

# The Janus-faces of cross-border crime in Europe



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Europe is changing rapidly, which may also have a bearing on its criminal landscape. This does not mean that all sorts of new crime are emerging: a large part of the crimes remains profit-oriented and is committed by known modus operandi. That is the old face of crime. Amidst the traditional landscape new faces of crime can be identified. The internet is such a new face which emerges among others in the sex industry. This is as old as the human race, with all the related abuses and exploitation. But the internet gives it also a new face because of its broad reach and related opportunities, negative as well as positive. This volume provides other examples of this two-faced Janus head of crime. Old criminal trades, such as the illegal cigarette market, synthetic drugs and criminal exploitation of human labour, but also new criminal specialisations, new professional and industrial skills developed by 'old' ethnic minorities on various crime markets in central Europe. Meanwhile, the on-going illegal migrations continue to exert their influence on the perception of crime: while the actual prevalence of most types of crime decreases, fear of crime continues to increase. The flow of migrants is unrelated to this outcome but it impacts nevertheless on the perception of crime.

This volume of the 18th Cross-border Crime Colloquium, held in Bratislava in the spring of 2017, contains the peer-reviewed contributions of 22 European experts and up-and-coming researchers. Their chapters cover a broad field of crime in which the double faced Janus head can be discerned: illegal migrants, criminal markets, corruption, money laundering and organised crime, highlighting many new aspects.



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The Cross-Border Crime Colloquium is an annual event since 1999. It brings together experts on international organized (economic) crime to discuss the latest developments in empirical research, legislation and law enforcement, with a special geographical focus on Western, Central, and Eastern Europe. The Colloquia aim at building bridges in three respects: between Eastern and Western Europe, between scholars and practitioners, and between old and young. The Cross-Border Crime Colloquium has previously been organized in:

2016 New Castle upon Tyne, UK	2006 Tallin, Estonia
2015 Prague, Czech Republic	2005 Sarajevo, Bosnia & Herzegovina
2014 Sarajevo, Bosnia & Herzegovina	2004 Berlin, Germany
2013 Cambridge, UK	2003 Airing, Germany
2012 Manchester UK	2002 Ljubljana, Slovenia
2011 Tilburg, the Netherlands	2001 Bratislava, Slovakia
2009 Gent, Belgium	2000 Budapest, Hungary
2008 Belgrade, Serbia	1999 Prague, Czech Republic
2007 Prague, Czech Republic	



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# Introduction: the multiple meaning of the Janus face in crime

*Petrus C. van Duyne*

## **The double face above the door**

“Panta rhei”, all flows, was one of the statements attributed to the pre-Socratic Greek philosopher Heraclitus. It looks like a platitude but following its tracks one may be surprised of the outcomes. Not because things change as such, but the ways they take place and how temporary they prove to be. Nothing has a final destination or an end-meaning as is symbolised by an ancient myth and expressed in the double sided Janus face. Why jumping from an old Greek philosopher to a respectable Roman god, probably with some Etruscan relatives? He was the god of “the beginning and end, opening and closing”, which can be associated with the “all flows” principle of Heraclitus. With this meaning his face landed above the *ianua* or door, and by further association gave the opening month of the year his name. But why his double-faced appearance? This was the result of a punishment by the upper-god Jupiter because of Janus’ transgression of hiding a ‘refugee god’, namely Saturnus. The latter (married to his own sister) had eaten his own children to prevent being dethroned by them. This incurred the wrath of Jupiter which was extended to Janus who since then had two faces. Despite his crimes he was worshipped as an important god which of course disappeared with Christianity. However, the mysterious two-faced head did not disappear and was found in many places and newly interpreted. Dissected from its godly origin the image of two faces got the association of duplicity. The lemma of present dictionaries mention: a double dealing personality. Thus the Janus face, having a criminal origin, can also mean two stories from one source. But which one is true? Combined with ‘everything flows’ this Janus concept is a suitable metaphor for studying issues with multiple facets, uncertainty and ongoing change, such criminality.

What is the Janus face of crime? That is a too broad question to answer because the Janus head can be found above every door through which crime or criminals pass, whether coming or going. If we want to detect a double meaning we must pass the door under his austere stone face to see what is on the other side because the metaphor is not necessarily universal. The other side may be empty: for crimes such as murder, assault, rape or theft it is unlikely to find ‘another face’ of crime, though a defence attorney will always try to suggest one. With other forms of crime a ‘second face’ would not be far-fetched. For example, one has ‘crimes for profit’ on one face but without a direct victim on the other side. Or, the ‘victim face’ does not look ‘unhappy’ at all, because of provided coveted illegal goods and services. With various economic crimes ‘abstract victims’ have to be dragged to the fore: ‘the state’, the ‘public fund’ or even more abstract ‘the community’ or the ‘general morality’. This vague or abstract face of crime is juxtaposed with the common consumers who are satisfied to have been served with: illegally crossing the borders, having a cheap cigarette or a joint or any other cheap illegal product having been made expensive or scarce by the authorities now parading as the primary victims of crime. They may rather be victims of own policy as may be argued about the global anti-drug policy (Bruun *et al.*, 1975; Van Duyne and Levi, 2005; Paoli *et al.*, 2009). Some criminal ‘services’ have no ‘happy face’ at the other side of the door: they may be a prelude to personal tragedy and victimisation: *e.g.* human trafficking and sexual exploitation after the ‘smuggling service’ of a safe border crossing.

The Janus face of crime has also a temporal side: the ‘pantei rhei’ door to the future. The New Year starts with the first of Janus or January and so figuratively the ‘new year’ of crime. Is there ‘a criminal futurology’ helping us to imagine the future Janus face? Some parameters are known: for example, a greying population with less crime, more migrants (for a better life or driven from hearth and home by war, prosecution or climate change), while the market of prohibited substances may prove to be as resilient as ever (UNODC, 2016). Nevertheless, there are important uncertainties. There is the cyber dimension in the commission of property crimes, hate and sex crimes.

An uncertainty of a different order is the dual political factor in dealing with crime: the public imagery or fear of crime is an emotive face with an

enormous political potential. ‘Fear of crime’ is an uncertain, intangible reflection of the actual state of crime. With a usual ‘upwards bias’ –believing more than there is – fear of crime is like ‘soft wax’ in the hands of political manipulators for moulding a suitable political, rather populist face. To this end some concrete elements must be added. Today, in the industrialised world, it is the (Muslim) migration issue being grist to the mill of populists: kneading migration plus ‘crime in the mind’ into a fearsome face. It is a guaranteed winning ticket for which a politician does not even need real crime or migrants, as is demonstrated by the election results in the quiet orderly Slovenia, May 29 18. The state of affairs in Hungary is also a good illustration for this psychological fear-of-crime-kneading: entrenched behind its barbed wire and fences the Hungarian people display a xenophobia and a fear of a ‘Jewish conspiracy’ though with few (Muslim) strangers or sinister Jews around. The exception is the philanthropist Soros whose NGO left the country in April 2018.

Indeed, the strength of the Janus face metaphor does not consist of an unchangeable stone sculpture, but in the flexibility with which one of the sides can be shaped and kneaded.

## **The alien Janus face**

Janus as the god of the entrance is a proper metaphor of the ‘alien’ trying to enter the European Union. However, instead of a mysterious god there is the European Commission guarding the entrance – to most citizens not a less mysterious being. Whether that is an improvement compared to a capricious ancient god remains to be seen. The EU is a rule based community of states, though in its functioning it may be as capricious as any ancient god. Also, there is not just one door: there are as many as there are member states each with its national Janus face, albeit with EU regulations at the doorposts. Behind the ‘national door’ there may be a hall with new doors leading to new uncertainties: what face is there on the other side?

