

# LEGAL FRAMEWORKS AND INVESTIGATIVE TOOLS FOR COMBATING ORGANIZED TRANSNATIONAL CRIME IN THE ITALIAN EXPERIENCE

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## I. THE ITALIAN CONCEPT OF AN “ORGANIZED CRIMINAL GROUP”

Generally speaking, we know that crimes can be committed either by isolated individuals or by a plurality of individuals joining together. Furthermore, a plurality of individuals joining together to commit crimes may have a continuing criminal programme and a permanent organizational structure. Only in this case can we say that these individuals form an *organized crime group*, according to the Italian legal tradition. In other words, the Italian concept of “organized criminal group” requires an *indefinite* programme of serious crimes and a lasting organizational structure. For instance, when we talk about an organized criminal group dealing with drug-trafficking we mean a continuing criminal enterprise – ranging, in some cases, from production to consumers’ markets – which must be necessarily carried on by a plurality of people (three or more) with a persistent criminal programme and a strong and stable organizational structure. Moreover, an organized criminal group is necessarily an *economic* criminal enterprise, because it moves significant amounts of money which enrich the operating group, need to be laundered and reinvested, give rise to induced investment and consumption and then pollute the legal economy of the concerned area.

If we compare the aforesaid notion of “organized criminal group” with the relevant definition given by Article 2 of the United Nations Convention against Transnational Organized Crime adopted on 15 November 2000 (“Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit), we can notice that the Italian notion is basically consistent with the UN definition, except for a significant detail: a group of persons acting with the aim of committing *only one* specific crime (no matter how serious the crime and how structured the group) could not be classified as an “organized criminal group” according to the Italian legislation.<sup>1</sup> As for the rest, the approach to organized crime is broadly the same, particularly as for the perception of its economic and entrepreneurial dimension (the purpose to “obtain, directly or indirectly, a financial or other material benefit”, according to the UN definition).

In fact, and in a certain sense, organized crime can be regarded (and is actually regarded by Italian legal practice) as a particular kind of economic crime. We know that the expression *economic crime* is traditionally intended as equivalent to *white collar crime*, i.e. a criminal conduct being committed only through a simple *misuse of the legal economy* (which is not the case of the typical “organized crime”). However, and in spite of the traditional terminology, that expression is now employed more and more broadly, extending it to those involved in organized crime, since those people directly create *their own* economy, which is itself a *criminal* economy, being supplied through a great number of illegal profit-oriented activities.

As a matter of fact, organized crime is any group of people committing systematically serious crimes having an economic aspect with a sort of a business organization, where costs, profits, money launderings,

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<sup>1</sup> Furthermore, the Italian case law requires for the criminal association an ‘organizational structure’ which has to be durable and more complex than the one implied by the UN Convention (compare the definition of “structured group” given in Article 2: “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”).

investments and reinvestments are programmed with an entrepreneurial approach, so that the group may acquire a favourable position within an illegal market and, through that, and through consequent reinvestments, within the legal economy itself.

This being the general concept of “organized criminal group”, it is important to note that the Italian legislature introduced into the Penal Code some specific legal provisions in order to classify, depict and punish the different offences (‘association crimes’) that shall be ascribed to the subjects accused of being members of the different criminal groups which may come into consideration.

Then we can distinguish between two main categories of ‘association crimes’: the common-type association crime (the basic pattern of it, plus two specific subclasses) and the so called ‘mafia-type’ association crime, the latter being characterized – in addition to the common elements – by a rather peculiar ‘mafia-method’.

We shall better clarify all this in the next paragraphs. There we shall also see how the mafia-type criminal groups have a special skill and an edge on other criminal groups – in performing their illegal and entrepreneurial activities – thanks to their peculiar code of silence and force of intimidation (the ‘mafia method’: see *infra* chapter II.C), and we shall see how the Italian legal system is trying to tackle them.

## II. THE PROVISIONS OF CRIMINAL ASSOCIATION OF THE ITALIAN LAW

### A. Introduction: the Profit-Oriented and the Transnational Dimension

Let’s come then to the strategy which the Italian legislature deemed useful in order to attack organized crime as a general target, then organized transnational crime and mafia groups as a special target, in the field of penal law, keeping in mind their profit-oriented dimension.

In the Italian experience, the suitable venue for any legal provision concerning criminal organizations is the special part of the Penal Code in which some provisions of *association crimes* have been formulated; each one of them is specifically defined, in order to cover the whole range of the possible criminal groups having the entrepreneurial dimension which I mentioned above. The same result can be reached with legal provisions of *conspiracy*, according to the Anglo-Saxon law tradition. But I will now describe the solution offered by the Roman law tradition, particularly by Italian law, where a description is given of a number of specific ‘association crimes’.

In Italy we have defined four different kinds of association crime which are suitable to attack organized crime and its entrepreneurial dimension. We have some others, concerning terrorism and conducts against the Constitution, but these ones are out of the scope of this presentation.

Then, four association crimes. Three of them are strictly related to each other: the *common-type* association crime, which is the basic and generic pattern of association crime, and its two direct and specific subclasses, namely the *drug-trafficking* association crime and the *trafficking-in-persons* association crime. The fourth one is more peculiar and is known as the *mafia-type* association crime.

It is fitting to talk about all four of them, because the common-type one presents a general scheme which broadly applies to the other ones as well. On the other hand, *organized crime* is a general category to which specific and sectorial organized criminal groups (including the mafia-type ones) belong. In other words, we can regard *organized crime* as a complex phenomenon, but still we also can maintain an overall view of it, in consideration of the entrepreneurial and potentially transnational dimension that seems to be a constant and unailing feature of every single criminal organization, no matter whether it is assisted or not by the mafia-type force of intimidation and no matter what is the illegal market being dealt with. And indeed, due to the global economy which characterizes the age we live in, the profit-oriented dimension and the transnational dimension of today’s organized crime phenomena are deeply and evidently interconnected.

### B. The Common-Type Association Crime and Its Subclasses

#### 1. The Common-Type Association Crime

The first association crime is the most general and simple. It is the *common type* of criminal association, i.e. the basic and generic pattern of it, which occurs when at least three persons join together with the aim of

committing a general programme of crimes and with an internal permanent organizational structure suitable for same (Article 416, paragraphs 1-5, Italian Penal Code). This could have an entrepreneurial dimension when the planned crimes are serious and profit-oriented and when the organizational level is somehow sophisticated. We can imagine, for example, a group of white-collar criminals having a programme of strictly economic crimes. But we can also think of a group of people who deal professionally with the smuggling of migrants or weapons, or money laundering, or trafficking in stolen cars, and so on. If no sufficient evidence exists of a specific recourse to the 'mafia method', this common-type criminal association applies. The relevant norm provides imprisonment of one to five years for the simple (rank and file) members of the association, and imprisonment of three to seven years for chiefs and organizers.

The general pattern of the common-type association crime (three or more persons joining together with the aim of committing a general and indefinite programme of crimes and with an internal permanent organizational structure suitable for the performance of such a programme) is also valid for its two 'sectorial' subclasses, that is to say the drug-trafficking association crime and the trafficking-in-persons association crime.

