

October 1998

Journal of
**Financial
Crime**

The official journal of
the Cambridge International
Symposium on Economic Crime

Volume Six *Number Two*



HENRY
STEWART
PUBLICATIONS

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Italy: Comment on the Money Laundering Section of the Italian Penal Code

Carlo Zaccagnini

BACKGROUND AND LEGISLATIVE EVOLUTION

The first legislative step undertaken by the Italian Parliament to detect money laundering dates back to Decree 59, issued in March 1978 and brought into force by Law 191/1978. The Decree introduced s. 648 *bis* into the Italian Penal Code; it was entitled 'Substitution of money or funds deriving from armed robbery, racketeering or kidnapping for reward'. The new offence was based on the structure of s. 648 'Handling stolen goods'; the crime was punishable with a sentence of between four and ten years' imprisonment. The introduction of s. 648 *bis* was required for two reasons: on the one hand, to address the concern arising from the numerous terrorist kidnappings and blackmail occurring in Italy at that time; on the other, to strengthen the criminal repression of the 'specified unlawful activities'.

However, the Italian Parliament definitively realised the 'macro-criminal progression' of money laundering offences after the implementation of international legislative initiatives such as Recommendation 10 adopted by the Committee of Ministers of the Council of Europe on 27th June, 1980; the United Nations Convention Against Illicit Traffic of Drugs and Psychotropic Substances, adopted in Vienna on 19th December, 1988, and the Convention on money laundering — the Research, the Seizure and Confiscation of the Proceeds of Crime — held in Strasbourg in November 1990.

In effect, the Vienna Convention and the Council of Europe Convention sensibly influenced the legislative evolution of s. 648 *bis*. This was initially ratified and implemented in Italy through Law 55 of March 1990, known as 'the Anti Mafia Law'. Section 23 of the above enactment amended, after 12 years, the previous version of s. 648 *bis*. The reform: (i) widened the list of 'predicate crimes' realised through the introduction of offences concerning the production and traffic of narcotic or psychotropic substances, (ii) criminalised conduct 'obstructing the identification of the illicit origin of

the assets'; (iii) lessened the burden of proof on the prosecution to demonstrate the *mens rea* of the offence; (iv) moreover, the maximum sentence was increased from 10 to 12 years; (v) the reform, likewise, introduced one aggravating circumstance where the offence was 'committed in the course of a professional activity'. Finally, s. 24 of the same law introduced s. 648 *ter* entitled 'Utilisation of money, goods or assets of unlawful origin'.

The Strasbourg Convention has been implemented in Italy through Law 328 of August 1993. This law has amended — just three years after the previous reform — s. 648 *bis* and 648 *ter*. The new version of s. 648 *bis* has criminalised two new behaviours: the 'transfer' of ill-gotten gains and the performance of 'other operations'; therefore, the major innovation introduced by this legislative intervention consists of the abolition of the list of the 'specified unlawful activities'. Thus, since the reform, the list of predicate crimes has been extended to all offences carried out intentionally. Law 328 has also introduced a special mitigating circumstance for laundering assets derived from offences punishable with up to five years' imprisonment. The *nomen juris* of the section has also been changed from 'Substitution of money or funds' to 'Money laundering', in Italian 'Riciclaggio'.

THE PRESENT LEGISLATIVE STRUCTURE

The first paragraph of s. 648 *bis* now provides:

'Apart from participation in the [predicate] offence, any person who substitutes or transfers money, goods or assets obtained by means of an intentional criminal offence, or performs any other operation in relation to them in such a way as to conceal the identification of illicit provenance of the said money, goods or assets, shall be punished by imprisonment of between 4 and 12 years and by a fine of between 2 and 30 million liras.'

Paragraph 2 provides:

'The punishment shall be increased if the offence is committed in the course of a professional activity.'

Paragraph 3 provides a special attenuating circumstance:

'if the money, goods or assets are the proceeds of a criminal offence for which the punishment is imprisonment for up to 5 years.'

Finally, para. 4 states that:

'the provisions of this Section shall also apply if the person committing the offence of which the said money or goods are the proceeds is not chargeable or punishable, as well as in the absence of the legal conditions for criminal prosecution in respect of the said offence.'

The following s. 648 *ter* extends the same punishment provided by s. 648 *bis* to:

'... any person using for economic or financial activities, money, goods or assets of unlawful origin obtained by means of a criminal offence ...'

THE ACTUS REUS

The *ratio legis* of money-laundering provision is to ensure the identification of the criminal origin of the assets; in particular any operation carried out in such a way as to obstruct the reconstruction of the paper trail falls under the definition of s. 648 *bis*. Three methods of conduct are expressly criminalised:

— 'Substitution'. This conduct encompasses even the opening of a bank account, given that, the bank binds itself to return the same amount of money.

— 'Transfer'. This implies a change of title of ownership or registration (real or fictitious); a movement from the financial sphere of one individual to another.

— The 'performance of other operations in such a way as to obstruct the identification of the illicit provenance' of the money.

