judgements.

The new law also subordinates the possible withdrawal of pre-trial custody in jail to the lack of current connections with the Mafia or terrorist organisation, to the compliance with the engagements made upon the subscription of the special protection programme and to the significance of the co-operation. The bill purposely provides that the co-operating witness shall undertake not to make statements relevant to the facts covered in the proceedings where he has co-operated to bodies other than the judicial authority, the police forces and his own defence counsel and not to meet or contact other people who co-operate or are involved in crime.

The stricter admission to non-custodial punishment is counterbalanced by the provision under which co-operating witnesses in custody shall be restricted in adequate units inside the correctional institutions depending on different approaches which may favour the social rehabilitation. This differentiated regime of custody in jail shall be arranged so as to hamper the statements agreed upon by more co-operating witnesses or suggested by external people. Such a solution - if it is approved - would result in the ballooning of the number of co-operating witnesses subjected to pre-trial custody in jail and thus would require the arrangement of adequate equipment.

Under the condition of a "differentiated" custody in jail, the best possible conditions to ensure the statements' truthfulness shall be guaranteed. In this respect, an adequate provision exists under which the in-mate is not allowed to have investigative talks with police bodies - at least until the record of the co-operation is drawn up - and neither is he allowed to meet other co-operating witnesses and receive or send mail outside, save for purposes connected to protection needs. The withdrawal of the

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pre-trial custody in jail or the replacement by house arrests shall be possibly granted only after a first instance judgement and only after the *significant importance* of the collaboration has been found by the judgement. In any case, the co-operating witness shall serve at least one third of the sentence in jail.

One more innovation introduced by the bill is the identification and acquisition of properties illicitly obtained by co-operating witnesses. Co-operating witnesses shall declare in the record - which shall be drawn within six months from its beginning - all the properties owned or managed, even indirectly, and shall undertake, upon the admission to the protection system, to hand over the money and transfer the assets illicitly obtained, even if they own them indirectly.

The reform which is going to be passed also regulates the destination of properties transferred by co-operating witnesses or anyhow forfeited. For the sake of accountability, the regulation on the forfeiture of Mafia members' properties was also extended to properties forfeited to co-operating witnesses with no reductions or exclusions. A quota of the properties seized and forfeited - identified by separate inter-ministerial decrees - shall be destined to the implementation of special preventive measures as well as to a Solidarity Fund for the victims of offences.

The bill also focused on the complex issue of the social rehabilitation of protected people. In this respect, some inter-ministerial shall be purposely issued and they will indicate ways to keep the employment or the transfer to other venue, specific measures for the assistance and social rehabilitation of minors and witnesses included in the programme.

The current system does not separate the position of persons originating from the criminal world and the position of those who do not belong to that world and are merely victims, witnesses or persons informed about criminal facts. This deficiency heavily contributes to refrain from collaboration, mainly in those social contexts where the law of silence has a major impact.

Needless to say, major progress in the fight against organized crime might be obtained by attacking the settlement of criminal groups on the territory. In this respect, a significant approach would imply encouraging citizens to report intimidation exerted by delinquent groups to the law enforcement authorities, mainly those groups involved in extortion and drugs trafficking also by means of an economic support, as I will mention later with reference to the Solidarity Fund for the Victims of Extortion and Usury.

The reform of the system provides that protection measures to the benefit of witnesses be applied even in cases when their statements do not amount to significant importance and are not referred to terrorist or Mafia offences provided that they expose the person making the statement to a serious and present danger. The National Commission - which is the body responsible for the admission to protection programs - shall ensure witnesses such economic support as to guarantee an *adequate way of life*. The Commission shall also favour the rehabilitation of these persons into the economic system by indicating ways and necessary funds.

A special provision deals with remote hearings with co-operating witnesses through audio-visual equipment (the so called video conference), which is regulated by the recent law no. 11 of 7 January 1998.

The text extends the use of the videoconference to all depositions by co-operating witnesses on the presumption that, being a tool directed to protect the witness, it shall be increasingly used in respect of people exposed to exceptionally serious danger.

Finally, amendments to the code of criminal procedure are envisaged with reference to the defence counsel's incompatibility. Specifically a rule will provide the incompatibility of a common defence for more defendants who made statements concerning the liability of another defendant in the same criminal proceedings or in other connected proceeding. These provisions are clearly intended to ensure the truthfulness of statements and to avoid undue influence by a common defence counsel - as it occurs sometimes.

Under the legislation in force - and also under the provisions contained in the bill currently under consideration by the Parliament - the National Antimafia Prosecutor has the responsibility to express opinions as to the admission of a person to the protection programme, as to the discontinuance or modification.

The large number of co-operating witnesses - and their family members - protected, the range of measures concerning them, as well as the exceptional confidentiality of the matter, led the National Antimafia Prosecutor to establish a Department equipped with a computer system so as to list and easily retrieve all the records relevant to a subject. Upon expressing the opinion, he acquires all the possible information on the criminal facts referred by the person, the reliability judgement issued by prosecutors as to the statements, as well as the path followed by the co-operating witness after the admission to the protection programme.

My Bureau is also involved in an analysis aimed at detecting the most common violations of the programme rules and identifying the "sanctions" which shall be proposed to the Ministerial Commission upon expressing the opinion so as to avoid inequalities. The establishment of the Department is therefore aimed at pursuing this target.

VII. TECHNICAL INVESTIGATIONS - ELECTRONIC MONITORING

Co-operating witnesses remain a fundamental tool in the fight against organized crime, as it was recognised by prosecutors and law enforcement officers of E.U. Member States during a meeting recently held in Rome upon the initiative of the ministries of Justice and Interiors. Yet, on the one hand, it is absolutely necessary to identify adequate checks for the statements and, on the other hand, prosecutors are fully aware that the *corroboration* can be also obtained by technical investigations and that this latter can provide, by themselves, evidence of guilt in respect of serious offences.