## 2. The Drug-Trafficking Association Crime

The second association crime is just a special form of the first one and applies – specifically and *instead* of the first one – to any criminal association acting in *drug trafficking* (Article 74 of Law no. 309 of 1990 on Narcotics). In other words it applies when the indefinite programme of delinquency being carried on by the criminal group concerns drug trafficking crimes. The punishment in this case is heavier: minimum ten years of imprisonment for simple members and minimum twenty years of imprisonment for chiefs and organizers, unless particular mitigating circumstances are present. Furthermore, the punishment provided for this crime shall increase if the programme of delinquency concerns both drug trafficking crimes and other crimes, because both association schemes (the common one and the drug-trafficking one) would formally coexist in such a case, since the two incriminating provisions protect two different public interests.

According to Article 51, paragraph 3-bis of the Italian Code of Penal Procedure, the drug-trafficking association crimes are investigated under the supervision of the special anti-mafia units at the District Offices of the Public Prosecutor.

## 3. The Trafficking-in-Persons Association Crime

This association crime has been recently created by Law no. 228 of 2003 on Trafficking in Human Beings, by introducing into the Italian Penal Code the new Paragraph 6 of Article 416 (the aforesaid basic provision of the common-type association crime) and by rewording Articles 600, 601 and 602 (on slavery and similar practices) of the same Penal Code. The new provisions were introduced pursuant to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted by the UN General Assembly in November 2000.

The trafficking-in-persons association crime is also a special form of the common-type association crime and applies – specifically and *instead* of the first one – to any criminal association acting in the relevant illegal market. In other words, it applies when the indefinite programme of delinquency being carried on by the criminal group concerns offences of slavery and trafficking in human beings, as they are described in the new wording of Articles 600, 601 and 602 of the Penal Code, in such way as to be consistent with the definition given in Article 3 of the aforesaid Protocol: “‘trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The relevant norm (Article 416 Paragraph 6 of the Penal Code) provides imprisonment of four to nine years for the simple members of the association, and imprisonment of five to fifteen years for chiefs and organizers. Again, the punishment provided for this crime shall increase if the programme of delinquency concerns *also* other crimes. However, if the programme of delinquency should include drug-trafficking

crimes as well, then the basic penalty should be the heavier one established for the drug-trafficking association, and the increase should apply on *that* penalty.

According to Article 51 paragraph 3-bis of the Italian Code of Penal Procedure, the trafficking-in-persons association crimes are investigated under the supervision of the special anti-mafia units at the District Offices of the Public Prosecutor.

#### 4. Common Features of the Three Aforesaid Association Schemes

It is fitting to emphasize that the three aforesaid association schemes are the only ones which may apply if no sufficient evidence exists of a specific recourse to the 'mafia method'.

The evidence of these three association crimes is reached when we can prove that at least three people joined together with a substantial association agreement, giving themselves the suitable permanent organizational structure, and giving themselves an *open* programme of crimes, i.e. a programme of crimes which is not previously defined as to the *number* of crimes to be committed.

On the other hand, the evidence for every single membership can be established by proving that a single defendant gave a *contribution* - even slight, but not meaningless - to the existence of the criminal group. An example: let's consider a criminal group trafficking in narcotics and stolen cars. The owner of a garage where the cars are kept and the narcotics are hidden gives a contribution to the life of the group and can be accused to be a member of it, even without any other specific conduct: provided he is acting *voluntarily* with at least two other people, *being aware* of the improper origin of the cars, and *being aware* of the illegal economic business and drug trafficking being dealt with in his own premises.<sup>2</sup>

When this evidence is established, a punishment is provided *for the association crime itself*, theoretically even if not one of the specific programmed crimes has been committed yet.<sup>3</sup> Of course, specific crimes being committed within the association (drug purchases, car thefts, etc.) shall be proven separately with regard to every single person being accused, and for each one of the specific crimes being proven a separate punishment - or sometimes an increase in punishment - is provided.

The drug-trafficking association crime and the trafficking-in-persons association crime are clearly liable to apply to criminal enterprises with a strong transnational dimension, but the same can be said of the common-type association crime, whose provision is often employed in Italy in order to incriminate members of criminal organizations dealing systematically on a transnational basis with money laundering, smuggling of migrants or weapons, trafficking in stolen cars and other illegal profit-oriented activities.

### C. The Mafia-Type Association Crime

#### 1. The Legal Definition of 'Mafia' and the Code of Silence and Intimidation

In very brief terms, and according to the Italian legal definition given in Article 416-bis, Paragraph 3, of the Penal Code, we can say that 'Mafia' is a particular kind of organized crime being characterized by a very peculiar force of intimidation and a deep-rooted code of silence strictly connected thereto. We shall see soon some other features which also typify mafia groups, but those other features are not really exclusive to mafia, they may belong to other criminal phenomena as well, while the peculiar force of intimidation I'm talking about *is* an exclusive feature of mafia. In other words, the Italian legal system takes into account that a mafia group is an organized criminal group which has a long history of violence and intimidation behind it:

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<sup>2</sup> Compare Article 5, Paragraph 1, of the United Nations Convention against Transnational Organized Crime, which takes into account both common law and civil law systems in order to outline the "Criminalization of participation in an organized criminal group". The part reflecting the civil law tradition is sub-paragraph (a) (ii), which indicates the following conduct to be established as criminal offence: "Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: a. Criminal activities of the organized criminal group; b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim".

<sup>3</sup> This is also consistent with Article 5, Paragraph 1, of the United Nations Convention against Transnational Organized Crime, which recommends in sub-paragraph (a) that criminalization of 'participation in an organized criminal group' be established as an *autonomous* criminal offence, i.e. "distinct from those involving the attempt or completion of the criminal activity".

this 'history' of violence and intimidation – for the reason of being well-known in the affected territory – has itself a strong threatening effect, so that the criminal group can easily acquire unlawful advantages through the simple unlawful use of other people's fear, mostly even without need of explicit and specific new threats. The recourse to this peculiar force of intimidation and to the relevant code of silence constitute the so-called 'mafia method'.

Let's go back to the UN definition of the expression *organized criminal group*: according to that definition (slightly readjusted in order to make it consistent, as we said *supra* in section I, with the Italian legal notion of 'criminal association'), an *organized criminal group* is "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing [...] serious crimes or offences [...] in order to obtain, directly or indirectly, a financial or other material benefit".

Well, in the Italian approach, mafia-type organized crime is all this and something more, since it presents some further typical features, the main one being the mentioned *code of silence and intimidation*, capable of creating a diffuse halo of fear around the criminal group, even without any need of direct threats. Then, as a consequence of this peculiar force of intimidation, the mafia-type criminal organization easily controls markets and territories, somehow putting itself in competition with governmental institutions. Finally, as a further consequence of all this, it has a strong tendency to corrupt public officers, taint public institutions and even taint the political life of the affected area.

Through the privileges deriving from all this, mafia-type organized crime is in a position to acquire a stronger economic power and a stronger international dimension, since its money-laundering activities move without frontiers taking advantage of the international financial system. And a strong code of silence and intimidation turns out to be very helpful also in this international dimension.