Of course, a rule based EU tries to avoid the accusation of being capricious. Rules are intended to reduce uncertainty. How that is implemented is set out in the chapter on trafficking victimisation by *Gwen Herkes*. Victimisation is not only an important existential event, it is also important as

a practical yardstick to manage the inflow of migrants and thus defend the European borders and security, however, with a ‘touch of humanity’. While the maintenance of security is one of the basic tasks of the EU and national authorities, there is also the harm dimension: the harm suffered by the migrant and the harm that may be done to the interests of the EU member states. According to the author ‘harm’ is a Janus face of its own, but with lack of clarity on its back side. Which harm is recognised? That depends considerably on who is harmed and how as that determines the allocation of the important ‘*victim label*’: victims need protection. Thus ‘trafficking’ implies an axiomatic victim status with all the protection measures it entails. Herkes gives an interesting exposé of the attributes of the ‘ideal victimhood’: young, female and thus vulnerable and exploited against their will. It helps to be trafficked by ‘organised crime’ which is important for the presentation of a threat dimension. Such a dimension also fits what Bouklis (2016) describes as the “victim industry” complex. If the victim-of-trafficking situation applies, Directive 2004/81/EC obliges Member States to apply a variety of protective measures to the victim. Of course, one should not have contributed to one’s own victimisation: the crime and harm should have happened to the victim and one should not have ‘tempted fate’. Therefore economic migrants are not entitled to victim status: they may have been served willingly by human smugglers who provide a safe border crossing. However, the faces of trafficking and smuggling are blurred: smuggled persons can be victims of “ruthless criminal networks” or may land in such an exploitation situation (modern slavery) that it can be qualified as trafficking. Nevertheless, they are not the ‘ideal victims’ and the author notices that the harm that came to them easily slides into the background. The author pleads for more equality in treatment of both groups based on their own experience.

There is another side of the ideal victimhood: the criminal money making opportunities under the cover of humanitarian emergency. This has been discussed by *Giacomo Orsino* and *Anna Sergi* concerning the endless flow of migrant to Italy and from there to Northwest Europe. Because of the harrowing situation funds in the inverse direction. However, emergency funding and aid allocation are rarely connected to a transparent financial management. Moreover, when such funds managed in a loose way land in traditional mafia territories such as Calabria, one does not need to be clairvoyant to see that the ‘ndrangheta soon takes advantage of these

opportunities. As a matter of fact they are already interwoven in the corrupt local public administration. The authors speak of a “concurrent predatory governance”: the local corrupt government and the mafia both dip into the pond of emergency funds. This local corrupt involvement was predictable but the mafia went beyond these territories: also emergency hotspots in Lampedusa and Rome were affected by mafia entrepreneurs where they met a similar and opportunistic greedy attitude.

We are not short of lofty recommendations while we witness a strong political tendency not to let migrants come even within sight of the EU gate: in June 2018 a rescue ship was not allowed into the harbours of Italy and Malta, on the Balkan side Europe looks like a continental gated community. All to no avail: dreams of better life keep luring and there are persistent rumours among migrants that behind some national doors migrants’ prospects are better than behind others: Germany and England are most often mentioned. But how to get there when behind each gate there is another gate with again that ugly stone face of some god that no migrant understands. They look all grim, as they have always been to new comers. At the end of the 19<sup>th</sup> Century the protestant Americans looked suspiciously at the Catholic beer and wine drinking migrants from Italy and Poland (Krabbendam, 1995). Now the Poles and Italians look the same way at Muslim immigrants. Poland does not want to have any of them, while in Italy migrants from Africa and the Middle East simply are there: shipwrecked in front of the island of Lampedusa or Sicily. *Anna Di Ronco* and *Anita Lavorgna* describe in their chapter how they are looked upon by the local population. This is not an abstract matter, but something that is being sensed in daily life: foreign people in hangouts which may be located anywhere – in the parks, play grounds and around other public facilities, such as railway stations. Though this can cause some public nuisance, much of the doings of migrants is soon interpreted in criminal terms. For this a new term has been coined: ‘crimmigration’ referring to the associated perception of crime and migration. As from other research it appears that the media play a role creating and maintaining the association of crime and migration (Antonopoulos and Papanicolaou, 2013), the authors analysed the two local newspapers in two Italian cities for the time span between 2008 and 2017. To find out whether the way the migrant problem was presented was influenced political colour, they took a city run by a centre-left coalition, Udine, and one by a centre-right coalition, Padova.

Regarding the political colour of the two municipalities there were no distinctive differences in the mainly crimmigration-like publications of the ‘migrant problem’: centre-left or right political colour displayed the same bias towards a negative reporting. In both cities asylum seekers as often seen as fake, ‘bogus’, spreading diseases and degrading the historic city centres: ‘disorderly and criminal’. The fact that a large part of those labelled in this way has fled from civil war and oppression gets less attention. Rather, fears are sensationalised by repeating the negative narrative frame of ‘threat, ‘siege’ or social and physical disorder or ‘*degrado*’.

The chapter by *Miroslav Scheinost* on the migrant issue in the Czech Republic does not only give a short and clear account of migration in and through the country in the past decades, its findings also show that public opinion, policy makers and media display different faces to migrants and what is perceived as a ‘risk of crime’. For example, the Ukrainians and the Vietnamese form a large part of the (illegal) migrant population. The Ukrainians were recruited for seasonal work and worked under (‘quasi-serf’) conditions which together could be considered as ‘exploitative’ and therefore trafficking. The Vietnamese, instead of being victimised, are engaged in various serious crime-enterprises, organising their businesses through their ethnic networks (This is described in a later chapter). Altogether serious crimes by an ethnic organised crime groups that has a high conviction rate. Nevertheless, these crimes and the criminal ethnic groups hardly evoke the emotional reactions as is the case with the inflow of migrants from African and the Middle East countries. The latter are publicly more associated with crime: migrants (roughly from Africa or Middle East) are seen as a public security threat, among others because they allegedly contribute to the increase of crime. However, in reality the crime rate in the Czech Republic is falling, as is the case in other European countries. However, perceptions prove to be ‘facts and figures resistant’. Despite these facts populist politicians still get away with this mis-representation and succeed with their anti-migrant stand in appealing to the electorate.

## **The transnational face of organising crime**

With the classical Janus face we think of a bearded severe head hewn in stone. Is that not dusty? What about an updated Janus face above a ‘virtual

door' that may just as well be the gateway of human traffickers for on- or offline sexual service? Why should potential participants – and among them victims – not enter or be lured by smart online advertisements on the virtual sex market? To answer this question *Parisa Diba, Georgios A. Antonopoulos* and *Georgios Papanicolaou* carried out an ethnographic research project in addition to the extensive interviewing of experts in the field. For the ethnographic investigation the authors also entered a multitude of websites – also the 'Deep Web'. It is a really pioneering work with still many questions unanswered, and at the moment yielding the Janus face, partly shrouded in mist. Yes there are indications that criminal organisers use the Internet and modern communication tools to recruit women from low income countries to the EU and the UK. Geographically widely spread advertisement campaigns, with the same spelling mistakes and same mobile numbers, raises the suspicion of a(n) organising individual(s) or a crime group. But do not jump to conclusions: there appears to be a lot of mist and the negative and positive faces are both present. The researchers describe 'red-flag' situations in which it is reasonable to suspect a plausible new online trafficking intended for the old-fashioned sex exploitation – 'offline' in the escort firm, behind the windows or on the streets. But a smart sex worker can also use the Internet and the mobile telephone as liberating facilities, keeping pimps at bay, recruiting clients online and providing a choice between an online, virtual, or offline, physical sex service (Bartlet, 2014). There is no hard evidence which mode of sex service will become dominant: the faces are changing all the time and not necessarily towards more threats.

The door with the two faces is sometimes almost a real thing rather than a metaphor. This is certainly the case where migrants move to and fro through the 'door': some smuggled, other trafficked, and some migrants operating as seemingly legal entrepreneurs, but fraudulently cutting edges to remain competitive with their local semi-legal enterprises. That is case in the highly confusing situation of the Chinese migrant workers and the Chinese garment industry in the city of Prato, Italy. In his provocative chapter on transnational crime of Chinese origin in the EU *Jurij Novak* sheds light on this criminal landscape. First the author does away with a lot of myths around Chinese Triads and Chinese migration of whatever modality. After this tidying up, the author goes into the organisation of crime in the textile and garment industry in Prato. Amidst a large Chinese

minority of 30.000 to 40.000<sup>1</sup>, of which a substantial part remains illegal in the country, Chinese entrepreneurs have established a partly underground garment industry. With an annual estimated profit of 2 billion Euros they serve any chic Italian brand (or forge them). To keep the production costs low and the products competitive, all kinds of law breaking have been observed. By any legal qualification the labourers can be considered as exploited or in a state of modern slavery. Despite that, they have little victimisation awareness, industriously working in long shifts after which they return to their crowded dormitories. Their main concern is to transfer their savings home. Those who pull the strings lead complex production organisations as ‘bourgeois’ crime entrepreneurs, dwarfing old fashioned organised criminals. For the author these findings lead to the question: shouldn’t we investigate the more serious economic forms of organising crime? That is, not focus on the Chinese human smugglers, but the wealthy underground entrepreneur who presents the ‘decent’ entrepreneur’s face but exploits his fellow countrymen.

