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# Italy: Suspicious Transaction Reporting: Recent Developments in Legislation

Carlo Zaccagnini

## INTRODUCTION

Considered from an international and comparative perspective Italian anti-money laundering legislation appears rigorous and comprehensive. It includes general norms and aggravating circumstances for conspiracy to engage in organised and economic crime; rules which oblige the financial sector to identify and report currency transactions in excess of 20 million lire (approximately £6,600; and hereinafter called 'large currency transactions'); provisions punishing money laundering as a crime; norms which sanction the failure to report suspicious transactions by financial intermediaries; provisions prohibiting 'tipping-off' and rules which provide for the confiscation and freezing of the proceeds of crime, which shift the burden of proof in cases where the accused fails to demonstrate the origin of the suspicious assets. The legislative structure provides, likewise, norms on 'sting operations', establishing an express immunity clause for 'undercover agents'. Lastly, the legislation further defines the parameters of international judicial assistance.

The approach to money laundering prevention and detection remains, however, two-pronged: on the one hand the Italian Penal Code defines all the offences which are criminally punishable, including money laundering offences; on the other hand, enactment 197/1991<sup>1</sup> ('anti-money laundering law') is a law largely regulatory and civil in nature, even though it provides a list of sanctions, both administrative and criminal, for non-compliance.<sup>2</sup>

Essentially, the anti-money laundering law contains three basic principles: the currency transaction report; the customer identification procedures; and suspicious transactions reporting.

The first prohibits the use of cash or any bearer instruments for any large financial transaction.<sup>3</sup> This law also operates to channel financial operations and payments towards specifically approved intermediaries. The transfer of cash or bearer instruments for aggregate values in excess of 20 million lire (or the equivalent foreign exchange

amount) must be exclusively carried out by: Italian and EU credit institutions and other depository institutions controlled by them; securities brokerage firms; post offices; trust companies; companies admitted to trading on a stock exchange; stockbrokers; insurance companies and securities investments fund management companies.

The second guideline, defining customer identification procedures, requires financial institutions to acquire the details of the person involved in large currency transactions or movements of bank accounts in excess of 20 million lire, including 'structured transactions'.<sup>4</sup> The same obligation of identification applies if the transaction is carried out on behalf of another person where full verification of the principal's identity is required. These cash operations are monitored, moreover, both through the use of a special code used by institutions and through the acquisition of the National Insurance Number.

The third guideline of the Italian anti-money laundering legislation is the reporting of suspicious transactions:<sup>5</sup> the remainder of this article discusses in detail this third component.

## An Achilles heel

Suspicious transaction reporting is the Achilles heel of the Italian money laundering compliance system. The system of suspicious transactions reporting was included in the 1991 text of s. 3 of the anti-money laundering law. The section introduced the duty of all intermediaries to report suspicious transactions to the local Head of Police (Questore) which subsequently transmitted the reports to the Special Unit of Currency Police within the Tax Police (Guardia di Finanza).

The results of this obligation from implementation in 1991 to March 1996 have been qualitatively and quantitatively disappointing. From the results of the Ministry of Treasury report to the Parliament of 1993, during the first two years of the enactment of the law, the Head of Police received

only 250 reports. In 1994 the police received 700 reports; in 1995 the report's number exceeded 1,000. In March 1996 the total number of reports was 3,964.

Several zones of southern and insular Italy did not make any reports. During 1994, for example, no reports arrived from Agrigento, Messina and Ragusa in Sicily, and Cagliari and Oristano in Sardinia.

### **Obstacles to money laundering compliance**

The figures above listed were insignificant and marginal by comparison with the corresponding ones in common law countries and Germany. These disappointing performances by the financial sector can be traced back to structural defects of the 1991 law. In particular, s. 3 did not adequately protect the confidentiality of the personal identity of the reporting officer. This legislative lacuna failed to protect credit and financial intermediaries, especially banks of small dimension with few employees, which operated in regions characterised by a high level of criminality. In these zones, where the intimidatory power of criminal syndicates such as Sicilian Mafia, Neapolitan Camorra and Calabrese N'drangheta is more palpable, the reporting officers feared retaliation by reported individuals, especially if the report resulted in prosecution. This issue is clearly expressed in the Guidance Notes of the Bank of Italy in part 3, point 1, which stated that the identity of the reporting officer should be kept secret, especially in the case of a trial.