In other words, when we say *mafia-type organized crime* we simply mean a particularly sophisticated form of *organized transnational crime*. It is interesting to note that the expression *organized transnational crime* was first used by the United Nations in 1994 in a very important document which paid great attention to mafia-type criminal organizations. The document in question is the *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, which was approved by the United Nations General Assembly on 23 December 1994 in view of the dangers connected to the international dimension of organized crime.<sup>4</sup>

This document affirmed *inter alia* the need for "particular efforts towards defeating the *social and economic power* of criminal organizations and their ability to infiltrate legitimate economies, to launder their criminal proceeds and to use violence and terror". Furthermore, the United Nations document urged the international community to adopt a generally agreed concept of organized transnational crime, and to consider the possibility of elaborating a convention in that field penalizing participation in criminal associations or conspiracies (which actually happened with the Convention adopted on 15 November 2000).

The Naples document also recommended a deep analysis of the experience of those States which have heavily confronted organized crime and mafia groups, as well as a careful consideration of the characteristics of organized transnational crime. The document pointed out these characteristics – including among them the *code of silence and intimidation* – in the following five points:

- Hierarchical links or personal relationships which permit leaders to control the group;
- A code of silence and intimidation used to secure impunity and other unlawful advantages;
- A potential for expansion into new activities and beyond national borders in co-operation with other transnational criminal groups;
- Violence, intimidation and corruption used to earn profits or control territories or markets;
- The laundering of illicit proceeds both in furtherance of criminal activity and to infiltrate the legitimate economy.

On this basis, we may conclude that 'mafia-type criminality' is perhaps the most sophisticated kind of 'organized transnational crime'. The word 'mafia', which is of Arabian-Sicilian origin, belongs to the

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<sup>4</sup> U.N. Economic and Social Council, *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, 21-23 November 1994, Doc. E/CONF.88/L.4.

terminology and historical experience of some specific continental European countries, such as Italy and later, Russia; the more general expression 'organized transnational crime' belongs to the Anglo-Saxon terminology, which has been borrowed by the United Nations.

In this paper I will try to focus on the matter of fighting mafia groups and organized transnational crime taking into consideration the strategies with which Italy experimented effectively in this field, particularly in the last thirty years and – more incisively – after 1982 (when the specific incriminating provision of mafia-type associations entered into force) and after 1992 (when the special anti-mafia units at the District Offices of the Public Prosecutor were created, with the specific task of supervising investigations on mafia crimes, in conformity to Article 51 paragraph 3-bis of the Italian Code of Penal Procedure).

I must emphasize, anyway, that these strategies have been dealing not only with mafia groups but also with other organized crime groups which, in spite of not being assisted by the mafia-type force of intimidation, nevertheless present a strong economic and transnational dimension (such as criminal groups trafficking in drugs or in human beings with no evidence of recourse to the mafia method).

## 2. The Elements of the Mafia-type Association Crime

The general pattern of the common-type association crime (see *supra* in section II.B.4) is also somehow valid for mafia-type criminality as well, since the specific incriminating provision created for the mafia associations (Article 416-bis of the Penal Code) is a *special*, although much more complex and sophisticated pattern, derived from the common-type provision. Article 416-bis was introduced into the Penal Code by Law no. 646 of 1982. You can see an English translation of this legal provision attached as Appendix to this paper.

The association is *mafia-type* when the members exploit systematically a situation of environmental intimidation, and a diffused condition of subjection deriving therefrom ('a code of silence and intimidation' according to the aforesaid United Nations document), in order to commit crimes *or* in order to acquire the control of economic activities *or* to acquire unlawful advantages. The punishment is heavy: minimum five years of imprisonment and in case of particular aggravating circumstances it can increase up to twenty-two years for simple members and thirty years for chiefs and organizers. Each one of the specific crimes (extortions, murders, etc.) being committed within the association as part of its programme shall be punished separately.<sup>5</sup>

A specific aggravating circumstance applies when the criminal group has weapons or explosives at its disposal for the pursuit of its aims, no matter whether weapons and/or explosives are hidden or stored up (Article 416-bis, Paragraphs 4 and 5). Another aggravating circumstance applies when the members of the criminal group operate the investment of criminal assets (the proceeds of specific criminal offences) in legal economic activities, whose control has been or is being acquired through the mafia method (Article 416-bis, Paragraph 6).

A mafia-type association may also be, at the same time, a drug-trafficking association (or an association trafficking in human beings, or in weapons, or in stolen cars, etc.), and in these cases, according to Italian law, the different association incriminations may occur and apply together, and an *increased* punishment will apply.

The mafia-type association crime has been defined by the Italian legislature, observing the typical *modus operandi* of the traditional Sicilian mafia. However, the result was a general legal definition, which applies to any criminal group *acting in the same way*, no matter in what part of the country the group might be active, and no matter how the group might be named. This is why the Italian legal definition of mafia-type association may be of some interest also in other countries, where new mafias may come to life.

First of all, Article 416-bis outlines the mafia way of acting, the *mafia method*, saying that a criminal association is mafia-type when the members pursue their goals using – as we will see soon – three particular instruments, which constitute the legal definition of the 'code of silence and intimidation'. Then Article 416-bis outlines the goals which can be pursued by a mafia group, i.e. the *mafia purposes*: they can be either

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<sup>5</sup> Article 7 of Law no. 203 of 1991 establishes an aggravating circumstance for each one of the specific criminal offences being committed within a mafia-type association as part of its programme.

criminal in nature (such as the perpetration of crimes) or formally legal (such as the control of economic enterprises). In order to better clarify the matter, we shall quote the relevant paragraph of Article 416-bis (Paragraph 3), underlining the part concerning the *mafia method* and italicizing the part concerning the *mafia purposes*:

“Mafia-type unlawful association is said to exist when the participants take advantage of the intimidating power of the association and of the resulting conditions of submission and silence to commit criminal offences, to manage or in any way control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for other persons on the occasion of an election”.

The first instrument of the *mafia method* – the main one – is the force of intimidation *proceeding from the association bond itself* (in the Italian original: ‘*forza di intimidazione del vincolo associativo*’). That means an autonomous force of intimidation, deriving from the history itself of the group, from its consolidated reputation for violence, so that it has a persistent frightening charge, even without any need of specific threats to be made. The two other instruments which complete the *mafia method* are consequences of this force of intimidation: 1) a condition of general subjection suffered by other people, due to the fear produced by the group; 2) a condition of more specific subjection, that produces a general attitude of silence and refusal – outside and inside the mafia group – to the possibility of being co-operative with investigating State authorities.

In short, a mafia-type association is criminal association acting *through a wrongful use of other people’s fear and subjection*. By this method, it pursues its *purposes*, which are also listed by the legal provision in a rather complicated way, but in a way which can be simplified and summarized as follows: it pursues *unlawful advantages* through the mafia method, either by committing specific criminal offences or – theoretically even without committing specific criminal offences – by acquiring an unlawful control of legal economic activities (‘unlawful’ as it is pursued through the mafia method). Even more briefly, we can say that the mafia-type association is the one which pursues unlawful advantages through *a pattern of wrongful use of fear*.