This is more than a pious wish, to which I would like to subscribe. Nevertheless, we should not close our eyes to the extensive manufacturing centres and trading networks supplying Europe’s craving customers with a variety of drugs. This is addressed by *Miroslav Nozina* who describes the emergence of a professional Vietnamese drug trading and industry sector after the 1990s. Due to its history in the socialist era the Vietnamese lived already in the Czech Republic since the end of the Vietnam War (1975). Most were sent by the Vietnamese government as labourers in the Soviet Bloc. Others, from South Vietnam, fled from the ‘liberation’ by the new North Vietnam authorities: many of them as the ‘boat-refugees’ heading to Australia, America and Europe. Together they form a diaspora of about three million Vietnamese.

After the dissolution of the socialist states the Vietnamese remained in countries such as Germany (East Berlin; von Lampe, 2005) and the Czech Republic (CR): so to say, they were already through the gate. In the first decade after the fall of ‘The Wall’ they kept themselves economically afloat by engaging in excise fraud, mainly concerning cigarettes. As Miroslav Nozina describes, after 2000, the Vietnamese in the CR switched to

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<sup>1</sup> All numbers in this volume will be in normal European notation: a comma for the decimals and a full stop for the thousands.

another economic pattern: the professional and wholesale cannabis plantation and after that the industrialised production of synthetic drugs: methamphetamine. Both branches produce a volume that far exceeds the domestic consumption which implies the exportation of surplus products through the criminal Vietnamese networks to surrounding countries. Though in diaspora the Vietnamese traders maintain ties to their home country and surrounding region. Not so much because of homesickness, but also because these open doors facilitate the importation of precursors as well as the re-export of finalised products. Geography helps the continuation of cross-border business: the Vietnamese psychoactive products are of good quality and price, and Germany, Poland, Austria are good selling areas with virtual open gates behind which other Vietnamese networks can be relied upon.

There are more places where the Vietnamese are active in the underground economy: Berlin, the place to be for the illegal cigarette retail trade. The development of this remarkable market described by *Trang Ngyuen* and *Klaus von Lampe*, illustrated the two faces of a persistent open illegality open on the orderly Berlin streets with a crystallised social and commercial balance between the participants. The Vietnamese, residing as labourers in the DDR, also found themselves laid off after the fall of The Wall, and virtually took over the existing Polish illegal cigarette market in Berlin. Overcoming an initial violent phase, the market settled. The authors observe a kind of in- and outflow of vendors: older vendors moving to licit jobs to be replaced by a new Vietnamese, fleeing their country for political or economic reasons. Though breaking the law, they are supposed to heed the informal market rules: pay for your vending place and your stock of cigarettes. And do not challenge law enforcement, being understaffed and more interested in wholesale smuggling and transport than in the open street market. Breaking the law is one face, keeping it orderly another.

## **(Organising) crime; Janus respectable faces?**

Getting over the border, or through our guarded Janus faced door with prohibited goods or human beings, whether or not intended for (s)exploitation, remains morally reprehensible. But that can also be considered as a result

of labelling of what is qualified as blameworthy. Of course, there are degrees of blameworthiness: smuggling can be a humanitarian act and safe lives; labelling abortion as evil seems at present to be a ‘prerogative’ of Catholic parties such as in Poland; and amidst the international discussion on the liberalisation of cannabis products one can find all sorts of labelling. This view may smack of a suspicious ‘moral relativism’ few dare to avow openly. Nevertheless, labelling a certain conduct as criminal is to a large degree a prerogative of the powerful: they can make exceptions to ‘crime labelling’ by excluding economic and financial misconduct or neutralising blameworthiness and focussing on lower-class criminality.

However, such dividing lines are not so easy, as *Anna Markovska*’s and *Alexey Serdyuk*’s chapter on the Ukrainian arms trade illustrates. Naturally, arms trade is never neutral: it is about violence and death as the final outcome. But the state has the monopoly of violence and thereby life and death, and as such is in this matter the ultimate labeller (Ruggiero, 1996). However, what if the state trades with the tools of death, weapons. This yields a morally awkward situation. The face of the state should radiate morality, but its commercial face turns a blind eye towards trading the tools of death as a commodity. There we are right in the middle of the international arms trade dilemma. Regarding Ukraine all ingredients for a ‘wrong’ story are present: a bitter inheritance of the Soviet Union, consisting of mal-governance; corruption and a huge stock of obsolete (nuclear) arms. Still needed are legal buyers who must have the ‘official right’ to buy arms internationally for which an end-user certificate is issued. There is no shortage of such clients, obligatorily mentioned in the end user certificate (but forged as appeared in a few deals). Or otherwise at present, on a lower official level, there are ‘patriotic battalions’ fighting in the Donbas against Russia-armed insurgents. These Battalions are partly provided with arms from the grey market or otherwise by simple theft and embezzlement. Who are the law breakers in this market? That is unambiguously determined. It depends who does the labelling: in this domain it is the elite, in the government as well as the arms industry: they have the power to label what is ‘criminal’ and must get the attention of law enforcement (Ruggiero, 2010). Thus, the elite enjoys a substantial extra income through fraud and embezzlement, virtually with impunity. After all, they have the power to determine which face of the arms trade is criminal or not. High-level arm trading will certainly not be labelled as such.

Obviously such a manipulation of labelling by the elite is not restricted to the arms industry. It is also relevant for other fields such as economic and environmental crime, grand corruption and embezzlement. Naturally, such a manipulation is only required when something has gone wrong. If the profitable law breaking has succeeded, the first concern is safeguarding the loot. That is a risk, because if the loot is not cash it must be hidden within the financial system and can potentially be connected to a (suspicious) beneficial owner. The latter has often no interest in becoming known for which he seeks the services of firms offering financial ‘secrecy products’, mostly available in traditional off-shore centres (Walter, 1989). However, as *Matjaž Jager* describes in his chapter on the Panama Papers and Paradise Leaks, this off-shore secrecy service provision is not perfectly safe. These leaks had worldwide repercussions, for the exposed persons and firms as well as the states that now has solid evidence to settle accounts with their tax dodgers. The author summarises the harm done to the public fund of almost all states: enormous tax evasion, fraud, money laundering etc. Despite the mainstream discussion on international unaccounted money flows, one may wonder whether states should be their ‘brother’s keeper’. Should a state that has no excise tax on wine lend support to a state that imposes very high taxes? Forcing ‘zero-tariff’ countries to comply when it does not even know the relevant tax measures is at odds with the sovereignty in tax matters. Its implications should at least be investigated. This also concerns the representation of the evil offshore centres, where tainted moneys are supposedly hoarded. That may be a partial myth: Van Duyne and Van Koningsveld (2017) found out that much of the hidden funds eventually ends in bank accounts of onshore countries of which the government complain about the ‘manifold harm of tax havens’. They rather look within their own (financial) gates with a big smiling Janus face.

What does the author remark about Slovenia? According to the author, Slovenia proves to be a neatly tidied-up country: after Finland the second best country in terms of the in terms of secrecy on the *Tax Justice Network Financial Secrecy Index* (2015). Furthermore it has a moderate profit tax rate (19%) and is certainly no ‘tax hell’ for which you need a ‘tax haven’ to mitigate the fiscal pain. The number of Slovenian legal and natural persons that featured in the Panama Leak and Paradise Paper is moderate: about 80 beneficial owners of offshore corporations. Naturally, this caused some indignation to which the government responded by promising action

which it fulfilled by installing a strategic working group. Nevertheless, it is also smiling with two faces. Slovenia wants join the (EU) efforts to stem the flow of hidden wealth and the use of artificial tax arrangements. However, at the same time it continues the competition in the global law tax race for which it is better not to have the reputation of a ‘tax hell’. In this regard it stands out compared to countries which while beating the drum against tax evasion and money laundering remain silent of their own states (Delaware among them) or dependencies (Channel Islands) performing many offshore functions, though without naming it as such. As a matter of fact, if the statement that the offshore financial industry is little more than a global embezzlement support scheme, few states resist the temptation to receive the fiddlers’ loot, while presenting to the global moral community their virtuous face.

## **Virtuous faces**

Naturally, the idea of the Janus face is intriguing because it suggests something hidden, a sinister ‘true face’. But the ‘*condition humaine*’ is usually neither sinister nor intriguing; it is just banal. The other face may be expressionless, empty. Many governmental ‘gates to virtue’, morally shining at the front may have such an empty face on the inside. Or, when that is politically required, some superficial cover is put onto it.

Fighting corruption and money laundering may be good examples of virtuousness with a rear side. Actually, there is a preference to combine them: fighting corruption through fighting money laundering. This is the line of policy making and implementation by the Financial Action Task Force on money laundering (FATF). Isn’t there another face? That may depend on the breadth of the scope.