General complaints arise due to the insufficient tools in the availability of prosecutors and police forces, tools which are necessary to carry out this type of investigation. For instance, this occurs in respect of wiretapping operations, due to the communication companies' inability to execute all the requests made by the judicial authorities. In this sector, the National Antimafia Bureau performs a regulating function establishing priorities more connected to the urgency of requests than to the chronological order - for this reason, dangerous fugitives have been recently apprehended and authors of heinous crimes have been discovered immediately after the fact.

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The shortage of equipment for expert technical operations led the district prosecutor offices to turn to private companies (acting as advisors) which own such equipment resulting in a dramatic increase of expenses. The issue of technology yet affects a more general problem. Today technology provides the criminal world with a wide range of tools in respect of communications, of the movement of money flows, of money laundering as well as in respect of paedophilia (ex. Internet). Technological progress cannot be arrested, of course, yet it takes licit or illicit forms depending on the uses.

Yet, while criminal groups - assisted by experts in various sectors - are always ready to use new technologies for their criminal purposes, the State cannot promptly identify the technical tools to fight the misuse of new developments, which is quite discouraging. Hence, the idea that the Ministry of Justice might set up a technical and scientific pool with highly qualified bodies capable to foresee the technological developments in the relevant fields and arrange the adequate "defences".

One of the most serious and urgent problems we are faced with concerns telephone interceptions. A widespread investigative tool is the wiretapping of international calls from unidentified phone numbers in Italy to a foreign identified phone number or to a whole district abroad, i.e. to foreign phone numbers identified by the first figures which are the same in the whole number (so-called *re-routing*). Wiretapping operations are carried out by Italian phone companies which act as carriers of communications originated in Italy to foreign countries.

On the matter of interception, the E.U. Convention on mutual assistance signed by

the fifteen Member States on 29 May - which has obviously not been ratified by Italy yet - contains a rule (art. 20) on whose heading is the "*Interception of telecommunications without the technical assistance of another Member State*" which provides that "where the telecommunication address of the subject specified in the interception order is being used on the territory of another Member State", the intercepting Member State shall inform the other Member State before executing it (save for the case in which it is not aware that the intercepted person is abroad; in this case it shall inform the other State as soon as he knows it). The rule has apparently been conceived with regard to satellite interceptions and of electronic surveillance in cars, yet it might be applied to the re-routing as well.

If we agree that the Convention does indeed regulate the case of re-routing, we support the argument according to which - irrespective of the ratification - this kind of interception does not fall into the domestic jurisdiction. Then the point is to estimate the risk that re-routing interceptions may not be used and the possibility to immediately turn to the legal assistance. Secondly, to assess whether the legal assistance should be provided by way of rogatory letters or by the far simpler form indicated by the European Convention, yet to be ratified. The Convention, of course, only concerns the EU countries and thus the rogatory letters would still be necessary in respect of the rest of the world.

No doubt exists as to the value to be attached to the privacy which affects the area of the person's character. Yet, the safeguard of privacy shall be counterbalanced by the safeguard of the effectiveness and confidentiality of investigations and the protection of the community from crime. I can quote an

example relevant to the situation in Italy where the two opposing needs clash in respect of the debate on the apparently opposed needs to relieve the correctional system by decreasing the number of in-mates, without waiving to the principle of the sentence enforceability, on the one hand, and the heavy demand of security by the society, on the other hand.

Needles to say, a multi-function correctional system which requires benefits for good behaviour in-mates is indispensable. Controls are needed which, for obvious reasons, cannot be exerted directly, but through electronic means. Yet this is not enough. A deterrent is also needed to punish those who escape controls: for instance, an increase of the sentence and the ban to obtain other benefits.

This form of electronic monitoring is no violation of the in-mate's privacy. This assessment would be erroneous. Actually anyone should not feel free in a cell accommodating eight persons, yet would rather stay at his own place wearing a device which neither intercepts one's voice nor "sees" what one is doing but only monitors one's movements.

The home-detention bracelet, which allows to remotely monitor a person subjected to correctional regime, is a very simple instrument: a transmitter, inserted in a box as big as a cigarette packet, is fastened to the in-mate's ankle by a plastic band. The device sends signals to a computer connected to a phone line. If the in-mates leaves the surveillance area, an alarm received by the monitoring centre immediately goes off. The same if the "virtual prisoner" tries to tear off the plastic band. The system works thanks to a one-year battery. The costs amount to an average 10,000 lire a day and in the United States, for instance, they are supported by

the in-mates themselves who choose to afford their conditional release.

In all countries where the "electronic monitoring" has already been tested, its use has been restricted to final convicts. As a point in fact, this measure is deemed too "harmful" to be applied to pre-trial custody in jail, that is in respect of a person for whom the presumption of innocence still exists.

In Italy the monitoring through home-detention bracelet should be tested in a while since it has already been approved by the Ministry of Justice. The project should be referred to two categories of sentence enforcement:

- (i) as an alternative to short sentences restricting personal freedom (today in Italy in respect of terms of imprisonment less than three years, it is already possible to challenge the warrant of arrest and benefit from house arrest pending alternative measures);
- (ii) in the late stage of execution before the release from jail (for up to six months).

The sanction consists in the restriction of the freedom of movement; the convict is assigned to his/her own abode and is allowed to leave it only at certain times fixed by the decision agreed with the body responsible for the execution.

When the terms set by the execution programme are not complied with or the monitoring system has been dodged, sanctions shall be adopted the most serious of which being the withdrawal of the benefit and the re-enforcement of the custodial sentence. o be entitled to benefit from this new way to serve the sentence, the convict shall:

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- (i) express his/her consent;
- (ii) have an accommodation equipped with a fixed phone line;
- (iii) obtain the agreement of any adults who live with him/her;
- (iv) be included in a working, training or voluntary activity keeping him/her busy for at least 50% of his/her time;
- (v) be subjected to a social service programme covering various needs (ex. regular controls for drugs or alcohol abuse);
- (vi) contribute to the execution expenses to a daily percentage extent.

Once the principle according to which the house-detention bracelet does not undermine the privacy at all - and that it is to be preferred to the pre-trial custody in jail - is accepted, this tool might be applied also as a non-custodial precautionary measure to subjects under house arrests. This solution would allow to pursue a two-fold objective: to thin out prisons and, at the same time, ensure a stricter control on the execution of house arrests which - as it occurs in Italy - is entrusted to the occasional control by the police forces spread out on the territory and is too easily exposed to be avoided.