This last sentence, even though it detracts significantly from the principle of maximum certainty in the definition of the criminal offence, appears justified by the nature of money laundering devices which constantly exploit the fast evolution of the services offered by the financial markets. In the Italian version the last sanctioned activity encompasses the other two behaviours (transfer and substitution). It is generally inferred, therefore, that this 'performance category' contains the nucleus of the conduct criminalised by s. 648 *bis*.

The prosecution has the burden of proof for demonstrating the actual capability of the conduct to jeopardise the financial investigations. It should be stressed, moreover, that money laundering offences belong to the category of the so-called 'conduct crime' also said to be 'pure (or mere) conduct crime'. In this type of offence, the behaviour personal to the offender is itself the mischief the crime is aimed at discouraging. In other words, the *actus reus* does not extend to proof of substantial harm caused by this personal activity, because the definition of the offence only requires proof of the capability of the conduct to realise the risk of the harm (which in this case is represented by the reconstruction of the paper trail). Moreover, this category of crime is also characterised by the absence of an obvious naturalistic event resulting from the conduct. In this sense, the naturalistic event should be intended as the substantive modification of the reality caused by the conduct of the offender.

MONEY LAUNDERING BY OMISSION

This crime can be committed through omission. It should be stressed, however, that in this case, the law must put upon the subject a duty to intervene to prevent the occurrence of the risk of harm. If the subject fails to act and the failure is a voluntary one and, further, the subject has the *mens rea* required by s. 648 *bis*, the perpetrator will be convicted of this offence. Even though (very generally

defined) examples of the duty of intervention are provided by paras. 6 and 8 of s. 3 of Law 197/1991; s. 6 states that: '... [The authorised financial intermediaries] shall ... adopt additional appropriate measures to guard against jeopardising the course of any investigations'.

Paragraph 8 states that: '[The authorised financial intermediaries] ... establish adequate procedures designed to prevent their being involved in money laundering operations, strengthening the system of internal controls and checks to that end and implementing specific staff training programmes'.

THE MENS REA

The *mens rea* of the money launderer encompasses two requirements: first, the offender must knowingly perform an act directed at obstructing the reconstruction of the paper trail; secondly, the offender must know the illicit provenance of the assets involved in such an operation. In other words, the *mens rea* of the launderer consists of the knowledge of the circumstance that the assets are the proceeds of intentional offences, coupled with the knowledge that such conduct is capable of obstructing the financial investigations.

However, there is a major interpretative issue raised by the subjective element of this offence represented by the possibility of conceiving the crime as committed through negligent conduct. That is to say, can the accused be held criminally liable notwithstanding the absence of one of these two prerequisites of the *mens rea*? It should be stressed that, on this particular issue, convergence of judicial trends does not exist even within European institutions. The European Council, for example, in Recommendation 26 (point b) of the 'Action Plan to Combat Organised Crime', states that: 'In the field of money laundering ... the following measures should be envisaged: criminalization of laundering of the proceeds of crime should be as general as possible ... The opportunity of extending laundering to negligent behaviour should be examined ...'.

On the other hand, the European Parliament in its Resolution 47 on the Recommendation of the Council on the 'Action Plan', replies: '... The extension of penal liability for money laundering to include negligent behaviour is rejected ...'.

Thus in several ways the criminalisation of negligent conduct of money laundering is intrinsically

linked to the definition of the boundaries — designed by each Member State — between negligence (the unintentional or inadvertent causation of the harm) and intent (the decision to bring about the [proscribed] result).

In general terms, it can be said that the borderland between these two states of mind is characterised by the outside position of one category (the negligence) and the convergence of the other (the intention). The particularity of the conduct encompassed in this narrow margin consists of the absence of knowledge, in the mind of the defendant, of one element of the crime, and/or by the lack of the wilful causation of the harm prohibited by the definition of the offence. In this sense, it could be said that, in this narrow section, the boundaries between negligent and intentional behaviours tend to blur. To solve this issue the Italian courts and draftsmen have created an intermediate level of negligence as well as an intermediate level of intent. These two different heads of criminal liability encompass the entire spectrum of behaviours falling within the above marginal 'borderland'. Thus these devices are used by the courts as a means of grading the seriousness of offences, culpability of the defendant and, of course, punishment. Generally, the latter will depend upon whether or not the accused intended to perpetrate the harm criminalised by the offence. The sections below will analyse in detail these two different heads of liability.

Advertent recklessness or negligence?

The first mental attitude defined by Italian criminal law can find a common law correspondent in the mental state of 'advertent recklessness'. This state of mind describes the situation where the defendant causes the risk of the harm, without the purpose of doing so, and without foresight of its certain occurrence, but knowing that there is a risk. To put the same point differently, the defendant believes that there is a risk that the prohibited circumstance exists, and decides to take the risk. In this case, will the perpetrator incur any criminal liability under s. 648 *bis*? This mental state could be exemplified by the case of a financial intermediary who carries out an operation without knowing, but just suspecting, the illicit nature of the money involved in the transaction which he is required to perform. Italian criminal law terms this subjective attitude '*colpa cosciente*' which, literally

translated means 'intentional negligence'; this mental attitude, in this particular case, is not capable of amounting to *mens rea*. In fact, it is conceived as an aggravating circumstance for strict liability crimes, and, therefore, cannot constitute the basis for criminal liability for an offence requiring the intentional causation of (the risk of) harm.