The chapter by *Petrus C. van Duyne, Jackie H. Harvey and Liliya Y. Gelemerova* broadens the scope beyond corruption to include criminal breaches of integrity. Subsequently they analysed how the (FATF) dealt with this broadened scope. After all, when there is an exchange of (monetary) favours against an illegal decision, then there are criminal proceeds to be laundered. Though that must sound like a simple truth, it took fifteen years for this to sink in. Then there was an outburst of activities in 2005 followed by a number of ‘silent’ years till 2009/10 when an intensified

awareness campaign was launched. In terms of our metaphor, the empty face of policy making was from time to time plastered over with some stern features. But how solid is this plaster?

To that end the authors analysed the FATF documents, such as: the annual reports, policy and guidance papers as well as the mutual country evaluations in two years in a sample of member states. They also made for each country a ‘reference count’ (of corruption subjects) and compared the outcomes with the Corruption Perception Index of Transparency International (TI Index) and the compliance rate for integrity relevant recommendations. However, between these diverse measurements the authors could hardly find a correlation. As they put it: “nothing correlates with anything”. This implies that all efforts of the FATF have led to nothing measurable: the plaster appears to be skin deep.

That is a serious conclusion. It implies that awareness raising by means of (overfilled) seminars and issuing guidance reports, though lofty measures, remained without any discernible effect. Parallel to this we have the MERs in which corruption is increasingly (but with many variations) mentioned as important, while one of the initial the question *how corruption damages the effectiveness of AML/CFT systems* remained unanswered because of lack of reliable data. How serious should we take the stern face of the FATF when it does not address the question about the reliability of its output?

This is not the only unanswered question which passes silently underneath the Janus face. One of these unanswered but urgent questions concerns the threat of money laundering and all that is conceptually connected to it. *Michele Riccardi* and *Riccardi Milani* discuss in their chapter the opacity of business ownership and the connected risk of money laundering. That is less straightforward as one would think. We begin by facing a conceptual tangle in which one element, the consequences of the threat, remains undetermined. This is not solved: neither by the authors, the FATF or the European Commission. Without being able to determine the consequences of a laundering threat, except in vague general terms, the whole formula ends in mist. Nevertheless, all stakeholders continue to say “it is significant” with which the shortcoming is declared solved.

The authors, working in 2015-2017 in an international consortium led by *Transcrime*, tried to solve the deficit by working with empirical data from Italy, the UK and the Netherlands. It was a heroic and pioneering

attempt processing empirical data with a transparent methodology. Naturally, such an innovative project raises a multitude of new questions, particularly about the database and the rough clustering of economic sectors, such as bars, restaurants, hotels or the entertainment and gambling industry. In countries such as the Netherlands, strictly controlled licencing revealed occasionally an inflow of unexplained investment. This happened with bars and restaurants, but these were usually small scale enterprises and the intended investment could rarely be interpreted as a manifestation of ‘organised crime’ penetration (Van Duyne and Van de Vorm, 2016). Where is the threat?

Nevertheless, the approach is worthwhile to be replicated and to be used as a sieve to select subjects for further refinement and deeper investigation. This applies particularly to the Beneficial Owner distance and the cross-border complexity of corporations. In addition, to address such questions the methodology must be more refined while existing potential refuting data should be heeded. This applies to the economic sectors as well as the actors. As a matter of fact, there may be far fewer sophisticated offshore ‘company illusionists’ than this research suggests (Van Duyne and De Zanger, 2014). For sophistication we will have look up, economically and socially, at the higher levels of economic and financial crimes and grand corruption. That encompasses ‘white collar crime’ or state crime as mentioned in the chapter of Anna Markovska and Alexey Serdyuk.

Is that a Janus face with a white collar? That looks anachronistic, but true. At the other side of Janus we enter a room of ‘mirror images’: business pretensions, deceptive constructions, and in the end one or more disappearing players in the fraud game. An example of this is provided in the chapter on VAT fraud, written by *Tomáš Strémy, Natália Hangáčová* and *Martin Kotovský*. We all know VAT fraud from our daily payments for goods and services, which we rarely notice because so much is ‘inclusive’. Of course, we notice it when the painter or handyman asks; “With or without receipt?” And we know that ‘without’ is some 20% cheaper. That is basic, but the authors go above this: they provide an elaborate description of the way VAT fraud is organised. Or is it organised crime? The authors do not engage in this sterile dispute: what they analyse is the organisation of complex scams, for which the execution always requires the full application of organised crime acts. But, in case of criminal investigation or prosecution, we do not find an ‘organised crime’ charge of participating in

a criminal organisation. It is remarkable to find a mention of organised crime in the introduction, but when it comes to the application of criminal law there are no examples: no grim Janus face in cases of VAT fraud schemes but again only a ‘white collar smile’?

That is confusing when compared with what *Anna Maria Maugeri* tell us about the way the Italian law maker and law enforcement agencies intend to address ‘polluting’ the economy by infiltration whether by the Mafia or other forms of organised crime. In addition to bringing the perpetrators to justice, the Italian legal system has a broad assortment of tools to tackle companies that are being infiltrated or are suspected of being instrumental to the Mafia or Mafia-type organisations. Companies can be confiscated, lock stock and barrel in a criminal procedure or can be handled within the framework of *civil* or *administrative* proceedings. The latter preventive measures are interesting: entrepreneurs who are too close to the Mafia or other organised criminals run the risk of losing their freedom of management because of being put under judicial surveillance. This is a two-sided sword: it hits the Mafia economically and financially, while it ‘cures’ the firm placed under judicial control. The author calls it a “therapeutic manner of management”, allowing the continuation of the firm, thus inflicting no harm to staff and third parties. Compared to the criminal law measures of confiscation and forfeiture of measurement these measures are less invasive.

Though according to this exposé the Janus face may look benign at the other side, one should consider carefully what is behind that: a lower burden of proof to assume an organised crime threat. Lowering the burden of proof is justified in view of “the need to repress illegality and the need to safeguard the ‘social value’ of the enterprise”. Is that another step in the levelling of protecting dikes against the power of the state? Do we move into the direction of proven guilty unless the accused can prove his innocence? Are the administrative law monitoring of licencing in the Netherlands or the ‘unexplained wealth’ observations and related court orders in the UK, Ireland (King, 2015) and Australia, similar steps in the direction of an “entire sanctioning system is rational and flexible”, which are euphemisms of more repression and power to the state?<sup>2</sup>

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<sup>2</sup> [https://rusi.org/sites/default/files/201709\\_rusi\\_unexplained\\_wealth\\_orders\\_keen\\_web.pdf](https://rusi.org/sites/default/files/201709_rusi_unexplained_wealth_orders_keen_web.pdf)

Developments in the eastern member states of the democratic European Union reminds us to be careful in balancing rule of law interests and to put a clear warning sign under this Janus face: Beware of the Power of the State.

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# **The Janus-faced victimisation in human smuggling and human trafficking**

*Gwen Herkes*<sup>1</sup>

## **Introduction**

In 2015, the European Union was confronted with an enormous number of migrants who wanted to reach a safe destination within its borders. This ‘refugee boom’ resulted in a flourishing environment for economic activities like human smuggling (HS) and human trafficking (HT) due to the higher demand for ‘migration services’, namely crossing borders and working once arrived at the destination. For months, the media reported on this topic with poignant footage on migrants arriving in boats in Greece and Italy being left to their fate by smugglers. Because of the increased public concern on these illegal and harmful activities, the phenomena of HS and HT turned once more into hot topics resulting in several new European policy initiatives.

Due to the increased (cr)immigration (explained later), the difference between several migration and criminal law measures is blurred. This development is also noticeable concerning HS and HT. The last decennia, the European Union claims their policy developments on migration, HS and HT to be established on human rights considerations for these victims. In this chapter, these claims of human rights are critically analysed with a focus on the used victim discourse and the underlying reasons for it. This analysis reveals within the EU policy documents on HS and HT a Janus-faced victimisation and a double instrumentalisation of the victims.

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## **Illegal migration: human smuggling or human trafficking?**

Since the so-called ‘refugee crisis’ that started in 2015, there has been significant media coverage on the topics of migration, human smuggling (HS) and human trafficking (HT). HS and HT are two types of irregular migration, which are regularly confused. This is not only a flaw of popular discourse since the two concepts are even often used interchangeably in scientific literature (Aronowitz, 2001). Even though these phenomena often might concern victim populations with similar characteristics, it is important to distinguish them clearly from one another, especially because the distinction goes hand in hand with some important policy implications (Vermeulen, 2006). Several legal entities already created their definitions of HS and HT with the United Nations being the first to elaborate two protocols in the combat against HT (UN, 2000a) and HS (UN, 2000b) arising from the fight against transnational organised crime. The focus of this chapter, however, is on the later developed definition of HT and HS in the policy documents of the European Union.