**VIII. ECONOMIC ORGANIZED
CRIME AND MEASURES ON
PROPERTY**

A general forward on the relationship between entrepreneurs and crime is necessary. It is useful to stress that the relationship between organized crime and the crisis of legal enterprise is a three-stage process. In the first stage, the enterprise is in difficulty when the crime works as a negative external (or environmental) factor, systematically destroying profits through extortion and through serious distortions of competitive mechanisms, resulting in

forms of unfair competition, which may go through the illicit financing and the corruption. Faced with such distorting instruments, the entrepreneurs' attitude is conflicting or passive. However it is not collaborative.

In the second stage, the legal enterprise - already on the wane or in liquidity crisis - is definitively undermined when its corporate finance policies undergo the action of criminal financiers (usury). Under this point of view, usury exerted by criminal organisations to the detriment of enterprises allows to clearly perceive the distinction between usury credit and legal credit. This latter is conceived so as to maximise the probability for the return of the credit whilst the usury contract is conceived in order to minimise such a probability, so as to take possession of the guarantee or to re-negotiate the credit at higher rates.

In the third stage, criminality brings about the enterprise insolvency when it alters the structure of ownership and controls and becomes an inner factor of crisis. This phenomenon is usually based upon the interaction between concealed criminal owners and straw executives or entrepreneurs and it can follow two paths leading from the criminal intervention to the crisis.

On the one hand, the contaminated enterprise may be more vulnerable since its target is not oriented to maximise profits, yet it is altered and exploited in order to conceal and re-introduce flows of illicit liquidity into the legal system (money laundering). On the other hand, the contaminated enterprise can be profit-oriented yet its vulnerability grows because its activity can be discontinued due to a preventive or repressive intervention by courts. In this case, the straw entrepreneurs or executives are likely to

have a co-operative or collusive attitude to the benefit of the real criminal owners.

For a correct construction of the overall framework which can be drawn from investigations conducted in Italy, it is necessary to make some previous remarks relevant to understand the mutual convenience of a relationship where both the subject apparently alien to the criminal organisation, and the organisation itself, take advantages from the mutual interaction, specific advantages which they would not acquire otherwise.

The three subjects listed above (the Mafia, politics, the enterprise) share common criminal interests where the features and the power of either of them provide the alliance with more benefits than their individual action would have permitted. The existence of real business committees constituted by politicians, entrepreneurs, owners of engineering offices and representatives of Mafia organisations has been found, a kind of mutual contract bound to be perpetuated in progress of time and aimed at exercising the power and acquiring huge illicit proceeds.

Basically, through the help of criminal groups, those politicians secured for themselves the control on elections throughout a wide area and in respect of an extremely high number of votes whilst, through the enterprises, they obtained an uninterrupted flow of funds for personal needs and for the expenses of the political machinery. The Mafia group in turn obtained:

- (i) significant funds from enterprises (not only as percentages on procurements, but also in terms of the agreement in the management of sub-contracts and the establishment of slush funds,

which is the core of the common business system between the enterprise and the criminal group);

- (ii) the subsequent, systematic control of the domestic economic activities, the possibility to offer jobs and marginal quota of corporate profits and, thus, a wide social consensus up to the open legitimisation;
- (iii) through the politicians, the necessary governmental covers were secured, namely in terms of police forces, as well as the possible intervention on judicial processes, if any.

Finally, due to this agreement, entrepreneurs steadily acquired a significant quota of the government contracts market, distorting the mechanism of competition and obtained:

- (i) the security of building sites scattered on the territory;
- (ii) no litigation with trade unions;
- (iii) tools to establish slush accountancy whose target was not tax evasion, yet the availability of unaccounted funds to pay kickbacks to politicians and Mafia members involved and, in some cases, to afford transactions in Italy and abroad.

In this context, extortion and usury to the detriment of entrepreneurs undoubtedly constitute the most worrisome development of the criminal emergency because thanks to them a vital part of the economy, that is the minor and medium-sized business concern, risks to be wiped out.

The integration of these two offences can be found in the Law no. 44 of 23 February 1999 containing provisions on the solidarity fund for the victims of extortion and usury. In the light of the relationship between the enterprise and the criminal organisation, it can be easily understood

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the importance of disrupting the collusive relation between the victim of the extortion and the usurer from the beginning, at its initial stage.

This objective is pursued by the law by means of provisions aimed at showing victims that it is more convenient co-operating with justice than yielding to blackmail and thus:

- (i) on the one hand, to encourage the victim to report the illicit pressures by ensuring the anonymity in the pre-trial investigation stage and providing adequate financial support;
- (ii) on the other hand, to fix strict and clear terms with regard to the access to the allotments and to the material destination of these funds to entrepreneurial activities so as to, at least, hamper any criminal manoeuvre.

Yet, there is a manifest need for a co-ordination among bodies responsible for implementing the law in order to make it apt to the preventive and repressive action. For this reason, the law contains some provisions aimed at the speediness and confidentiality of the administrative procedures involving the allotment of funds to the benefit of the victim.

These provisions, in fact, compel all the bodies and subjects performing some functions within the procedures to abide by the classified information in order to ensure their confidentiality and also prescribes that similar caution shall be used also in the transmission of documents and in the notices sent to the persons involved.

Another rule provides the suspension of the time limit fixed to submit the application for the allotment of funds in

case the prosecutor - due to the existence of a present and material danger of retaliation acts - orders adequate measures to ensure that the identity of the person who declares to be a victim of extortion shall be kept confidential. Article 416-bis co. 7 penal code prescribes that:

"In the event of a conviction, articles which were used or intended to be used to commit the offence and the proceeds thereof shall be forfeited".

Furthermore, another basic instrument to counteract the accumulation of illicit profits is the provision - article 12 - sexies of the Law N. 356 of 1992 - that extend compulsory forfeiture of properties owned by convicts on charges of Mafia crimes, which turn out disproportionate in comparison with the legal income of the owner and this one cannot justify.