As a matter of fact, the most general *purpose* of the Italian mafia-type association – among the ones listed by the legal provision of Article 416-bis – that is the purpose of reaching ‘unlawful advantages’, has a breadth of meaning sufficient to embrace all the other aims that may be pursued by a mafia group. As a consequence, the mafia-type association may be as well regarded as a criminal association which *deliberately and unjustly exploits the fear and subjection of other persons in order to pursue the acquisition of undue benefits*, through an ‘enterprise planning’ which draws no substantial distinction between one or other of the various and more specific *purposes* listed in the legal provision.

We already know that this ‘enterprise planning’ could be carried on even without committing specific crimes simply by exploiting the fear and subjection of other people. That notwithstanding, the systematic exploitation, by the criminal group, of its enduring ‘intimidatory position’ turns out to imply *automatically* a programme of crimes involving, *as a minimum*, threats and coercion: in other words, the mafia group will always maintain this *minimal* programme of crimes, since it will always consider specific threats and specific acts of coercion as instruments to be used *if necessary*. However, the greater the enduring intimidating power of the group, the smaller the actual need for specific threats and specific acts of coercion.

Keeping in mind all this, we may conclude that the evidence of the general structure of the mafia-type association crime is usually reached proving specific *conditions of fear* being exploited by the group, and proving the *unlawful advantages* proceeding therefrom. Furthermore, this evidence can be reached even if no evidence exists of specific conducts of violence or threat. It must be noted, on the other hand, that specific violence and threat may well belong to a *common* criminal association: in fact, a pattern of wrongful use of fear is something more, and something different.

I give an example taken from experience: it came to be relevant in a court trial, as a proof of the mafia method, that the sale of real estate for a price far below its actual value was due to the fact that it was proven that the seller was in a condition of fear and subjection, and the buyer was a member of a drug-trafficking mafia group exploiting ‘a code of silence and intimidation’.

This example clearly shows that the objectives pursued by a mafia-type association may well be *formally legal* objectives (such as the purchase of real estate at a very low price), but they are *made illegal* by the fact that they are pursued by using *unlawful means*: namely by regularly exploiting the association's 'code of silence and intimidation' and its capability to strike terror, and by regularly exploiting the victims' subjective condition of fear.

The incriminating provision on mafia-type associations clearly pays great attention to the illegal profits of the concerned criminal groups and establishes that, in case of conviction for this association crime, proceeds and instruments of crime must be always confiscated (Article 416-bis, Paragraph 7). We shall come back to this issue *infra* in section III.B.1.

### 3. The Typical Incriminating Conduct of Members of a Mafia-Type Association

In accordance with the general pattern of the common-type association crime (*see supra* section II.B.4), the evidence for every single membership within a mafia-type association can be established by proving that a single defendant gave a *contribution* – even slight, but not meaningless – to the activities and to the *existence* itself of the criminal group. In other words, a member of the association must give a contribution which goes beyond simple isolated participation in a single act of the association itself: for instance, being an accomplice in a single criminal offence referable to an organized criminal group does not mean necessarily being a member of it. On the other hand, if a person, without being a victim of coercion, and being aware of his or her deed, places a building at the criminal group's disposal for the pursuit of its aims, then he or she gives a contribution to the life itself of the criminal enterprise and proves to be a *member* of it.

In Italian legal practice and case law a long-lasting and rather pedantic discussion took place on the possibility of distinguishing between a real *internal membership* in the mafia association and an *external complicity* in the association crime. Some jurists regard this debate as futile, since in any case the crime would be the same as the one described in Article 416-bis. Usually, legal practice prefers to recognize an external complicity in the contribution given to a mafia association by white-collar subjects (such as corrupt civil servants or politicians), who entered into a business relationship with a mafia group in order to pursue their own interests.

The relationship between a mafia association and an entrepreneur, being originally a victim of mafia racketeering, may become particularly problematic when the subject enters into such a business relationship with the mafia group to turn his or her position of victim into a profitable position (in a given market), in the framework of an agreement which bears mutual benefits. If the entrepreneur proves to give a contribution to the life of the criminal group gaining for himself or herself advantages from its enduring 'intimidatory position', he or she can be incriminated for participation in the mafia-type association crime. In this case legal practice would prefer as well to recognize an 'external complicity'. In the framework of the racketeering activity carried on by mafia groups, the problem of drawing a clear distinction between entrepreneur-victims and entrepreneur-accomplices is a major problem facing Italian case law.

### 4. The Italian Mafia-Type Association and the Problem of International Double Criminality

The final Resolution of the U.N. World Ministerial Conference on Organized Transnational Crime of 1994 expressly stated that "in order to effectively combat organized crime, States must overcome its code of silence and intimidation", and affirmed the desirability of a precise definition of 'organized crime', capable of including also its possible intimidating power, besides its international and profit-oriented dimension.

Furthermore, in one of the base documents of that World Conference, Article 416-bis of the Italian Penal Code and the United States Racketeer Influenced and Corrupt Organizations (RICO) Statute were presented as models for an effective strategy to fight organized transnational crime: "The numerous indictments in the United States on the basis of the RICO legislation and the positive results of the implementation of Article 416-bis of the Italian criminal legislation suggest that the extension of those categories to other national legislations may have definite advantages."<sup>6</sup>

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<sup>6</sup> U.N. Economic and Social Council, *National legislation and its adequacy to deal with the various forms of organized transnational crime; appropriate guidelines for legislative and other measures to be taken at the national level*, Doc.E/CONF,88/3, Naples, 25 August 1994, p. 7.

As a matter of fact, there are quite a number of interesting similarities between the Italian Mafia Statute and the United States RICO Statute, the former representing a typical civil law approach and the latter a typical common law approach to transnational organized crime. A comparison between the two systems could be productive, although this is not really the suitable venue for such analysis.

However, since problems of *double criminality* between different legal systems may constitute a serious obstacle to international judicial assistance, a rapid survey would certainly be useful on the problem of *double criminality*, which the Italian mafia-type association may face in a common law system, where the crime of ‘conspiracy’ exists instead of the civil law ‘criminal association’. To this particular effect, the comparison with the legal system of the United States turns out to be particularly productive.

Of course, in practical terms, when we consider a specific indictment for an offence of mafia-type association, double criminality is not a real problem if we have overwhelming evidence about a significant number of grave specific crimes (murders, drug transactions, extortions, etc.) committed in a significant period of time in the framework of the mafia association. But how can the problem be faced, with respect to a common law system based on conspiracy, if we don’t have such evidence, but do have significant evidence of considerable ‘unlawful advantages’ acquired by exploiting the ‘enduring intimidating power’ of a sophisticated criminal enterprise? This is an interesting legal question. Let’s try to find the answer to it.

Common law *conspiracy* is usually defined as “an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means”. In the federal system of the United States, conspiracy is punishable as a crime – according to Section 371, Title 18 of the U.S. Code – “if two or more persons conspire [...] to commit any offence [...] and one or more of such persons does any act to effect the object of the conspiracy [...]”.