Human trafficking is defined as:

“the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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” (art. 2 Directive 2011/36/EU).

Human smuggling, on the other hand, is defined as:

“Intentionally assisting of a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens. Or intentionally assisting, for financial gain, a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.” (art. 2 Council Directive 2002/90/EC).

The above-mentioned definitions distinguish HT from HS. Firstly, the definition of HT does not include the requirement of border-crossing to establish the crime. This means that a person can be trafficked even within the borders of just one country. However, for HS, the illegal border-crossing is a constitutive element of the crime. Secondly, the most important condition to constitute the crime of HT is its intended *exploitative* nature. In case of HS the purpose of exploitation is not required, only the intention to ‘help’ someone crossing a border. The definition moves even further away from this exploitative purpose since strictly speaking even the help from a humanitarian point of view (without any financial benefit) is included in it.

## **Evolution of the EU policy on migration matters**

The creation of the policy on HS and HT cannot be discussed without considering the emergence and the development of the general migration policy in Europe. Migration is a phenomenon of all times but the debate surrounding it has changed over time. Even though legal and illegal migration should not be lumped together, the policy initiatives on these topics have gone through a common evolution.

After the Second World War most western European countries considered migrants as extra manpower willing to work under very interesting and beneficial conditions that the employers could not meet in the internal market (Huysmans, 2006). At this time not much political attention was given to migration policy since most of the countries were favourable towards migration to enhance their economic growth. Therefore, the regulation of the legal status of these migrant workers, who were at the time only temporary residents, was not listed as a priority for many years. This also meant that the public opinion and political discussions on this subject was not as polarised as these days.

It was not until the late 1960s and 1970s that a turning point became apparent. Following a protectionist socio-economic view, the migration regulations in many of these Western European countries were strengthened after realising that these migrants were more interested in permanent residence rather than just being a temporary guest worker. Together with this development migration and migrants were more often linked to the

disturbance of the public order (Ugur, 1995). These initiatives were mainly national issues because the migration policy was at that time not yet a core issue in the development towards a European Union (Twomey and Korella, 1995).

A first step towards a more protectionist common European region was taken with the creation of the Regulation 1612/68 of the Council, which made for the first time a distinction between the freedom of movement for nationals of a Member State and of third country nationals (Ugur, 1995).

Migration policy in Europe at that time was mostly based on socio-economic concerns. However, all of this started to change from the 1980s onwards. This turnaround was based on the changed perception of migrants, especially because of the changed attitude regarding (bogus) asylum seekers. The asylum procedure was increasingly considered as an alternative 'entrance procedure' abused by economic migrants (who cannot be considered as legitimate refugees or asylum seekers) who want to obtain a right to stay and work in Europe. This change of attitude for many Western European countries resulted in a more important role of the European institutions in operationalising a common migration policy (Huysmans, 2006; Lavenex, 2001).

Furthermore, migration became an important topic in existing intergovernmental initiatives such as the Trevi group, the *ad hoc* immigration group and Schengen. These initiatives ensured the gradual incorporation of migration and asylum policy in the structures of the European Union (Huysmans, 2000). However, it was noticeable that these groups used a mainly repressive approach with a focus on the prevention of migration and return policies. The main reason for this was the founding basis of some of these groups. For instance, the Trevi group was originally established to combat cross border crime, resulting in a similar approach and logic within these intergovernmental initiatives regarding migration and asylum issues (Cholewinski, 2007). Moreover, Schengen systematically addressed migration and criminal policy topics by introducing common measures. A clear example of this is the Schengen Information System, which was developed for a more efficient support of external border control and law enforcement cooperation to help these institutions to preserve security within the Schengen member states. Both subjects (related to criminal offences) and foreigners (third-country nationals) are recorded in this

large-scale information system as potential threats for the national security of these states (Cholewinski, 2007).

This trend continued when the European Union was created. The Treaty of Maastricht (1992) brought together the themes of migration and security under the third pillar on Justice and Home Affairs. Topics of migration and these of police and judicial cooperation in criminal matters were from then on treated under the same regime of this third pillar. Only some years later in the Treaty of Amsterdam (1997) was the policy on migration and asylum 'communitarised' by transferring it to the *first pillar* (economic, social and environmental policies). For the first time, a clear distinction between asylum and migration matters and criminal matters was established. Even though this can be considered as an important development in the history of EU migration policy, this change was not motivated by the existing need to more clearly distinguish the politics on these topics. It was rather based on the lack of willingness and readiness of Member States to communitarise the entire existing third pillar by further integrating and harmonising the criminal policy (Cholewinski, 2007; Huysmans, 2006).

It was in this transformed pillar structure that the first action plan to combat illegal migration and trafficking in human beings (2002) was introduced. In a directive – at the time a first pillar instrument – the Member States were encouraged to install effective, proportionate and deterring sanctions for these crimes. However, the minimum standards concerning the nature and the length of the sentences were only introduced in an accompanying Framework Decision, an exclusive third pillar instrument (Vermeulen and De Bondt, 2015). The Lisbon Treaty (2007) then abolished the pillar structure and opted for a common migration policy in which some important goals are introduced.

First, all Member States should approach and control immigration in a similar way. At the same time, a more repressive objective was introduced in which the prevention and fight against illegal migration became the most important focus together with the equal approach towards all third country nationals. Moreover, the rise of the European border and coast guard agency (FRONTEX) can be situated in this context. This agency was established to contribute to these policy goals and enforce the prevention, enforcement and protection of the external borders of the EU. This agency continued to have a functional relationship with other organisations like

Europol, CEPOL<sup>2</sup> and OLAF,<sup>3</sup> which have all been strongly related to criminal matters (Vermeulen and De Bondt, 2015).

Within the European Union, the policy on migration and asylum was never far away from security topics, in which a repressive approach was often a priority. The combat against illegal migration therefore had always been an important issue in the European policy.

## A development towards ‘cimmigration’

Lately, an increased overlap can be observed between issues of *criminal law* and *migration law*. The contraction of these words introduces the term *cimmigration*. This stands for the trend of a *de facto* and *de jure* entanglement of the criminal and migration law in which both fields mutually benefit from each other (Vermeulen, 2007). This overlap is even more specified by the increased criminalisation of transgressions of migration law, which used to be handled with administrative measures rather than criminal ones. But it is also present when migratory measures are used as criminal sanctions, for example, the extradition of legal migrants after committing a crime (Stumpf, 2012; Vermeulen, 2007). ‘Cimmigration’ might also be considered as the contraction of the words *crime* and *migration*, which rather focuses on the impact of migration on criminality and insecurity. In this chapter, cimmigration will be used in its traditional meaning as the entanglement of criminal and migration law.

The development towards cimmigration in the European Union has been enhanced in the last decennia, especially concerning the phenomena of HS and HT. Due to the ever-increasing safety issues, migrants are being regularly considered as a high-risk group in view of disruption of public order. This often results in a security-based approach to tackle this so-called problem or even crisis (Parkin, 2013).

The European regulation concerning the criminalisation of HS was introduced by the Directive 2002/90/EC and characterises this cimmigration evolution. The main objective of this criminalisation is to combat the illegal migration, which is particularly a migration law issue (Stumpf, 2006).

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<sup>2</sup> European Union agency for law enforcement training.

<sup>3</sup> European anti-fraud office.

Furthermore, by systematically describing HT and HS as crimes undertaken by organised criminal networks, there is an attribution of a threat dimension to the phenomena that results in the assumption of an enormous risk for our society, though perhaps incorrectly (Grewcock, 2003; Vermeulen *et al.*, 2010). An even more pure form of crimmigration is the criminalisation of HS for humanitarian reasons. The Directive 2002/90/EC leaves the option open to be decided by the Member States whether or not to criminalise even these ‘smugglers’ who help people cross the EU borders in order to protect and help them and without any financial gain and therefore without any abuse or exploitation. The failure of the European Union to close this option, due to the pressure of some Member States, proves the extent of the crimmigration within the EU in which the criminal law is used to combat illegal migration sometimes even without the presence of any criminal intent.