The list of offences which - when they are found - constitute the requirement for the enforcement of forfeiture includes all the conspiracy offences or those offences marked by a Mafia character and most of the offences considered as instrumental to organized crime. In particular, I refer to the Mafia type conspiracy (article 416 bis of the Italian Criminal Code), the offences committed exploiting the conditions set out under article 416 bis Criminal Code or in order to favour the activity of Mafia type associations, the conspiracy offences specifically dealing with drugs production and trafficking, extortion, kidnapping for ransom, usury, aggravated smuggling, fraudulent transfer of valuables, handling stolen property, money laundering and re-use of illicit capitals.

Finally, the Law No 646 of 13 September 1982 applies to person suspected to belong to a Mafia-type organization compulsory forfeiture of its goods, which turn out disproportionate in comparison with its

legal income and cannot be justified (so called patrimonial measures of prevention). According to the Italian jurisprudence, there is in such cases a sharing of the burden of proof: the prosecution has to first prove that the assets are effectively owned directly or indirectly by the convicted or the suspect (who usually use figureheads or straw men), and that the assets are disproportionate to the income of the convicted or suspect. The convicted or suspect thereafter must prove the lawful origin of the assets.

The regulation on the management and utilisation of properties forfeited to Mafia members, introduced by Law no. 109/96, is based upon the distinction between personal movable property owned by the dangerous subject (bound to be paid), immovable property and businesses. Immovable property forfeited - when they are included in the State's assets, that is when they are not sold - shall be destined for aims relevant to justice, public order, safety in case of hazards, schools and they are likely to be destined to the Municipalities for institutional or social aims.

Businesses can be leased to public or private companies or to workers' co-operatives where there exist founded possibilities to carry on or resume the productive activity. Sums of money obtained from sales or leases shall go to a fund established at the prefecture (local governmental authorities) and they shall be used for public interest activities among which one of the most important is the intervention in schools for education courses focusing on legality, cultural activities and entrepreneurial activities for unemployed young people.

The political significance of this new law is very clear in that it assigns a "visible" function in the fight against organized

crime not only to forfeiture, but most importantly to the specific destination of properties forfeited. The EU Commission, through a Group of experts purposely established at the General Directorate for Justice and Home Affairs, started an in-depth analysis on the issue of the relationship between organized crime and government contracts.

In compliance with the objectives set by the Action Plan of 1997 - namely, by Recommendations 6 and 7 aimed at reducing the risk of penetration by organized crime into government procurement contracts, public works and, thus, into the community legal economy - the works intend to favour an increasing integration among existing legal systems in Member States on this matter and the centralisation and circulation of information pertaining to businesses competing among the various governments in EU countries.

Special focus is placed on the need to harmonise the rules establishing the terms to admit to or exclude businesses from tenders and to favour the circulation of information within any State and among Member States. The Directive n.93/37/EEC - confirming the contents of Directive 89/440/EEC - establishes that the participation in tenders can be ruled out in respect of any entrepreneur who is in such situations as bankruptcy, winding-up, suspension of activity, litigation, composition with creditors or other similar situation; in respect of any entrepreneur versus whom either of the said procedures has been initiated; any entrepreneur who has been convicted with final judgement on account of any offence affecting his/her professional ethics; who has committed a serious professional error found by any means of evidence produced by the administration granting the contract, who has not complied with obligations relevant

to the payment of duties and taxes; who was guilty of false declarations in providing information which may be requested by the administration granting the contract.

The Group shall provide the Commission any useful information to establish new standards to be introduced as amendments to the existing Directives and shall also identify joint guidelines for action within the Third Pillar (collection and exchange of information among the different authorities, possible complementary measures in the judicial field, in the market sector, etc.). Significant differences among the various legislation still exist. And the political will to counteract the phenomenon of criminal infiltration into public contracts does not seem to be strong.

A crucial issue in the path towards the harmonisation of community rules still remains on the background: the definition of a common concept of "organized crime" and the resulting identification of the conducts expressed by it. The question is still open because the European Commission is apparently oriented to specify in its prospective Directives the illicit conducts "manifesting organized crime" which should be the common platform of standards to exclude businesses from public tenders in Member States.

The issue under consideration concerns all government contracts; yet, although many cases of criminal infiltration into government contracts for services, this phenomenon mainly affects the public works sector which - since it has always been a milestone within the development policies in our country - is the traditional enrichment source for Mafia type criminal organisation and the main channel in the system of parties' illicit financing.

A watchdog authority on public works has been working also in Italy for some

time. The National Antimafia Prosecutor has already contacted this Authority to acquire - for the purposes of co-ordination and investigative impulse - information on contracting and sub-contracting businesses, on bids of tender and on the awarding procedures, with specific mention as to the reasons why competitors have been excluded.

IX. THE BANKING AND FINANCIAL CIRCUIT AND THE SEIZURE OF ILLICIT CAPITALS

The volume of criminal proceeds transferred yearly on the economic and financial circuits has not been precisely estimated yet. To give an idea, the International Monetary Fund estimated in 1996 the yearly income of criminal organisations at 500 billion dollars of which at least 400 billion are supposed to be originated from the drugs trafficking. Yet this is likely to be an underestimate since it takes account of the turnover connected to the drugs trafficking only. To these proceeds, those originated from other trafficking directly run by organized crime should be added (arms, tobacco smuggling, noble metals and clothes and, recently, harmful or radioactive waste trafficking) as well as those originated from their reinvestment in other illicit activities in turn resulting in huge proceeds (such as usury and unauthorised financing and credit whose turnover is an estimated 10,000 billion Italian lire).

The overall figure leads to estimate a global turnover equal to about 1000 billion dollars per year. The EU Report reads:

Criminal activities run by organized crime generate an immense amount of money, a significant part of which needs to be laundered in order to be re-invested in legal activities or entities or to be used by criminals as

their own income. The International Monetary Fund (IMF) has estimated that about 2% of the global economy involves drug trafficking. Even though drug trafficking certainly ranks amongst the most lucrative criminal activities, it gives an idea about the fact that the sum of all-crime related money is an important part of the overall economy.