This is the *general* scheme of conspiracy. There are other *special* forms of it, such as the conspiracy specific to organized crime and defined in the RICO Statute: however, for the moment, I will take into account only the general scheme, because – paradoxically enough – the general scheme of conspiracy might better assist the research for a solution to our problem of *double criminality* of the Italian mafia association. On the other hand, in this general scheme, an agreement to pursue *formally legal* objectives by unlawful means may also constitute a ‘conspiracy’, a feature which is particularly consistent with the legal framework of the Italian mafia association.

Then, according to this general scheme, a crime of conspiracy is committed when at least two people reached a specific *agreement* to commit *one or more offences*, provided that there was, on the part of one of the participants, even unknown to the others, *at least one ‘overt act’* aimed at achieving the purposes of the agreement.

Well, a solution to our problem of double criminality can be found by simply applying this scheme of conspiracy to the crime of extortion as it is defined by the federal law of the United States: “the term ‘extortion’ means the obtaining of property from another, with his consent, induced by *wrongful use of* actual or threatened force, violence, or *fear*, or under color of official right” (Section 1951.b.2., Title 18, U.S. Code) (emphasis added). In other words, the Italian mafia-type association may be considered in the United States as *a conspiracy to commit extortion by wrongful use of fear*, provided that an ‘agreement’ and an ‘overt act’ – consistent with the general scheme of conspiracy – are recognizable in common law within the available evidentiary framework.

Let’s now come to the special scheme of conspiracy defined by the United States RICO Statute (Section 1962, subsections *a-d*, Title 18, U.S. Code). The reason for which this scheme would tend to make difficult, rather than assist, the search for a solution in terms of double criminality, with respect to the Italian mafia association, is because it must be characterized by an extremely specific and very peculiar ‘pattern of racketeering activity’, which requires the commission, in a period of ten years, of at least two of a given list of offences set out in Sec. 1961: this very peculiar and specific ‘element of crime’ does not belong to the Italian legal framework.

However, it is important to emphasize that the ‘pattern of racketeering activity’ may well contemplate the crime of extortion committed by ‘wrongful use of fear’, which is crucial for the comparison with the

Italian legal framework. On the other hand, insofar as the pattern of 'wrongful use of fear' of the Italian legal framework may be comprehended in the 'pattern of racketeering activity' of the RICO Statute, the two legal frameworks may probably cover the same range of criminal conduct and the same range of unlawful profits and advantages.

### III. THE LEGAL AND INVESTIGATIVE TOOLS FOR COMBATING THE ECONOMIC DIMENSION OF TRANSNATIONAL ORGANIZED CRIME

#### A. Money Laundering Activities and the Relevant Italian Legal Provision

Since organized crime means criminal economy, criminal law has to pursue not only the punishment of the criminals, but also the 'punishment' – in quotation marks – of their criminally acquired assets.

It is clear that, with this viewpoint, money laundering assumes an enormous importance. In particular, money laundering and criminal economy are to be tackled in the knowledge that the members of a criminal association are inevitably obliged to institute manoeuvres which will conceal the illegal origins of their funds. Thus, the members themselves of a criminal group are the first *necessary launderers* for their illegal wealth. This is why a central importance must be given to the investigation of assets *within* any investigation concerning a criminal group, even before investigating the possible existence of *external* money launderers.

As a matter of fact, mafia people and organized criminals in general, after *producing* dirty money, frequently take care of the *first steps* of the laundering by themselves, within their own criminal activities, and they apply to external professionals only for *further* laundering techniques and investments, which creates a strong connection between the laundering activities and the predicate trafficking activities.

Because of this situation, in many national legal systems, the provision of a particular crime of money laundering applies only to people who carry on laundering activities *for the sake* of criminal organizations but *without being part* of them. This occurs also in Italy, where laundering and investment of the proceeds of crime are penalized by Article 648-bis of the Penal Code, which provides a punishment (imprisonment for 4 to 12 years and a fine) for people who did not take part in the source-crimes, but anyway acted *knowingly* in order either to conceal, or substitute, or transfer, or invest their proceeds (the punishment is increased when the offence is committed in the course of a professional activity).

Thus, we can say that money laundering activities can be either *internal* or *external*. Internal laundering activities are those which are committed *by the same people who produced* the illegal funds through the source-crimes and in Italy, these activities are punishable within the framework of the general penal provisions concerning organized crime (mainly the association crime provisions). On the other hand, external laundering activities are those which are committed *by other people*, and they are punishable through the special legal provision of money laundering. It is fitting to emphasize that, according to Italian law, any intentional criminal offence may be the predicate offence of a crime of money laundering.

We can say, then, that the new frontier of investigation on organized crime and mafia crime is a systematic strategy of *economic* investigation, aiming at searching and tracing the proceeds of crime so as to reconstruct every stage of the money laundering activities, both internal and external, being carried out by, and for the sake of, a criminal group.

We shall see how the final goal of all this could be the seizure and confiscation of the criminal assets of the investigated criminal organizations, not only on a national scale, but also on an international scale.

#### B. The Italian Legal Provisions for the Confiscation of Criminal Assets

##### 1. The Regular Criminal Confiscation of Articles 240 and 416-bis of the Penal Code

In Italy, for every one of the association crimes which are provided by law, the law itself also establishes the possibility of seizure and confiscation of the respective criminal assets.

More exactly, confiscation of criminal assets (instruments of crime and proceeds of crime) is always allowed by Article 240 of the Italian Penal Code *within* criminal proceedings, in case of conviction for any major crime (particularly criminal associations) and according to the rules of evidence (beyond a reasonable doubt) which apply to criminal proceedings. The same confiscation is even *compulsory*, in case of sufficient

evidence leading to a sentence, when the penal charge is the mafia-type association, according to Article 416-bis, Paragraph 7, of the Italian Penal Code. In any case, the seizure is always allowed by Article 321 of the Code of Penal Procedure, in presence of probable cause and in view of a possible future confiscation which might occur at the end of a trial. In cases of urgency, the Public Prosecutor himself can order a seizure, subject to later confirmation by a judge.

This is the *regular* criminal confiscation, which may concern a convicted person, with respect to assets to be directly proven to be criminal assets without any inversion of the burden of proof. It can be compared to the common-law 'forfeiture *in personam*'.

The limit of the regular criminal confiscation provided in Article 416-bis and Article 240 of the Italian Penal Code, lies in its effective inability to reach and strike those sections of the criminal economy which have been well established for a long period of time, with the resulting inability to reconstruct with sufficient evidence their remote origin. This is due to the fact that, within criminal proceedings, the rules of evidence are very strict and no inversion of the burden of proof is usually admitted in that field, neither in view of a sentence nor in view of a confiscation.

In order to find a solution to this problem, the Italian legislature introduced two different legal remedies which are conceived in such way as to reach and confiscate the consolidated sections of criminal economy whose distant background can no longer be duly reconstructed. The first one is a judicial remedy belonging to substantive criminal law; the second one is an administrative remedy, although judicially guaranteed.