In two more recent European policy initiatives, namely the European Agenda on Migration and the European Agenda on Security, this crimmigration development is explicitly stated. The European Agenda on Security (2015), determines the European priorities in the battle against cross-border crime. The three determined priorities are terrorism, organised crime and cybercrime. HS and HT are included in the priority on combatting organised crime, argued to be major problems of the EU.

Once more is there an obvious connection between migration and security since both agendas should be looked at together because of the relevance of certain migration measures regarding to some security priorities. Furthermore, the collaboration of EU Member States and third countries in the fight against migrant smuggling also became a top priority for the next few years. HS and HT as migration issues are clearly treated as very important security issues and therefore included both in the European Agenda on Security (COM(2015)2185) and in the European Agenda on Migration (COM(2015)240).

## **Victim discourse in the EU policy on human smuggling and trafficking**

Generally, a person who has migrated – *a migrant* – is not considered a victim especially since the increasing growth of migration into Europe. Furthermore, this view is often linked to the development of an intensified fear of crime in the resident population, frequently resulting rather in a criminal-image than a victim-image. This development resulted in a lack of compassion and disregard for migrants as potential victims (Collins, 2007; Parkin, 2013). Only in case of extreme abuse and vulnerability to exploitation, might a migrant be considered a victim in public discourse (Agustín, 2003a).

The labelling of persons as victims is always the result of several reasons and motivations of those who impose a label. At the same time, this label often consists of a predetermined meaning. Consequently, when a certain group of people are regularly characterised as non-victims, imposters or even criminals, they are unlikely to be considered as *typical* victims. Often the actual experiences of these people are not taken into account and the label is therefore mainly build on the perceptions of these persons, organisations or political actors who possess the power to impose or withhold the label (Hoyle *et al.*, 2011; Walklate, 2011).

By analysing the European legislative and policy framework on HS and HT there are reasons to assume that the label of victim is deliberately used when the negative treatment of the persons being smuggled or trafficked reaches a certain level of severity. In the absence of these conditions, it may be denied. There is also a dual approach in regard to the concept of *the ideal victim* that can be found in EU policy documents on HT and HS since migrants can be divided in two extremes that are only separated by a thin line of interpretation we will discuss in the next section.

### **Victimisation as an objective fact or a constructed reality?**

The traditional image of victims usually results from standard concepts which are described in several theoretical frameworks on criminal victimisation.

In the first criminological theories, victimhood was considered as an objective reality. When confronted with a crime, everyone is, therefore, able to recognise who the victims are. Hence the victimisation in itself is not questioned. For a very long time, this understanding of victims remained the dominant perspective in the positivist victimological frameworks. Most of the positivist authors however focused on obvious and visible victims of conventional crimes like violent crimes or theft (Davies *et al.*, 2003). Besides, these static victim-conceptions often directed the attention to the contribution of victims to their own victimisation. Concepts like ‘victim proneness’, ‘victim precipitation’ and ‘victim lifestyle’ were introduced in victimology and were given a prominent role in future victim research (Davies *et al.*, 2003; Rock, 2011; Walklate, 1989). At the time, there was not much room for alternative appreciations of the concepts ‘victim’, ‘victimisation’ and ‘victimhood’. Questions regarding the process of becoming a victim were unnecessary because of the fixed image and the ‘predetermined’ characteristics of victims. Either someone was a victim or not.

It was only later that the above-mentioned positivist tradition in victimology was challenged. Holstein and Miller (1990) encouraged researchers to further establish the victimological understanding and to look for the interactional dynamics, which could cause a person to become a ‘victim’. This new way of thinking can only originate from a critical approach of the – at that time – existing static victimological concepts. Rather than simply studying those who are considered victims (and the reasons why they could possibly be blamed for their own victimisation), the understanding of the underlying process of victimisation became an important focus in victimology (Burgess *et al.*, 2013). Holstein and Miller (1990) introduced *symbolic interactionism* as a suitable framework to criticise the objective and factual victim image.

Symbolic interactionists start from the principle that there are certain existing definitions of ‘concepts’, which are used and known by everyone, and are therefore linked to a common meaning (Blumer, 1969). By interpreting the victim-concept through this symbolic interactionist view, researchers started to look at victimisation rather as a label than as a rigid objective truth (Miers, 1989; Rock, 2002). At that time, the labelling theory was already well known and developed in the field of criminology. Historically, this perspective, however, solely covered the labelling of offenders

and criminals. Only later was this framework also applied to victims and therefore providing a first step in acknowledging that there might be an important societal influence regarding the victimisation of people (Kenney, 2002).

The labels ‘*victim*’ and ‘*offender*’ are created by important societal actors who use these words and create their meaning through, among others, policy documents. At the same time moral standards with respect to these labels are developed. Therefore, the accompanying connotations become widespread as a sort of public knowledge resulting in predetermined assumptions regarding victims of crime (Lima De Perez and Vermeulen, 2015).

These assumptions often lead to the creation of several conditions for people to ‘deserve’ the status of a victim. This image of a *deserving victim* results in a societal necessity to morally convince others to sympathise and pity them because of what they have experienced (Green, 2011; Wilson and O’Brien, 2016). Christie (1986) was the first to introduce the concept of the *ideal victim* and described this as a label in which “*a person or a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim*” (Christie, 1986, p.18). To fit this image, victims have to be weak and respectable, and cannot be involved in their own victimisation. Ideally, the offender is considered as *big and bad* and not related to the victim. Therefore, the *ideal victim* fulfils a passive role and waits to be rescued from its terrible situation.

By introducing the *ideal victim* concept, Christie (1986) revealed the strong limitations of existing societal victim labels since the *ideal victim* is often used as a framework for interpreting victimisation. At the same time, the use of these labels does not stroke with victimhood realities. Persons who do not fit the strict conditions for being considered as an *ideal victim* will not be recognised as such even if the objective circumstances of their experiences do justify a victim identification. On the other hand, many labelled victims might not consider themselves victims (or might not want to be labelled as one) (Matsueda, 2014; Rock, 2002; Van Dijk, 2009; Spencer, 2015).

The discussion on these contradictions surrounding the concepts of *victims* and *victimisation* is relevant for many types of crime. However, in this field of crimes of HS and HT the specific use of these concepts is of importance. By analysing the European policy documents concerning these

topics, we find out that the use of the (*ideal*) *victim* concept has significant underlying meaning.

## **Human trafficking: consensus on ‘*the ideal victim*’ in order to instrumentalise**

On 5 April 2011, the European Parliament and the Council of the European Union adopted Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. It replaced the Council Framework Decision 2002/629/JHA. The directive was needed to tackle the most recent developments concerning the phenomenon of trafficking in human beings. The Directive adopted a broader concept of what should be considered as HT than in the older 2002 Council Framework. Some additional types of exploitation were included, therefore some variations of exploitation (*e.g.* forced begging) were from then on considered as actions resulting in HT. This directive “*establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings*” (art. 1 Directive 2011/36/EU).

The major objectives of the Directive 2011/36/EU are the prevention and prosecution of HT but at the same time the protection of victims’ rights. Throughout this instrument, the necessity for the protection of these people is never questioned. This protection is even applied to those who might risk to be prosecuted or punished for illegal migration while being trafficked (*e.g.* the illegal border crossing, the irregular residence in a Member State or the use of false documents). This objective is expressed through the encouragement of various initiatives of assistance and support before, during and for an appropriate time after criminal proceedings in order to create the possibility for victims to free themselves from their exploitative situation. Even when the victim is illegally residing in a Member State, the Directive introduces a right to a reflection period in which this person has the right to protection and assistance. The Directive also goes beyond the sole encouragement of assistance and even states that this help should be given every time when there are reasons for believing someone is a victim of trafficking even when this person is not willing to act as a witness in a criminal procedure against the trafficker (Note 18 Directive

2011/36/EU). By introducing this Note 18, the Directive places the interest and protection of the trafficked victim above the potential success of the criminal trial against the trafficker. It is important to notice that this additional provision does not have any binding obligation for the Member States.

Another important instrument in the combat against HT is the EU strategy (COM(2012)286) towards the Eradication of Trafficking in Human Beings (2012-2016). This strategic document was introduced to support the Directive 2011/36/EU by establishing a priority list and implement measures against HT. It is remarkable that the identification of victims to offer help and assistance is considered top priority in this document. Second on the list are the actions to prevent this type or crime; and third is the prosecution of the traffickers of human beings.