Constructive intention and reckless knowledge

The second subjective attitude is an intermediate stage of intention similar to the common law 'constructive intention' and 'reckless knowledge'.¹ In Italy it is termed 'dolo eventuale'. This situation occurs when the defendant acts (or omits to act) knowing that another event will follow, that is, he foresees the occurrence of this event as a certain result of his conduct. In this case the defendant is to be viewed as intending this event although he did not act (or omitted to act) with the purpose of bringing it about.

This situation can occur, for example, when the bank teller, without knowing the illicit source of the money, agrees to carry out a transaction which has been expressly defined as 'suspicious' by the Guidance Notes of the Central Bank and at the same time fails to file the report to the Compliance Officer. In this case his omissive conduct is certainly capable of obstructing the reconstruction of the paper trail. In this situation, will the bank teller incur any criminal liability under s. 648 *bis*?

Two opposite judicial currents divide decisions and texts on this interpretative issue. The first trend affirms that the mental attitude characterised by the uncertainty of one prerequisite of the offence, coupled by the intention to perform the conduct, must be regarded as the criminal intent and is therefore punishable under s. 648 *bis*.

The other judicial trend stretches the concept of 'constructive intention' to that of 'reckless knowledge'. It affirms that, given the nature of the offence which belongs to the category of 'pure conduct crime', where there is no perceivable event resulting from the incriminating conduct, the *mens rea* requires the proof of a *quid pluris* to criminalise the negligent behaviour. To put the same point differently, in this category of offences 'the *mens rea* is linked to the mere intention to perform the conduct described by the provision'.² Thus, it can be held that the mental state of uncer-

tainty, even though aggravated by the foresight of the harm on the part of the defendant, could simply indicate negligent conduct. This judicial trend suggests that these cases of 'negligent money laundering' should be dealt with by the criminal sanction provided for the aiding and abetting of the offender, or the sanction provided for acquiring goods of apparent illicit origin, coupled with the administrative sanction provided by Law 191/1997. Section 5 (point 5) of this enactment states that: 'Unless the fact constitutes a crime, failure to file the reports [of suspicious transactions] ... shall be punishable by a pecuniary sanction of up to one half of the value of the transaction'. This judicial trend has been followed by Sentence 894/95 of 10th October, 1995, of the Tribunal of Florence. The above decision has held that:

'The prospect of the illicit provenance from crime as a mere possibility ... colours the conduct, at the most, with the connotation of negligence with particular reference to the transgression of the duty to report suspicious transactions; in this case the *mens rea* of money laundering does not appear correctly conceivable because it requires that the accused intends to operate on money deriving from crime: it implies the actual knowledge and not the simple doubt with respect of the origin of the assets.'

INTERESTS PROTECTED BY S. 648 *BIS*

Money laundering is a multi-offensive crime in the sense that the same conduct can jeopardise contemporaneously different interests which all require criminal protection. However, the most important among them is the administration of justice. This expression describes the interest of the state to prosecute crimes: the obstruction of the reconstruction of the paper trail, in effect, constitutes one aspect of the financial investigation directed to capture the perpetrators of the pre-dicated crimes. In this respect, some authors hold that s. 648 *bis* contributes to the protection of the public order, given that the wrongdoers could often be involved in the traffic of hard drugs and organised crime. The third interest protected by the provision in question is the economic order

which, in this particular case, coincides with the *par condicio* of the investors. Regarded from this particular perspective it constitutes a device of unfair concurrence.

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- (2) See Zanchetti, M. (1997) 'Money Laundering in Italian Law', Milan, p. 432.

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New Zealand: A Current Analysis of the New Zealand Serious Fraud Office

Shaista Shameem

BACKGROUND

The New Zealand Serious Fraud Office (NZSFO) was set up in 1989 in response to issues arising out of the 1980s financial crisis, in particular the share-market crash of 1987. In the short period of about a year the total sum thought to be involved in corporate fraud schemes in New Zealand had increased dramatically, from NZ\$10m–15m before 1988 to NZ\$50m–70m in 1989.¹ Consequently, the Department of Justice proposed setting up a specialist institution and legal mechanisms for the investigation of serious or complex fraud.

Modelled on the UK SFO, the new structure

was designed for fraud investigation and prosecution separate from, but in consultation with, other government investigative agencies such as the police. The UK model, fostering a unified or integrated prosecution unit, was thought to be appropriate for New Zealand.² The rigorous powers set out in the Bill mirrored powers provided to the UK SFO under Britain's Criminal Justice Act 1987, with some modifications to suit the New Zealand situation.³ The NZSFO Bill was introduced to Parliament by the (Labour) Government in 1989 and became law (the Serious Fraud Office Act) in May 1990.

Journal of Financial Crime is published quarterly.

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Subscriptions: the subscription for the current volume, Volume 6, comprising 4 issues, is £195 in Europe; \$315 in USA and Canada; and £210 in the rest of the world. Price includes postage and packing. Discounts for multiple subscriptions are available.

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