## 2. The Special Criminal Confiscation of 'Unjustified Assets' Introduced in 1994

The first remedy, the judicial one, is a very peculiar mechanism introduced by the Italian legislature with Article 12-sexies of the Law no. 356 of 1992, as it was modified by the Law no. 501 of 1994 ('Urgent provisions in relation to the confiscation of illicit assets'), which provides a *further* instance for compulsory criminal confiscation, suitable for striking at sections of consolidated criminal economy, and allowing some inversion of the burden of proof under a number of strict conditions. In fact, the law in question lays down precise parameters whereby a given source of wealth may be considered as a portion of the consolidated criminal economy (and thus a source liable to confiscation), even without direct and specific evidence concerning its origin.

We talk about 'unjustified assets' in this case. Normally, unjustified assets cannot be confiscated simply because of being unjustified, but the law of 1994 introduced an exception, of course under a number of conditions.

The essential condition for a confiscation of an *unjustified asset* is that the concerned person has been found guilty and was irrevocably sentenced *for any one of the crimes specifically indicated* by the new legal provision itself, which indicates a list of crimes particularly familiar to major organized crime phenomena (drug smuggling, mafia association, trafficking in human beings, extortion, money laundering and so on). Then this is the *first* condition: the law applies only to persons convicted for one of the specified crimes.

Subject to this primary condition, the legal provision stipulates the compulsory confiscation of the unjustified assets under the following further conditions: 1) that the accused cannot provide a satisfactory proof of the legal origin of the assets; and 2) that the assets are disproportionate to his or her official income or to his or her official economic activity.

Under these three conditions, the confiscation is made possible through an inversion of the burden of proof. However, I must emphasize that all this may apply only to people who have been sentenced for serious organized crime offences, such as mafia-type association, major drug-trafficking, money laundering, kidnapping for purposes of extortion, trafficking in persons and a few others. This is the reason why the inversion of the burden of proof has been found consistent with the Italian Constitution.

Of course, the confiscability of these unjustified assets causes the same sources of wealth to become automatically liable to seizure under Article 321 of the Code of Penal Procedure in the course of the preliminary investigation concerning the specified predicate crimes.

3. The Old Administrative Confiscation Introduced in 1982

The second remedy given by Italian law, in order to reach consolidated criminal assets, is the one provided by an older anti-mafia statute (Articles 2-bis and 2-ter of the Law no. 575 of 1965, as modified by the Law no. 646 of 1982), which allows public prosecutors to seize and confiscate criminal assets also *outside* a criminal proceedings, and with a looser rule of evidence. This possibility, concerning mafia crimes and drug crimes, is provided through a non-penal and administrative procedure judicially guaranteed, as it is ruled by law and controlled and decided by a judge. In presence of some probable cause of an organized crime offence, an asset can be seized as illegal, and then confiscated, within this administrative procedure, when it appears to be disproportional considering the tax declarations and the legal economic activities of the affected person, and when the affected person does not prove the legal source of the asset. This old legal instrument, unlike the previous one, applies without any need for a criminal conviction of the affected person and then raised some doubts about its consistency with the Italian Constitution. In spite of these doubts, it is a legal remedy still in use, somehow similar to the common-law 'forfeiture *in rem*'.

**C. The Italian Law on Suspicious Financial Flows and International Confiscation**

It must be said that the most effective instrument for the prosecution of criminal assets in Italy is no longer the administrative remedy introduced in 1982, but the judicial system of criminal confiscation, as it is defined by Articles 240 and 416-bis (Paragraph 7) of the Penal Code, strengthened by the Law no. 501 of 1994 on 'unjustified assets', thanks to the limited inversion of the burden of proof allowed by this new statute and, then, by the current wording of Article 12-sexies of the Law no. 356 of 1992.

As a matter of fact, investigation and prosecution of criminal assets must be allowed to develop beyond national frontiers, and this is made possible today by the International Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, promoted in 1990 by the Council of Europe, which has been ratified by Italy. The target is the seizure and confiscation of criminal assets on an international scale, since the Convention requires each signatory State, on the request of another signatory State, to seize assets in view of a request for international confiscation, and also to permit the confiscation of criminal assets in its own territory. The old-fashioned administrative confiscation introduced in Italy in 1982 would not be consistent with the parameters established by the Convention for the purposes of 'international confiscation'.

It is fitting to emphasize that the Convention of the Council of Europe on money laundering is based on a philosophy which strongly favours a network of interconnected asset investigations, to be extended on an international scale in view of a series of international confiscations, as the most effective investigative tool against transnational organized crime and its profit-oriented dimension. In other words, a systematic strategy of interconnected *economic* investigations, aiming at searching and tracing all the criminal assets (i.e. the proceeds of crime, the instruments of crime, and the proceeds of formally legal economic activities carried on with criminal means by a criminal group) may allow investigators to reconstruct every stage of the money laundering activities, both internal and external, being carried through by, and for the sake of, the criminal group.

For this reason, the investigating authorities should adopt a mental approach which considers 'under investigation' not only the *persons* (for the purposes of some future punishment) but also their related *wealth* (for the purposes of some future confiscation), and should get used to giving *priority* to asset investigations. Furthermore, asset investigations will have to be specific, concrete and linked together one to another, so as to be clearly oriented towards gradual progressive targets, with the final goal of securing evidence on the connection between laundered wealth and predicate offences.

Let's consider, for example, a criminal group trafficking in narcotics and stolen cars which are hidden in a garage. This garage should be *itself* the target of a careful economic investigation: the linking economic investigations should trace the origin of the money which was invested in the garage, through the analysis of the transfers, the contracts, the licences, the invoices for works in the building, the financial transactions and banking movements behind all this, as well as through the examination of any person who had something to do with all this, in order to discover all the economic aspects of the criminal group and all the 'internal' laundering activities. Further developments of this kind would finally lead to discovering possible 'external' laundering activities, and even external enterprises dealing professionally with money laundering for the sake of the criminal group. Moreover, moving further along these '*follow-the-paper-trail*' techniques,

the investigation may reach the more sophisticated dimension of international money laundering. The real challenge of this transnational investigation is how to overcome the last frontier of money laundering, which is constituted by the use of international electronic transfers of funds.

In this field, a new path is now being experimented with in the countries that gave themselves specific legislation for the control of suspicious financial operations.

According to Italian Law no. 197 of 1991 (“Urgent provisions aiming at limiting the use of cash in transactions and preventing the use of the financial system for purposes of money laundering”), every bank must establish its own computerized database and must pass aggregate information on the overall flow of funds, on a monthly basis, to the central banking authority, which is responsible for processing the information into usable statistics, so as to detect anomalies and identify regions or towns with suspicious financial flows. Special attention is paid to the aggregate data concerning electronic transfers of funds, for which the concerned towns (domestic and foreign) must be also reported to the central authority.

Let’s now imagine that, in the course of a criminal investigation (for instance on a mafia group active in Palermo), the public prosecutor finds evidence of some financial flows between the mafia group and some individuals operating in a given foreign town (for instance Tokyo). In this case the prosecutor can ascertain from the central agency which financial flows were overall reported in a given time between Palermo and Tokyo, so as to identify a number of specific electronic transfers of funds which deserve to be better verified: e.g., he or she might be interested in the transfers operated between the two cities in a given month, particularly relevant to the investigation.