The second element, which has probably reduced the propensity towards compliance is the lack of a 'safe harbour policy' for the officer submitting the report. Section 93A(3)(b)(i) of the UK Criminal Justice Act 1988-93 provides a defence for the officer who becomes aware or suspects the illicit origin of the money after executing a transaction, if he or she informs the police as soon as possible. On the other hand, under Italian s. 3 anti-money laundering law, reporting a transaction after it has been executed does not constitute a defence for the bank teller who carried out such a transaction. Indeed, the bank operator can be then prosecuted for handling stolen goods, purchasing property of apparent illegal origin, aiding and abetting an offender.

The third reason which presumably affects the compliance system derives from the choice of criminal policy adopted by the Italian<sup>6</sup> Parliament to overextend the utility of the anti-money laundering regulation, which is used for two different purposes: money laundering prevention and tax evasion detection. In other words, the Italian Government attempts to overwork the regulations related to the transparency of financial flows and currency transactions, to extend and strengthen the investigation powers ascribed to the Tax Administration in the fight against tax offences. The corroboration of this strategic purpose clearly appears in the duty to record the National Insurance Number of the client, among the other identity documents required for large currency operations. It should be stressed that in Italy (and in France) bank customers tend to structure their financial transactions in such a way as to evade scrutiny by the bank, mainly for reasons of avoidance or evasion of taxes. This circumstance makes it even more difficult for the bank teller to identify a suspicious transaction under the anti-money laundering law.

In effect, the customer's desire to avoid compulsory reporting, which in general constitutes a ground of suspicion, does not automatically indicate a money laundering scheme. This consideration assumes even more importance after the 'sentenza' of the Constitutional Court 18.2.1992, No. 51. This ruling affirms the principle that information customarily covered by bank secrecy which reaches the police, needs to be passed on in its entirety to the financial administration because bank secrecy is, in effect, secondary to the activity of criminal prosecution and repression.

Given this legislative framework, it is clear that the bank operator faces a dilemma each time he or she has to decide whether or not to denounce an individual who has made a suspicious transaction under s. 3, given that the latter could be an 'innocuous' tax dodger or a hard drug trafficker. In the first case, if the bank teller decides to report the transaction the bank will have lost a client, while in the second case, if the transaction is not reported, the bank operator, according to the norms on wilful blindness, could be prosecuted as a money launderer. In this second case he or she could be required to demonstrate the lack of suspicion of the illegal nature of the assets involved in the transaction, which may not be an easy task.

### The compliance system's double nature

These considerations help to understand the double nature of the handicap of the Italian compliance system. Some of the defects, such as the insufficient secrecy given to the source of the report, and the lack of a 'safe harbour policy' for the bank operator are 'endogenous' to the bank system itself; they can be faced and solved through an intervention on s. 3 of the anti-money laundering law. There is, then, an 'exogenous' factor that impacts compliance: it consists in the high level of tax evasion in Italy, which affects the banking compliance system by mere confusion as to the nature of the activity under suspicion.

There are two strategies which can resolve the 'exogenous variable' dilemma:

- (1) The first method which could be adopted, and which has already been efficaciously used by the US and German Governments consists in the exclusion of tax offences from the list of 'specified unlawful activities'. This could be possible through the restrictive interpretation of s. 648 *bis* of the Italian Penal Code.
- (2) The other way could consist of sharpening and focusing the attention of the bank teller on to the economic meaning of the suspicious transaction. The transaction aimed at the avoidance of tax duties usually implies the optimisation of investment which is pursued via the long-term medium of investment and operation, which is, in general, more remunerative. The scope of a money laundering transaction is diametrically opposite: the launderer does not pursue the optimisation of the investment but the obscuration of the source of 'tainted' proceeds. This may even imply unprofitable operations provided that they effectively conceal the 'paper trail'. Moreover the launderer, to pursue this scope, especially at the layering stage, will imagine and design as many transactions as possible, which naturally will be on a short-term basis. From a temporal and economical point of view, the financial architecture of the launderer will be fluid and resilient; the tax dodger's rigid and stable.

The section below will scrutinise in detail the strategy adopted by the Italian Parliament

to solve the 'endogenous' handicap of the Italian compliance system.

### The new scenario after Decree 153/1997

On 26th May, 1997, the President of the Republic adopted Decree No. 153, which completes the implementation of the European Directive 91/308 on money laundering. The Decree renews the system of reporting suspicious transactions. It introduces separation of criminal investigations from the financial inquiries through the strengthening of the Italian Foreign Exchange Office (Ufficio Italiano Cambi, hereinafter called UIC), which has now become the anti-money laundering law enforcement agency.