The Action Plan against organized crime, adopted by the European Council on 28 April 1997, provides interesting binding indications to Member States among which:

- (i) the urgent need to tackle the issue of money laundering on the Internet and through the electronic payment instruments (the digital cash which risks to make the existing money out-of-date) and the new technologies; moreover, the need to require electronic transfers to mention the details of the payer and the payee;
- (ii) the need to link investigations on money laundering to those on tax evasion and frauds: the channels whereby money escaped from domestic tax and currency authorities is laundered often proved to be particularly apt to shelter and provide anonymity to the criminal proceeds to be concealed;
- (iii) the need to enlarge the scope of subjects falling into the scope of money laundering provisions also increasing Europol's investigative function in this field;
- (iv) the need to enforce new rules allowing to forfeit illicit proceeds also in case of the criminal's death (it is the origin of Mafia property which makes it dangerous and contaminating to the economy,

- irrespective of the owner);
- (v) the need to enlarge the scope of subjects falling into the scope of money laundering also to the *negligent* conduct of the agent (yet this hypothesis was firmly rejected by the EU Parliament in its resolution of 1997);
- (vi) the expectation to extend the duty to report "suspicious" transactions - with the relevant sanctions in case of non-compliance - to professions other than the financial brokerage.

Among the countries which took the hard line against money laundering, Italy has progressively adjusted its own legal system to the EU directives starting from the Law no. 197/91 regulating the mechanism of the report of suspicious transactions. The new legislation and the new effort in the international co-operation are expected to strengthen the criminal repression against money laundering and the use of illicitly obtained properties. Therefore it should be easier to obtain the necessary evidence to attain a number of trials, convictions and forfeitures proportionate to the magnitude of the criminal phenomenon⁶.

There exist many surveys and reform proposals on the issue. Under this point of view, a significant reform - recommended by the Community - is expected to introduce a fresh institution into our legal system: the criminal and administrative liability of companies for offences committed by its own corporate bodies.

The following legislative decree no. 153/97, issued to supplement the enforcement of the EEC Directive no. 308/91, radically changed the law no. 197/91. In particular, it provided more confidentiality guarantees to safeguard brokers bound to report the transactions deemed as "suspicious" on the

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⁶ In Italy, the criminalization of the laundering of proceed of crime is embodied in the following provision.

Article 648-*bis* penal code (*Money Laundering*)

Except in cases of participation in the [predicate] offence, any person substituting or transferring money, goods or assets obtained by means of intentional criminal offences, or any person seeking to conceal the fact that the said money, goods or assets are the proceeds of such offences, shall be liable to imprisonment of 4 to 12 years and to a fine of LIT 2 to LIT 30 million.

The penalty shall be increased when the offence is committed in the course of a professional activity. The penalty shall be decreased if the money, goods or assets are the proceeds of a criminal offence for which the penalty is imprisonment of up to 5 years. The final paragraph of article 648 shall apply.

Article 648-*ter* penal code (*Use of money, goods or assets of unlawful origin*)

Except in cases of participation in the [predicate] offence and in the cases provided for in articles 648 and 648-*bis*, any person using for economic or financial activities money, goods or assets obtained by means of a criminal offence, shall be liable to imprisonment of 4 to 12 years and to a fine of LIT 2 to LIT 30 million.

The penalty shall be increased when the offence is committed in the course of a professional activity. The penalty shall be decreased pursuant to paragraph 2 of article 648.

The final paragraph of article 648 shall apply.

Article 12-*quinquies* Decree-law n.306/1992 (*fraudulent transfer of valuables*)

Any person fraudulently transferring to other persons the ownership or availability of money, goods or other assets with a view to avoiding compliance with the provisions of the law concerning the prevention of smuggling and offences against property, or to facilitate committing any of the offences referred to in articles 648, 648-*bis* and 648-*ter* of the Penal Code, shall be liable to imprisonment of 2 to 6 years, unless the offence is more serious.

basis of the standards identified by the Bank of Italy as of 1993; it assigned the *Ufficio Italiano Cambi* (Italian Exchange Bureau) the role of an "anti-money laundering agency" responsible to receive the suspicious transactions reports and to analyse and process them - also by means of the accounts and deposits register provided for by the Law no. 423/91; can immediately order the suspension of the transaction and informs the Currency Police Special Unit of the *Guardia di Finanza*.

It also established the duty to inform the National Antimafia Prosecutor - in relation to the specific functions of co-ordination and impulse vested on him by article 371 bis of the Italian Code of Criminal Procedure - as to the reports resulting to be linked to organized crime.

To enforce this provision, the Suspicious Transactions Department was established at the National Antimafia Bureau, constituted by three prosecutors, in order to analyse and deal with this information. The activity performed by this Department involves various aspects: the analysis and focus on the main interpretation issues resulting from the legislation in force; steady and systematic contacts with governmental bodies involved in the same activity (Italian Exchange Bureau, Antimafia Investigations Office, Currency Police Special Unit) identified by this law; analysis of information received; focus and arrangement of operational patterns apt to make the action against money laundering uniform and effective. In case that suspect turn out to be grounded, all information collected and processed are reported to the competent Prosecutor for the pre-trial investigation.

Awaiting to verify the effectiveness of the new legislation in view of the fight against organized crime, it must be noted that the

banking system - especially in some southern regions - is still one of the most preferred channels for money laundering operations, often intertwined to usury and unauthorised financing and credit operations. In these areas, even irrespective of any inner complicity, banks are often used in criminal actions where money laundering and unauthorised credit are mutually strengthened, due to the heavy demand of unauthorised credit brought about by the malfunctioning of credit institutions themselves.

I already said that the management of the payment system and credit - also due to the recent technological developments within the globalisation of economic relations - is particularly exposed to money laundering irrespective of the operators' awareness. Moreover, the control of the brokers is perfectly inserted into the criminal logic including the control of territory and of the economic activities carried out therein even - and maybe above all - through information owned by banks. This information allow criminal organisations to maximise profits by attacking without any risk the most profitable economic subjects (by way of extortion or usury financing or the two alike, depending on the case).