After receiving the proper information about the financial flows that were overall reported in the selected month between Palermo and Tokyo, the prosecutor can first request more information from the concerned banks in Palermo about the selected transfers, in order to discover which of them may be actually related to the investigated criminal group. The next step could be seeking judicial co-operation from the Japanese authorities.

#### **IV. OTHER LEGAL AND INVESTIGATIVE TOOLS FOR COMBATING ORGANIZED CRIME**

##### **A. Italian Legislation on Protection of Witnesses and Collaborators of Justice**

###### **1. The Mitigating Circumstances in Favour of the Collaborators of Justice**

###### *(i) Introduction: the legal position of the collaborative accused*

In the Italian legal system, where the exercise of penal action is not discretionary, no immunity can be granted to an accused, no matter how co-operative he or she may be. However, and particularly in the proceedings concerning organized crime and mafia groups, some favourable mitigating circumstances apply to the co-operative accused who gives significant help to the investigators in the research of decisive evidence against the criminal group.

In a civil law system, an accused is never considered a ‘witness’, even if he or she takes the stand in court, and his or her statements are never sworn statements. Notwithstanding that, in the Italian system the statement given by an accused in court is considered evidence, but it has to be carefully “evaluated together with the other elements of proof which confirm its reliability” (Article 192 of the Italian Code of Penal Procedure). In other words, the statement of a co-operative defendant accusing another defendant can be regarded as evidence only if it finds some ‘corroboration’. This requires, anyway, that the statement be given in open court, in such way as to be liable to undergo cross-examination (Article 513 of the Italian Code of Penal Procedure).

The statements given by two different collaborators of justice can corroborate each other, provided they prove to be autonomous of each other and both reliable. The rules for correct corroboration and for correct evaluation of the reliability of the collaborators of justice are a major and rather complex issue of the Italian case law on organized crime.

According to Articles 500 (Paragraph 4) and 210 (Paragraph 5) of the Italian Code of Penal Procedure, when there is evidence proving that a co-operative defendant was threatened or otherwise suffered duress or was offered money or other benefits in order to prevent him or her from giving a statement in trial, his or her pre-trial statements shall be admitted as evidence in trial.

(ii) *The mitigating circumstance for mafia-type associations and mafia crimes*

This mitigating circumstance specific to mafia-type criminality is established in Article 8 of Law no. 203 of 1991, that was introduced by the Italian legislature paying special attention to the usual and general attitude of silence and refusal, outside and inside the mafia groups, to possibly co-operate with investigating authorities. In order to defeat this refusal of co-operation *inside* the mafia group, the mitigating circumstance was devised, with the aim of breaking the solidarity among the members of the criminal organization, in favour of those defendants who agree to co-operate with police and public prosecutors, helping them in discovering the criminal groups and in finding the necessary evidence.

The mitigating circumstance applies in favour of the collaborative accused with respect to both participation in the mafia-type association and perpetration of the specific criminal offences being committed as part of its programme.<sup>7</sup> The benefit awarded to the collaborator is a sensible reduction of the punishment: the life imprisonment penalty shall be substituted by imprisonment for 12 to 20 years and the other penalties shall be decreased by one-third to one-half.

(iii) *The mitigating circumstances for drug-trafficking associations and their offences*

A specific mitigating circumstance is established for the drug-trafficking association crime in Paragraph 7 of Article 74 of the Law no. 309 of 1990 on Narcotics. The punishments established by the same article for the participation in the association crime shall be decreased by one-half to two-thirds for the accused who “effectively did his or her best to ensure the evidence of the crime or to deprive the association of decisive resources for the perpetration of its offences”. The wording of this provision implies that the benefit shall be awarded to the collaborative accused only if his or her contribution was really *suitable* for ensuring the evidence or depriving the association of decisive resources, even if the desired result was missed for reasons not attributable to him or her.

A quite similar mitigating circumstance is established in Paragraph 7 of Article 73 of the same Law no. 309 of 1990 for the specific drug-trafficking offences being committed as part of the programme of the association.

(iv) *The mitigating circumstance specific to the crime of kidnapping for ransom*

The crime of kidnapping for ransom (Article 630 of the Italian Penal Code) was frequently perpetrated and is still sometimes perpetrated by mafia-type associations in Italy. The crime is punished with imprisonment for 25 to 30 years. If the hostage is killed the punishment shall be life imprisonment.

When a co-operative accused behaves in such manner as to determine the hostage to recover his freedom without ransom the punishment established for simple kidnapping shall apply (Articles 630, Paragraph 4, and 605 of the Penal Code: imprisonment for six months to eight years).

Apart from this case, for the accused who agrees to co-operate with police and public prosecutors, helping them effectively in discovering the criminal groups and in finding the necessary evidence, the life imprisonment penalty shall be substituted by imprisonment for 12 to 20 years and the other penalties shall be decreased by one-third to two-thirds (Article 630, Paragraph 5, of the Penal Code).

In both cases, the punishments established by Paragraphs 4 and 5 of Article 630 can be further decreased (by not more than one-third) if the co-operative contribution given by the accused was exceptionally important, also with respect to the duration of the kidnapping and the safety of the hostage (Article 6 of the Law no. 82 of 1991 on Protection of Witnesses and Collaborators of Justice).

## 2. The Provisions for the Protection of Collaborators of Justice

Co-operative defendants (collaborators of Justice) who were active in organized crime circles may be granted a protection measure or, in some cases, a protection programme, which may be extended to the members of their families and may imply change of personal details and assistance in the organization of a new life. The protection system is supervised by a governmental Commission and is regulated by Law no.

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<sup>7</sup> When this mitigating circumstance applies, the specific aggravating circumstance established by Article 7 of the Law no. 203 of 1991 (see *supra*, note 5) is excluded.

82 of 1991 (“Provisions on Protection of Witnesses and Collaborators of Justice”) as modified by Law no. 45 of 2001.<sup>8</sup>

The basic provision is Article 9 of Law 82, which establishes the possibility of special protection measures for persons who are in serious danger because of the co-operation given to Justice and because of the statements given in criminal proceedings concerning organized crime offences provided for in Article 51, Paragraph 3-bis, of the Code of Penal Procedure.<sup>9</sup> According to Paragraph 3 of this article, co-operation and statements, in order to have protection awarded, must have “a character of subjective reliability”, must be “new and complete” and must appear “of significant importance for the purposes of the trial or for development of investigations concerning the organizational structure, the equipments, the domestic and international relationships, the purposes of the criminal organizations”.

Among the special protection measures Paragraph 4 of Article 13 of Law 82 lists the possibility of a bodyguard service, of technical devices of security, and of detention in special protected prisons. If such protection measures prove to be insufficient, then a special protection programme shall be defined and operated according to Paragraph 5 of Article 13 of Law 82. The programme can establish the transfer of the person (when not in detention) and his family to a protected place, measures of personal and economic assistance, change of the personal particulars, and assistance for the organization of a new life.