After the implementation of the Decree, the UIC now receives 50 reports per day. This result brings the Italian system in line with European standards. This progress derives from the new formulation of s. 3 of Law 197/1991, as amended by ss. 1 and 2 of the Decree No. 153/1997, which has increased the secrecy of the source of the report. The new formulation is based on the interposition of the UIC between the intermediaries and the criminal investigation. Under this provision, once the internal evaluation is completed, the financial intermediary will not transmit the reports to the local Head of the Police but directly to the UIC.<sup>7</sup> The Office now represents a cloak which allows the report to arrive at the investigators of the Guardia di Finanza wrapped in the thickest secrecy. Moreover, the Decree introduces a new s. 3 *bis*:<sup>8</sup> under this provision the identification of the intermediary or the reporting officer is precluded *ex lege*. In this way the secrecy of the report is assured, on one hand, *ab initio*, because it reaches the UIC lacking any nominal reference; on the other hand, because, if a crime's scheme is identified and the eventuality of a trial arises, the investigators must conceal the name of the reporting officer when laying the information before the magistrate.

There is another important innovation brought by the Decree: it acknowledges the new and incisive powers ascribed to the UIC. The Office will now file a technical evaluation on each report; moreover it will request of the reporting intermediary more data and information regarding the report; it will also avail itself of the results of the statistical analysis of the aggregate data to ascertain

any singular anomalies. It will also further investigations in cooperation with the sector's oversight authorities such as the Central Bank, the Ministry of the Treasury, the Consob<sup>9</sup> and the Isvap.<sup>10</sup> Moreover, the UIC will also exchange and 'provide information to anti-money laundering law-enforcement agencies of other states that pursue the same goals' (s. 3(4)). Since the promulgation of the reform, the UIC must, in any case, communicate the negative outcome of the report to the intermediary; this last provision creates useful feedback between the financial institution and the 'honour' status of the client; in other words, this new norm, filling the lacuna of the previous law, exonerates a client under suspicion from wrongdoing by UIC's positive feedback to the financial institution concerning his earlier transaction.

In addition, the Office must transmit 'without delay' the reports to the special unit of Currency Police within the Tax Police and to the Direzione Investigativa Antimafia. The latter, if a report pertaining to organised crime, will inform the Anti Mafia Attorney General who carries on the essential functions of commencing investigation, coordination and control of the inquest undertaken by the single regional Anti-Mafia Units.

After the reform of 1997, the UIC, collaborating both with the law enforcement agencies and the financial intermediaries, together with the Bank of Italy, now possesses powers on which the entire structure of protection of the legal economic system against criminal infiltration relies.

At the same time, however, its new function avoids the convergence between criminal investigations and financial inquiries, which probably constituted the most serious handicap of the previous anti-money laundering law.

## COMMENTS

The Decree consolidates and rationalises the system of suspicious transactions, confirming a choice on the part of Parliament of preferring a collaborative preventive approach to the fight against economic offences rather than a repressive one towards the financial and banking system.

The strategic importance of the reform imparts a new impulse to the countermeasures to money laundering, testified by the increment of the number of the reports received by the UIC. However, there are still some areas of concern,

especially from a repressive point of view, which reduce the effectiveness of the entire legislative structure.

First, France abolished the juridical principle '*societas delinquere non potest*' in 1994, but in Italy it is, unfortunately, still in force. Under this principle, which provides immunity from criminal liability for company and corporations, a business crime can only be prosecuted if it condemns the individual natural person from management, the Board of Directors, or the principal actors of the offence. In particular, this principle also limits the schemes of sanctions — such as the one based on the reputation of the company — which, in other juridical systems have shown themselves to be particularly effective for the repression of business offences. Given this legislative framework, the adoption of economic and administrative sanctions, which are more flexible and rapid, when applied by the authorities of the particular sector, could represent a valid alternative to criminal punishment for corporate offences.

Secondly, it should be stressed that the Enabling Act N.52/1996 prescribes a two-year time limit for the implementation of 'The Unified Anti-Money Laundering Act' which should, finally, consolidate and coordinate the numerous legislative interventions for anti-money laundering in an organic and functional way. The up-to-date Guidance Notes of the Bank of Italy and the Unified Anti-Money Laundering Act represent the most effective armoury for reducing the progression of this macro-criminal offence.