There exist one more fundamental aspect in the counteracting approach which we must focus on. The Directive of 1991 was enforced by EU Member States in various degrees and it led illicit capitals towards forms of *non financial money laundering*, therefore the current suspicious transactions report regime affects only some of the flows of dirty money. And maybe neither the most significant one.

The quantity of reports is on the increase. Yet this is no positive factor since the issue is the *quality* of reported

transactions, that is we still wonder how effective they are in terms of usefulness of information collected. The situation is uninterruptedly developing because money launderers are increasingly skilled and they always seek new concealing techniques capable to dodge investigations and because the only border to the possibilities of money laundering is the inventiveness of money launderers.

The need to address a non-criminal financial or credit broker to perform activities which do not seem suspicious and do not draw the attention of the monitoring authorities urges the money launderer to accomplish layering operations before inserting the money into the legal circuit. Hence, the need already called for by the European Council to urge EU governments - probably through a new Directive - to generally extend the duty to report suspicious transactions to persons and companies operating outside the financial sector.

A first response is the new legislative decree no. 374 of 25 September 1999 which marks one more step forward towards the total enforcement of the Directive 308/91/EEC on the prevention of the use of the financial system for the purposes of the laundering of criminal proceeds. Many investigations were conducted in the latest years on persons and companies operating outside the financial sector and many cases mainly concern gambling house, valuable items outlets, that is economic subjects who, out of convenience, accept to shield the launderer by concealing the origin of the dirty money behind their apparently licit activity.

The legislative decree no. 374/1999 affects this sector, yet the duties imposed by the new legislation are not the same for all the subjects involved. The law-maker took account of the nature of the activities

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involved and distinguished two professional categories to which the confidentiality duty, set out under article 3 bis of Law no. 197/91, and the sanctions provided for by the same law in case of non-compliance shall be extended.

The first category is supposed to include the most exposed activities and pinpoints the subjects compelled to identify, register, and report the suspicious transactions: those involved in debt recovery on behalf of third parties; guardians and carriers of cash and securities or valuables through special watchmen; carriers of cash, securities or valuables without special watchmen (road haulage of items on behalf of third parties); estate brokerage agencies; dealers in gold; managers of gambling houses.

The same duties are imposed upon the financial activities agencies listed under article 3 of the new legislative decree. They are financial brokers whose activity in respect of the public is restricted to the subjects registered in a list set up at the Italian Exchange Bureau. The reporting duty was extended to the financial promoters, that is to the subjects used by the authorised financial brokers for off-premises offers. In this case, reports of suspicious transactions shall be sent by the promoter to the broker for whom he acts who will forward the report to the Italian Exchange Bureau.

The second category includes subjects compelled to identify and register customers accomplishing transactions worth of over 20 million lire: dealers in antiques, auction houses or art galleries managers, manufacturers of and dealers in valuables, craftsmen manufacturing valuables. This regulation, still, does not extend the reporting duty to independent professionals and audit companies, two categories which should be dealt with by

the next European Directive.

In this respect, EU bodies had already focused their attention on independent professionals and, namely, on legal professionals (lawyers, notaries, accountants and audits). In particular, the possibility had been verified to separate the activity providing legal advice, legal defence and court representation from other trade activities - such as the estate brokerage - related to the same professional subjects.

A useful suggestion in order to prevent that these professions be exploited for money laundering purposes is included in the Action Plan against organized crime which provides the enforcement of measures aimed at safeguarding some professions exposed to criminal influence, for instance by way of codes of conduct.

With regard to auditing companies, in Italy, the increased need for a regulation which impose the duty to report suspicious transactions is due to the fact that - while under the previous law the board of auditors were also responsible for auditing of listed companies - pursuant to the legislative decree no. 58/98 such activity is exclusively vested in audit companies.

**X. EUROPEAN MONETARY UNION
AND MONEY LAUNDERING IN THE
AGE OF INTERNET**

The onset of the European Monetary Union might have a multi-faceted impact on monetary and financial flows linked to the development illegal and criminal economic activities. This impact brings about unprecedented issues relevant to economic policy and then to criminal policy.

For instance, one of the effects that the EMU (Economic and Monetary Union) should bring about, through different

channels, is the reduction in the transactions costs which hamper the development of illegal economy. If a reduction of the transactions costs should be welcomed, with a view to the development of legal economy, it must be considered that, lacking adequate measures, it would also favour the illicit economy.

The National Antimafia Bureau, together with the "Bocconi" university in Milan, undertook a survey on the foreseeable impact that the entry into force of the single currency - both in the stage of conversion of domestic currencies and in the following one of intra-community and extra-community circulation of Euro - will have on money laundering strategies also taking into account the different levels of surveillance still existing, notwithstanding the uniform community standards, among the eleven EMU countries, in particular due to the different tax and bank secrecy regulations.

The target of the DNA - Bocconi survey is to build analysis patterns allowing to identify the conditions in which - in respect of the monetary, banking, financial and computer science sectors - the EMU might increase the possibilities for money laundering and, thus, the criminal organisations' capacity to corrupt markets and the legal economy. In this respect, the E.U. Report remarks:

"Several esteemed experts are debating that the next introduction of Euro as a single EU currency can provide further good opportunities for money laundering, for the fundamental reason that there will be no need to change the money earned from one currency into another, when it is moved within other Member States. The future Euro bills with the denomination of 100, 200 and 500 could be an attractive option to the US dollar and can be spent

everywhere in the EU or easily exchanged when the European currency will circulate in the international markets.

There are also concerns of the possibilities offered in the next future by modern technologies such as the Internet and electronic banking cards, even though up to now investigations give no evidence related to these issues."

As a result, Member States have two sets of objectives: a) identification of special monetary, banking and financial channels which by EMU might decrease the transactions costs for the illegal economy; b) implementing adequate measures to regulate and monitor the system of payments and the banking industry to find balanced solutions in the relation between the defence of the system from the criminal economy distortions and the boost to the efficiency and the development of legal markets.

Monetary aspects must be separated from banking and financial ones. On the monetary level, the Euro is seemingly bound to become a significant reserve currency in international exchanges, both legal and illegal ones. A recent survey presented at the last meeting of the Italian Economists' Association analysed the effects that might be brought about if the Euro becomes the currency used to settle the exchanges made in order to launder cash originated from illegal markets.