On the other hand, the protected person must undertake to respect a number of rules, such as comply with security norms and keep co-operating with Justice (Article 12 of Law 82). In case of non-compliance the protection programme can be revoked.

Article 16-quater of Law 82 provides for a particular deed named “illustrative record of contents of the collaboration” which constitutes a condition for the protection programme to be awarded. In this record, the person who manifested the will to be a collaborator of Justice shall immediately (and within six months) report to the Office of the Prosecutor the whole information in his or her possession that is useful to reconstruct the facts and circumstances relevant to the proceedings, to identify and arrest the authors of the offences and to identify, seize and confiscate their criminal assets and instruments. The person shall also testify on record that he or she is not in possession of further significant information which might be relevant to Justice. If this assertion proves to be untruthful, the protection programme shall be revoked. As a rule, any new statement given by the person to the prosecutor or the police after the six-month term cannot be used in trial.

### 3. The Provisions for the Protection of Witnesses

A wider protection is provided for in Articles 16-bis and 16-ter of Law 82 in favour of the so-called “witnesses of Justice”, i.e. persons (unrelated to organized crime circles) who simply have a position of victims and/or witnesses and agree to testify against a criminal organization even when this behaviour exposes them to grave dangers. The Italian legislature recognized that these persons, and their families, deserve not only proper protection (through the aforesaid special measures and protection programmes provided for by Articles 9 and 13 of Law 82), but also a complete reparation of the suffered damages.

The only requirement for a statement given by a witness of Justice, in order to have the protection programme awarded, is its ‘reliability’ (besides, of course, a condition of grave danger as a consequence of the statement). It is not required that the information given be new or complete or of special importance for the proceedings. Furthermore, the statement may concern also crimes that are not included among the ones indicated in Article 51, Paragraph 3-bis, of the Code of Penal Procedure as typical organized crime offences. Of course, there is no need for an “illustrative record of contents of the collaboration” is needed for the witnesses of Justice.

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<sup>8</sup> Confidential informants of the police have no special protection, other than the strict confidentiality of any information about them. On the other hand, the information provided by them can never be used in court (Article 203 of the Italian Code of Penal Procedure).

<sup>9</sup> See *supra*, section II, paragraphs B.2, B.3 and C.1.

Moreover, the economic benefits in favour of the witnesses of Justice and their families are rather substantial (and anyway more favourable than the ones established for collaborators of Justice), since they must assure “a personal and familiar standard of living not lower than the one enjoyed before the start of the programme, until they recover the possibility to enjoy their own income”, then “even after the end of the protection programme” (Article 16-ter, Paragraph 1.b, of Law 82).

Apart from the special provisions contained in Law 82, it is fitting to remember that Article 500 (Paragraph 4) of the Italian Code of Penal Procedure is somehow related to the issue of protection of witnesses, since it establishes that, when there is evidence proving that a witness was threatened or otherwise suffered duress or was offered money or other benefits in order to prevent him or her from testifying, his or her pre-trial statements shall be admitted as evidence in trial.

## **B. Legal Provisions on Some Investigative Tools Specific to Organized Crime**

### 1. Electronic Surveillance

Telephone tapping and interception of on-site conversations are widely used in Italy as an investigative tool in the field of organized crime.

The general regulation of electronic surveillance, as it is dictated in the Code of Penal Procedure (Article 266 et seq.) is very strict. However, in the investigations concerning organized crime, the regulation is made looser by a particular legal provision introduced in 1991 which allows electronic surveillance “whenever the interception is necessary in order to carry on investigations related to an organized-crime offence [...] for which sufficient indicia exist” (Article 13 of the Law no. 203 of 1991).

In any case, a motivated warrant of electronic surveillance has to be issued by a judge, at the request of the public prosecutor. The warrant can be granted for a maximum term of forty days, but may be extended by the judge. In case of urgency, the warrant, or the extension, may be provisionally issued by the public prosecutor himself, but has to be presented to the judge within 24 hours with a request of validation.

### 2. Undercover Operations

Undercover operations, performed by undercover police officers, have been regulated in Italy only in the last fifteen years.

Undercover agents are allowed to make simulated purchases of drugs in order to acquire evidence concerning drug smuggling. However, high level police commanders have to decide or authorize these operations. Furthermore, the public prosecutor must be informed in detail of any undercover operation, and may issue a motivated order to postpone the seizure of the purchased drug until the conclusion of the investigation, if so requested by the police (Article 97 of the Law no. 309 of 1990 on Narcotics).

An identical regulation has been introduced for undercover operations concerning simulated acts of money laundering and simulated purchases of weapons (Article 12-quater of the Law 356 of 1992).

### 3. Task Force Units

Task force ‘anti-mafia’ units of prosecutors (*Direzioni distrettuali antimafia*) were created in 1992 and are active for investigations and prosecutions concerning organized crime in the 27 District prosecuting offices of the country. They are co-ordinated by a central co-ordinating unit for anti-mafia prosecutions (*Direzione nazionale antimafia*) (Article 51, par. 3-bis, and Article 371-bis of the Italian Code of Penal Procedure).

Task force units exist – for specific organized-crime investigations – in the different police forces (*Polizia di Stato*, *Carabinieri* and *Guardia di Finanza*), so as to specialize in this or that field of investigations: drug smuggling, extortions, money laundering, etc., and they are also co-ordinated by central co-ordinating units. A new central inter-force police unit (the *Direzione investigativa antimafia*) was also created fifteen years ago in order to enhance the fight against mafia organizations (Law no. 410 of 1991).

**APPENDIX A**

**ARTICLE 416-BIS OF THE ITALIAN PENAL CODE  
(MAFIA-TYPE UNLAWFUL ASSOCIATION)**

1. Any person participating in a Mafia-type unlawful association including three or more persons shall be liable to imprisonment for 5 to 10 years.
2. Those persons promoting, directing or organizing the said association shall be liable, for this sole offence, to imprisonment for 7 to 12 years.
3. Mafia-type unlawful association is said to exist when the participants take advantage of the intimidating power of the association and of the resulting conditions of submission and silence to commit criminal offences, to manage or in any way control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for other persons on the occasion of an election.
4. Should the association be of the armed type, the punishment shall be imprisonment for 7 to 15 years pursuant to paragraph 1 and imprisonment for 10 to 24 years pursuant to paragraph 2.
5. An association is said to be of the armed type when the participants have firearms or explosives at their disposal, even if hidden or deposited elsewhere, to achieve the objectives of the said association.
6. If the economic activities whose control the participants in the said association aim at achieving or maintaining are funded, totally or partially, by the price, the products or the proceeds of criminal offences, the punishments referred in the above paragraphs shall be increased by one-third to one-half.
7. The offender shall always be liable to confiscation of the things that were used or meant to be used to commit the offence and of the things that represent the price, the product or the proceeds of such offence or the use thereof.
8. The provisions of this article shall also apply to the Camorra and to any other associations, whatever their local titles, seeking to achieve objectives that correspond to those of Mafia-type unlawful association by taking advantage of the intimidating power of the association.