### **Victimisation in case of human trafficking**

The victimisation of persons who are being trafficked is a well-discussed topic that is often interpreted in different ways. However, traditionally, the focus in HT is on the *sexual exploitation* of the trafficked person. In this case, the trafficked person meets the requirements to be considered as an *ideal victim* (Christie, 1986) with the characteristics of being very vulnerable, weak and blameless in addition to being young and woman (Hoyle *et al.*, 2011; Srikantiah, 2007; Wilson and O'Brien, 2016). This image is clearly present in the above-mentioned EU policy documents on HT in which the passivity of the victim is stressed and a 'deserving' and ideal victim is described.

There exists clear evidence of 'labelling the victim' of trafficked since the vulnerability of these victims becomes an immutable presumption while the capacity of an own decision-making process is totally dismissed. The consent of the victim to 'participate' in the act of human trafficking is considered irrelevant in case of the use of "*threat[s] or [. . .] force or other forms of coercion, or abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability*" (art. 2, 1 Directive 2011/36/EU). The definition of this position of vulnerability as a "*situation in which the person concerned has no real or acceptable alternative but to submit to*

*the abuse involved*” (art. 2, 2 Directive 2011/36/EU), results in the acceptance of an innocent victim image which – even though they might have consented to the act of HT – will almost never be blamed and therefore, considered a victim.

Therefore, the victimisation and vulnerability is determined as soon as these persons come in contact with these traffickers. Throughout the policy documents, the problematic vulnerability of the victims is prioritised and, therefore, the EU is given an explicit mandate to protect these victims as a ‘patriarchal protector of the weak’ and combat the crime (Agustín, 2003b; Capous Desyllas, 2007).

Both the Directive 2011/36/EU and the EU strategy claim to start from a human rights perspective in which human trafficking is considered as a serious form of crime and a major infraction on the fundamental human rights (also forbidden by Article 5 of the Charter of Fundamental Rights of the European Union). Therefore, the protection, the support and the help for these victims to escape their exploiting situation is considered as a moral duty. Besides these human rights arguments, the combat against HT is motivated by the moral outrage concerning the exploitation of these victims. HT is therefore also a crime often lumped together with other phenomena like *modern slavery* and *prostitution* (Hoyle *et al.*, 2011; Lima De Perez and Vermeulen, 2015; O’Connell-Davidson, 2010). The connection with slavery also helps to fit the consensus on the ideal victim label by openly focusing on a crime in which there is a *bad* perpetrator and an *innocent* victim (Hoyle *et al.*, 2011; Spencer, 2015). Moreover, the indissoluble link between forced prostitution and HT includes an extra dimension through which the anti-prostitution agenda was underhandedly introduced (Lima De Perez and Vermeulen, 2015; Persak and Vermeulen, 2014). Even though there is a focus on human rights regarding the topic of HT, a *touch of security* can be found within these policy initiatives by investing in the battle against criminal organisations.

However, an explicit form of instrumentalisation of the victim can be noticed in regard to these rights that are derived from being considered as a victim. As mentioned before, the assistance and help to victims of HT is recognised as a priority in the EU policy. By introducing the Directive

2004/81/EC that obliges Member States to grant residence permits, assistance and protection to victims of HT<sup>4</sup> who cooperate with the authorities, the European Union created an extra protective measure for victims who decided to escape their exploitative situation and cooperate with the authorities in order to bring the offenders of trafficking to justice.

Even though this right to protection, assistance and a residence permit might be considered as a positive action, the instrumental background of this measure can be derived from article 14 of this Directive 2004/81/EC that further elaborates on the withdrawal conditions of the residence permit. There are some expected terms for withdrawing the assistance and residence permit due to the renewal of the contact with the suspected trafficker, the fraudulent motives of the victim, arguments of protection of national security and if the victim ceases to cooperate with the authorities. However also the mere decision of judicial authorities to stop the procedure is mentioned as a withdrawal condition, implying that these benefits can be withdrawn in case the public prosecutor decides not to prosecute even though the victim would have fully. Thus, this courtesy is only meaningful in cases of successful judicial procedures, which are scarce. This results in treating the victim as a mere instrument in the route towards a successful criminal procedure (O'Connell Davidson, 2006; Vermeulen *et al.*, 2006).

## **Human smuggling: dualism in the perspective on victims**

The two most important documents in the discussion on the European framework of HS are the Directive 2002/90/EC and the Framework Decision 2002/946/JHA, which together form the '*facilitators' package*'. These two documents are still used as the foundation of the European HS policy, even though they date from 2002. This package was installed to better protect the European borders and prevent the illegal migration into the European Union. It should be noted that these documents focus mainly on the

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<sup>4</sup> The Directive 2004/81/EC includes the possibility for Member States to grant the same to smuggled persons, but this is not mandatory. However, the Action Plan against HS (2015) included the revision of this Directive in a more binding instrument for vulnerable migrants (mainly women and children).

*facilitation* of the illegal entry, transit or residence rather than the individual act of illegal migration. Therefore, this policy focuses on the smugglers rather than on the smuggled persons themselves.

As mentioned above, the only important component of HS is the actual intention to facilitate the act. Consequently, there is no need for financial exploitation or the abuse of the vulnerable position of a person to determine the crime of HS. There is only one possible exception to this rule in which the Directive allows for individual Member States to spare those who facilitate the illegal entering or transiting for *humanitarian* reasons only. Nevertheless, this is just a built-in possibility for Member States and therefore not an obligation. The Framework Decision expects Member States to punish HS infringements by creating measures that are “*effective, proportionate and dissuasive criminal penalties which may entail extradition*” (art. 1, 1 Framework Decision 2002/946/JHA).

Three aggravating circumstances are considered in case of HS. Firstly, when the act was committed for the purpose of *financial profit*. Secondly, if it was facilitated by a network of *criminal organisations*. Thirdly, when the *life of a person is endangered* during the act of HS. In these cases, Member States are required to impose custodial sentences, of which the maximum cannot be less than eight years.

After the introduction of the European Agenda on Migration (COM(2015)240) and the European Agenda on Security (COM(2015)185), and of course also by the influx of refugees in 2015, the European Commission developed a five year action plan to combat the smuggling of migrants (COM(2015)285). The goal of this plan is to “*fight against migrant smuggling [. . .] to prevent the exploitation of migrants by criminal networks and reduce incentives to irregular migration*”. The exploitation that these vulnerable migrants experience during their trajectory to Europe is mentioned in the introduction of this document as the first and most important concern for developing this action plan. To achieve this, the plan wants to combat “*ruthless criminal networks [. . . which . . .] organize the journeys of large numbers of migrants desperate to reach the EU. They make substantial gains while putting the migrants’ lives at risk*” (p. 1 Action plan against HS). The tasks of police and law enforcement are prioritised together with a better knowledge and information sharing system. The action plan only mentions the smuggled persons themselves in the third action point. The goal of this action is twofold. On the one hand, it strives for

more assistance for the vulnerable migrants (women and children). Otherwise, the need for improved preventive measures against illegal migration is stressed. This preventive part is mainly achieved by enhancing the EU return policy and therefore creating a deterring effect regarding consenting to the act of human smuggling “*it has to be made clear to them that they will be returned swiftly to their home countries if they have no right to stay in the EU legally*” (p. 7 Action plan against HS).

## **Victimisation in case of human smuggling**

In contrast to HT where there is an unambiguous view regarding the victims of crime, the victim image of smuggled people is not as obvious. First of all, smuggled persons do not fit in the *ideal victim* framework since this type of victim willingly engages in a risky situation that may result in their own victimisation. HS is particularly an event in which there is an obvious mutual understanding (concerning the destination, the planned route and the price) before the crime can be carried out. The smuggled person uses its own agency to make these decisions and to negotiate the conditions of the agreement. This usually implies that the smuggled person consented to being smuggled under also dangerous circumstances (Brouwer and Kumin, 2003; Tamura, 2010).

As mentioned above, the concept of ‘victim precipitation’ is well studied in the early years of victimology. However, many theories in victimology based on this idea were strongly criticised because of its victim-blaming reasoning (Green, 2011). Nevertheless, this reasoning was again reinstated in the Action plan against HS. The difference between the ‘guilty’ smuggled person and the innocent HT victim is described as follows “*The difference between the two is that in the former, migrants willingly engage in the irregular migration process by paying for the services of a smuggler in order to cross an international border, while in the latter they are the victims, coerced into severe exploitation which may or may not be linked to the crossing of a border*” (p. 2 Action plan against HS). Therefore, the smuggled persons are theoretically not considered as vulnerable and ‘deserving’ victims who should automatically be granted protection. This innocence problem results in the exclusion of the smuggled person from the traditional victim image because of his own role in the decision making

process and because of its active contribution in becoming ‘victimised’. Barely any considerations regarding the need for assistance, support and protection of the victims – which were the fundamentals in HT – can be found in the action described in the policy regarding HS.