This analysis results in interesting indications for domestic law-makers. Basically, the more effective the legislation against illegal and criminal activities generating profits is, the more the pressure on the monetary, banking and financial markets increases. The more the laundering techniques use cash, the more this pressure affects the demand of Euro, mainly in big denominations.

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With the single currency and increasingly integrated banking and financial markets, we must not overestimate the effectiveness of monetary measures against money laundering such as the limits to the issue of Euro in big denominations. The demand for money laundering might be simply affected by a replacement so favouring camouflaging and laundering techniques deemed as safer through banking and financial channels.

Turning to the credit and financial aspects, the EMU will expectedly result in an increasing integration of the agents' activities and the European markets. Illegal and criminal capital flows might benefit from this integration. The simultaneous existence of integrated credit and financing markets, with the incomplete harmonisation of the regulation and surveillance schemes, favours the illegal financial flows.

Interesting remarks can be found in the Final Report of the project "*Euroshore. Protecting the EU financial system from the exploitation of financial centres and offshore facilities by organized crime*" financed in 1998 by the E. U. Commission's Falcone Programme published on 25 February 2000. They can be summarised as follows: the distinction between offshore and onshore is losing many of its conventional meanings, i.e. opacity and transparency.

Some offshore jurisdictions move towards the adoption of better criminal laws and better forms of international co-operation resulting in an acceptable level of transparency (Group 1: European financial centres and offshore jurisdictions; Group 2: Economies in transition).

- (i) others (Group 3: offshore jurisdictions outside the EU) keep all the opacity features of their

regulation systems which created the commonly perceived correspondence between the concept of offshore and the opacity one. Meanwhile, onshore countries which have a long-standing tradition of financial centres and are located in Europe have transparency levels equal to or lower than those of the countries officially defined as "offshore" centres.

- (ii) association agreements work: countries which applied to enter the EU are amending their criminal legislation and introducing financial regulations directed to an increased transparency.
- (iii) the political and economic proximity works: the closer the offshore jurisdictions are to the EU and the less they stray away from the accountability standards fixed by the international community and by the EU ones.
- (iv) the European financial system should become more transparent before asking the same to other countries. In particular, in respect of company law - which has a major importance to the transparency of any financial system - EU Member States have opacity problems, although less than other countries, and they had better solve them before asking other countries to do it.
- (v) company law exerts a chain effect on the opacity of other sectors of regulation: financial law and banking law. If company law - due to efficiency reasons - tends towards anonymity, it carries the two other sectors of regulation with it resulting in the inevitable failure of investigative and judicial co-operation in respect of criminal

organisations which exploit this company anonymity as a shield.

The said differences in the regulations of “strict” countries - the more industrialised and thus stronger countries, yet for this reason more exposed to criminal aggression - and “lax” countries - the traditional *tax havens* and, more generally, those countries having weak economic structures and lacking resources to spend on the international markets - results in the frustration of the action against money laundering.

The choice between strict and lax policies depends on a range of structural factors being difficult to overcome in the medium and in the long run; yet a stricter attitude, at least at the European level, will undoubtedly allow and maybe impose stricter domestic policies. On the contrary, a low level in common rules might even drive potentially strict domestic systems towards lax attitudes.

In other words, the *competition in regulation* shall be fully considered by the European anti-money laundering front since a two-fold order of rules would widen the gap and so contribute to strengthen the transnational criminal organisations who would be left free to exploit diversities to widen their scope and frustrate the efforts made by the most strict countries.

The solution to this issue will undoubtedly imply long-range efforts and it needs to be applied on an international and global scale as in the current community prospective. In view of the introduction of the single currency, the EU Commission warned with concern that counteracting measures implemented by the European Union - albeit strict - will be easily jeopardised within the globalisation of markets by the legislative voids still existing in too many EU countries.

The special European Council, held on 15 and 16 October 1999 in Tampere regarding the implementation of an area of freedom, security and justice within the European Union re-launched the specific action against money laundering defined in the final document as “the very heart” of organized crime and urged the adoption of a new anti money laundering directive which may promote the balance between the system’s global defence from the distortion of organized crime (money laundering, corruption, Euro counterfeiting) and the safeguard of the rights of persons and economic operators. At this point, two specifications are necessary:

The concept of e-money goes back to the late ‘60s with the first electronic funds transfers (EFT) initially developed to allow the transfer of deposits stored by banks in the central bank and later extended to include transactions of significant unitary amount. Yet, while substantial transfers of conventional currency were developing, through the electronic networks run by telecommunication companies and by outstanding holdings, the very concept of e-money (or e-cash) has been changing, unrelated to the traditional deposits. Currently, the means of payment named e-money can be identified with the so-called “*virtual money*” which requires some necessary conditions: it is generated and transformed by computers; it is not dependent on the currency forms controlled by governments and on bank deposits, it is alien to the current monetary aggregates; it is not regulated by the watch-dog authority monitoring the financial markets; it can take various forms, of which only some are offered by banks.

When I talk about the “new financial subjects originated from Internet”, I refer to the *trading on line* phenomenon and to

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the asset management, both dramatically on the increase on Internet. Trading on line means the possibility to deal in securities, mainly shares, but also bonds or similar instruments, on the Internet which offers customers the possibility to interact with a dealing broker (and through this person with the market) exclusively using the Web so disregarding any form implying further interactions with the broker to complete the execution of the order. This phenomenon might be simply regarded as a development in the distribution process of a product - the securities - which banks and stock brokerage companies have always offered. Actually, analysing such markets as the US one - which have seen the development of the trading on line for a few years - it can be proved that we are not faced with a mere appendix of traditional dealing ways. This phenomenon, instead, is likely to radically change markets' organisation and brokers' and investors' behaviours, to bring about the onset of a new type of brokers marked by "low costs and efficient and adjustable service" but mainly by anonymity.

As to the Italian experience, decades of operators by now are able to offer trading on line services - with all the possible options listed above - which have increasingly spread in a few months. According to estimates on the overall market, the commissions amount to about 150-200 billion lire for the year 2000 and the number of on line investors in Italy is estimated to reach over 300.000 in three years.