## REFERENCES

- (1) In several aspects, this law anticipates the implementation of the EU Directive 91/308.
- (2) The sentence for 'tipping-off', for example, consists of six months' to one year's imprisonment and an administrative fine of from 10 to 100 million lire.
- (3) Section 1 of Law 197/1991, entitled 'Limitation of the use of cash and bearer instruments', provides that: 'Transfer of cash or bearer instruments in Lire or foreign currency, effected for whatsoever reason between different parties, shall be prohibited when the total amount of the value to be transferred is more than twenty million Lire. Nevertheless, such transfers may be carried out by means of the authorised intermediaries referred to in Section 4 [...]'. Section 5, entitled 'Sanctions, procedures and controls', punishes the failure to comply with the above obligation with an administrative fine of up to 40 per cent of the transferred amount.
- (4) Section 2, entitled 'Identification and registration requirements', stipulates that:
  - '1. Any person who carries out transactions involving the transmission or transfer of means of payments of

ever type in an amount of more than twenty Lire [...], must be identified by the staff responsible therefor and must indicate in writing, on his own personal responsibility, the complete identifying particulars of the person, if any, on whose behalf the transaction is carried out [...]

The revision of paragraph 1 shall also apply when, in view of the nature and procedures of the transactions effected at different times within a certain period of time, even if individually below the threshold indicated in paragraph 1, nonetheless constitute a single transaction. [...]

Complete identifying particulars and identity of the person effecting the transaction [...] shall be filed [by the intermediaries] within thirty days in the data bank.'

4) provides that: 'Failure to set up the data bank in accordance with section 2 shall be punished by imprisonment for a period of months to one year and by fines between 10 and 20 million Lire.'

Section 648 bis, entitled 'Reporting transactions', provides that: 'The principal of the affiliate, of the office, or of any other unit of one of the [...] [financial intermediaries] has the obligation of reporting, without delay, the identifying particulars of the principal of the concern, or to his representative in respect of every transaction which, by virtue of its characteristics or nature, or by virtue of any other circumstance that is recognised because of the functions performed by the entity to which the activity is carried out, also taking into account the economic capacity of the entity, is one to believe, based on the elements available, that the money, assets or goods involved in the transaction may derive from the crimes covered by sections 648 bis and 648 ter of the Penal Code. The identifying particulars covered under the preceding sentence include the execution of multiple transactions or the activity justified by the activity carried out by that person or else, if there is such knowledge, by members of the same household or by employees or collaborators of the same enterprise, or in any case, through third parties [...].'

5) provides that: 'Unless the fact constitutes a crime, failure to make the reports provided for in Section 648 bis shall be punished by a pecuniary sanction of up to one million Lire of the value of the transaction.'

Comments by the American Parliament. See 'Comments by the American Parliament', Department of Treasury, Department of Washington, DC, 25th March, 1996, in GAO/05. Money Laundering, p. 41, Appendix VII.

Second paragraph: 'The principal of the concern shall indicate in the reports he has received, and if he is not the principal, a well founded [...] transmits them without delay before executing the transaction [...] to the data bank without mentioning the names of those who have provided the report.'

(8) Section 3 bis entitled 'Confidentiality of the Report' provides that:

'1. In the case of a denunciation or a report pursuant to Sections 331 and 347 of the Code of Criminal Procedure, the identity of the person and intermediaries [...] that made the reports is not mentioned, even if known.

2. The identity of the person and of the intermediaries may be revealed only when the judicial authorities, in a warrant specifying the grounds, hold that it is indispensable for the criminal investigation they are conducting.

3. [...] In the case of seizure of acts or documents, the precautions needed to ensure the confidentiality of the identity of individuals who made the reports are to be adopted. [...]

(9) The overseeing authority for companies admitted to the Stock Exchange.

(10) The overseeing authority for insurance companies.

#### FURTHER READING

- Andelman, D. A. (1994) 'The Drug Money Maze', *US Foreign Affairs*, July/August.
- Bernasconi, P., 'International Congress of Comparative Law'.
- Bosworth-Davies, R. (1995) 'Definition and Classification of Economic Crime: The Regulation and Prevention of Economic Crime Internationally', Kogan Page Ltd.
- Finney, R. (1993) 'UK Money Laundering Law After the Reforms of 1993', *Butterworths Journal of International Banking and Financial Law*, December.
- Haynes, A. (1994) 'Recent Developments in Money Laundering Legislation in UK', *Journal of International Banking Law*, February.
- Hill, C. (1995) 'Money Laundering Methodology', *Butterworths Journal of International Banking and Financial Law*, April.
- Parlour, R. (1994) 'International Guide to Money Laundering Law and Practice', Butterworths, London.
- Rider, B. A. K. (1996) 'Money Laundering Control', Round Hall, Sweet & Maxwell.

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