As all the sectors within the financial brokerage, asset management also started to exploit the possibilities offered by the Internet and first appeared in Italy in 1999. The most varied services are offered on the Web ranging from the presentation of one's own products with the relevant costs to the possibility to subscribe funds quota and

manage switches from one fund to the other, and the management of the "education" unit which is a kind of financial primary school where basic information, researches on financial markets and helps for the planning of one's own savings can be found.

As to these issues, the European Commission submitted proposals for directives to the EU Parliament specially aimed at:

- (i) ensuring the financial accountability of non-banking institutions which issue e-money without hampering the development of the e-money within the Community;
- (ii) ensuring a high standard of safeguard of general interest targets, such as the protection of minors and of the human dignity, the protection of the consumer and of public health.

Yet we still have a long way to walk towards a legislation which cannot but be co-ordinated at international level in a field which was correctly defined as "no one's land". Meanwhile, investigations led to find - not simply suppose - many cases where the Web has been exploited by criminals for such heinous uses, as the videotape e-commerce for paedophiles between Russia and Italy recently discovered in Naples, which shows the existence of an international trafficking of minors who are the victims in these disgusting tortures until they die. These problems are faced in the draft Convention on Cyber-crime adopted by the European Committee on Crime Problems (CDPC) of the Council of Europe on 2 October 2000.⁷

XI. INTERNATIONAL CO-OPERATION

The theme of judicial co-operation with regard to transnational crime refers firstly to structures and secondly to criminal case and evidence. Further, the preconditions for effective judicial co-operation are knowledge of the fact and coordination of investigation, that are both ensured in Italy, in conformity with the Recommendation n.2 of the Action Plan of 1997, by the National Antimafia Prosecutor Bureau, central point of contact within the European Judicial Network established by the EU Council in order to promote the judicial co-operation among Member States.

The criminal judicial co-operation at European level against organized crime made significant efforts and marked a milestone with the Action Plan adopted by the European Council on 28 April 1997. Among the Recommendations contained in Chapter VI of the Plan - entirely dealing with the issue of the relationship between organized crime and money - I believe it is worth mentioning the ones from 26 to 30 focusing on the various types of connections among criminality, capital accumulations and economic circuits, with special reference to the issues of money laundering, corruption, tax frauds and the so-called "forfeiture of worth".

The first need highlighted - that is to make membership of a criminal organisation a criminal offence in the legal system of any Member State - was satisfied by the adoption of the Joint Action of 21 December 1998 which provides a definition of criminal organisation and compels Member State to make it a criminal offence to participate in the criminal organisation ensuring that one or both of the types of conduct are punishable, i.e. the Italian-like pattern of participation and the common law "conspiracy" pattern.

The Plan was further implemented by the Joint Action of 3 December 1998 on money laundering, detection, seizure and confiscation of criminal proceeds which aims at eliminating or at least reducing the reservations which can be opposed to the Convention of Strasbourg of 1990 on money laundering and confiscation. The Convention compels to introduce in domestic legal systems the "confiscation of worth", that is confiscation through payment of a sum of money corresponding to the worth of the price, of the product, or of the proceeds of a crime (this institution has already been introduced in our legal system - art. 735 bis code of criminal procedure - when the Convention of Strasbourg was ratified in 1993, yet it is restricted to provide assistance in relation to the execution of foreign confiscation measures).

I still have to mention the Joint Action adopted by the Council of the European Union on 22 April 1996 which entrusts the liaison officers with functions directed to favour and accelerate any form of judicial co-operation in criminal matters and, if necessary, in civil matters with a view to increase speediness and effectiveness namely through direct contacts with the competent services and with the judicial authorities of the destination State.

⁷ The most meaningful topics of the EC Draft Convention are: 1) measures to be taken at the national level about offences against the confidentiality, integrity and availability of computer data and system; 2) principle of corporate liability for those criminal offences committed for their benefit by any natural person; 3) binding principles relating to international co-operation (extradition; mutual assistance, also regarding provisional measures and coercive and investigative powers).

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On the wake of the Convention of Strasbourg, we have to welcome the draft Convention of the United Nations against organized crime which is going to be approved and signed next December in Italy and focuses on the issue of the fight against money laundering, specially following to the liberalisation of financial and trade movements after the opening to the Eastern European countries.

Moreover, the UN General Assembly called a Special Session (New York, 9-11 June 1998) on the fight against drugs at global level which was attended by nearly all the countries in the world. Notwithstanding the divergences expressed during the works, they resulted in three Resolutions. The first one contains a declaration of political commitment, the second one concerns the guidelines with a view to the decrease of drugs demand, the third one involves measures to strengthen the international co-operation to counteract the illicit trafficking, the criminal phenomena which support them and the laundering of criminal proceeds. This latter provision pays special heed to the control of precursors and the necessary international co-operation in the destruction of the illicit sources of natural drugs.

Following to these Resolutions, on 6 October 1998 the European Parliament approved the Recommendation A4-0211/98 on the policies that Member States are urged to implement in the fight against drugs. In brief, the United Nations are also accepting the idea that the economy is the new frontier of the fight against transnational organized crime and that a successful action against drugs trafficking and money laundering requires the coordination of domestic legislation and shall be connected to the development of payment means at international levels.

My opinion on the actual possibility that the international community may adequately and soon succeed in counteracting such criminal phenomena is that such a possibility does exist provided that governments are aware of the need of an effective and loyal co-operation, leaving aside the ambiguities and hypocrisies which marked the choices and policies in too many countries.

In conclusion, transnational organized crime is a serious threat for the economy and the security of the international community. But - as used to say my unforgettable colleague and master Giovanni Falcone, victim of Mafia in 1992 - Mafia and other similar criminal organizations are human phenomenon and, like any human phenomenon, they had beginning and they will have an end. Therefore it's up to us, members of law enforcement, to the international co-operation, but also to the worthy leagues of citizens who exercise the social control against crime, the responsibility to support, and if possible accelerate, this process toward a civil society's development in legality and in peace.