Nonetheless, the introduction of the EU Action plan against HS implies that it was developed to combat the ‘ruthless’ criminal smuggling networks because of the manifest exploitations of the smuggled people on their way to Europe. It is well-known that human smuggling creates a vulnerability which results in an increased risk to experience many different abuses (Koser, 2000; Vermeulen, 2001). The justification for the action plan is also based on these traumatic experiences, the abuse and the exploitation during the smuggling trajectories. This could create the impression that the policy on HS is mainly developed because of the concerns for human rights, which would imply a deserving victim image. However, this approach can be scrutinised since the victim label is clearly not used on smuggled persons. Firstly, the victimisation vocabulary used in regard to HT is nowhere to be found in the policy documents on HS. In addition, the presumed, or sometimes maybe even created, vulnerability is not applied on smuggled persons since they are often stereotyped as young adult males, who because of their gender and demonstrated agency, are no longer considered as vulnerable (Lima De Pérez, 2015a). This accepted vulnerability is merely present amongst the ‘*more vulnerable migrants*’ like women and children (Spencer, 2015). The human rights perspective, therefore, is rather used as a cover to undertake measures inspired by a protective attitude and safety concerns in which the European identity is the priority (Gallagher, 2001).

These two contradicting objectives between the reality and perception result in a Janus-faced victim image in the cases of HS. The victim label and human rights concerns are so to speak used to justify the current anti-smuggling policy even though it is based on alternative motives: prevention of the phenomenon, but first and foremost the prosecution and punishment of the offenders became the prioritised goals. This protective focus also results in a changing approach towards the smuggled persons in which they are often considered as illegally smuggled objects like weapons and drugs rather than as human beings. From this perspective, there is even a tendency towards criminalisation of the smuggled persons because of their

illegal residence within the EU borders, instead of a victimisation (Lima De Perez and Vermeulen, 2015).

## **The importance of consent in regard to the labelling of victims of smuggling and trafficking**

Even though the concepts of HS and HT – regarding the abuses and the victims – are often used interchangeably and are considered as similar crimes in the media, there is an important difference between the labelling of persons who are being smuggled as opposed to trafficked in the EU policy documents and action plans. The numerous casualties, the abuse (while travelling), the inhuman treatments and the various types of exploitation happening in smuggling as well as in trafficking are firmly condemned. This would suggest a strong human rights-based motivation in the core of these initiatives. However, after further exploring the existing policy it is obvious that the more than thirty-year-old ideas of Nils Christie (1986) concerning the (non) ideal victim are making a come-back throughout the legislation and policy making on HT and HS (Srikantiah, 2007). Regarding both phenomena, the victim-label is used very differently resulting in an important distinction between the ‘smuggled person’ and the ‘trafficked victim’.

There is a categorical shift in discourse throughout the documents concerning the compassion for smuggled persons. In the introduction of the action plan against HS and in the description of the reasons for its development, there is a strong focus on the abuses and the violations of human rights. The documents focused on the horrors and on the large number of smuggled persons that died in the Mediterranean Sea.

“Ruthless criminal networks . . . putting the migrants’ lives at risk”,  
“Scores of migrants drown at sea, suffocate in containers or perish in the deserts” . . . “The human rights of migrants are often gravely violated through abuse and exploitation” (p.1 Action plan against HS).

Despite this outspoken moral outrage, this rather victimising discourse changes direction. The empathetic and victimising discourse is lost throughout the rest of the action plan where the people involved are just

appointed as ‘migrants’ and are blamed because of their willingness to pay smugglers to come to Europe.

In case of HT this consent to the act is not taken into account because of the exploiting and abusive nature of the crime. The consent of the trafficked person is considered irrelevant in case of threat or use of force, coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability or of the giving or receiving payments or benefits to achieve the consent. The introduction of the notion abuse of the ‘position of vulnerability’, and its broad interpretation resulted a situation in which almost all trafficked persons will be considered victims. However, this is not always in agreement with the own perceptions on victimisation of these labelled persons (Spencer, 2015; Lima De Pérez, 2015b).

On the other hand, this exclusion of the possibility to consent to the act was nowhere to be found regarding to HS. Nevertheless, it could be argued that also smuggled persons are often deceived and even given benefits in order to achieve their consent to be smuggled. Furthermore, HS is often a textbook case in which people are abused and find themselves in a position of vulnerability. The very existence of smuggling services is driven by a lack of legal migration opportunities and increasing border control activities, making alternative solutions impossible (Brouwer and Kumin, 2003).

These findings imply a double standard concerning the victimisation in policy concerning HT and HS. The focus in HS policy is not on the violation of human rights during the travel. Despite the slightly victim tainted discourse, it is clear that the underlying objectives of the policy are first and foremost the protection of the European safety and identity. This might all be summarised by the name of the ‘facilitators’ package’, namely preventing the facilitation of unauthorized entry, transit and residence in the EU. Therefore victimisation and vulnerability are both concepts which are socially constructed and serve political objectives (Green, 2011). The moral compassion present in the HT policy is absent in the protective approach towards HS which is primarily founded on the goals of European safety, protection and surveillance of the external borders.

## Conclusion: dubious victim discourse

The labelling framework introduces a victimological perspective through which a social interactionist reality can be critically analysed. It should be noticed that the victim label is used in a different manner regarding to the legislation and policy of HT and HS. This results in a false dichotomy between the ideal trafficking victim and the non-ideal smuggled person. For a person to fit the *ideal victim image*, he or she should passively endure all harm and exploitation while any own contribution to the crime is entirely dismissed (Christie, 1986). If a person does not respond to all of these conditions, this results in the exclusion of the victim label. Consenting to the crime is one of these criteria for which different standards are used in case of HT and HS. The consent to HT is ignored due to the vulnerable position of these persons. However, consenting to HS results in the elimination of smuggled person as official victim. This polarisation does not even end with the distinction between an ideal and a non-ideal victim but is increasingly linked with other opposite qualifications such as ‘legal’ and ‘illegal’, ‘guilty’ and ‘not guilty’ migrants (Buckland, 2008; Stumpf, 2006). Thus, a fine line exists between victimisation and criminalisation when the person does not fit the ‘ideal victim’ criteria (Spencer, 2015; Hoyle *et al.*, 2011; Munro, 2008; Sharma, 2003).

This artificial distinction based on an outdated victim image can be criticised for several reasons. Firstly, the justification for these two extremes in victimising of people being smuggled or trafficked should be questioned. It goes without saying that victims of HT have to endure exploiting situations caused by and also causing their vulnerability. But also smuggled persons face this vulnerability and experience particular types of exploitation and abuse, which can result in exploitative dependencies (Andrees and Van der Linden, 2005; Buckland, 2008; Chapkis, 2003). Actually, HT victims often commence their road in not that different circumstances: as some economic migrants, asylum seekers and smuggled persons (Gallagher, 2001). The explicit line between the innocent victims and the opportunist illegal migrant, used to further stipulate the right to protection, is not only a dangerous one but also makes no sense since many people who are being trafficked are in essence also economic migrants (Chapkis, 2003). Starting from a dominant victim image is in this case not

only inept to grasp the complexity of victimisation in these phenomena, but will often lead to inappropriate and sometimes even harmful approaches in tackling human smuggling and trafficking (Buckland, 2008).

Secondly, besides the imposition of this label and the relating potential harmful consequences, it is necessary to investigate the legitimacy of this label. These uncanny distinctions in the legitimacy of the victimhood does not take into account the real experiences of a person, which then fails to engage with the complexities and flexibilities of these people (Spencer, 2015; Hoyle *et al.*, 2011). By imposing this victim label to a prior determined group of people it is possible to lose sight of the own victim perception of the labelled person (McDonald and Erez, 2007; Pemberton, 2016). Therefore, it is essential to include a person's own reality into these considerations to pursue a complete image of the migration experience. Victimhood cannot be deemed an objective reality since this will never be the same experience for all victims (Christie, 1986). Van Liempt and Sersli (2013) argue for a reality check by comparing the used victimizing discourse and labels with the actual experiences of these migrants. It is especially important to recognise the relativity of the concept 'victim' because of the complexity of the experiences (Collins, 2007; Goodey, 2003; McDonald and Erez, 2007; Vervliet, 2013).

Thirdly, the instrumentalisation of the victims after their labelling is twofold. Firstly, victims are used to defend the current EU policy but implicitly serve to support alternative policy motives. Secondly, this instrumentalisation is explicitly present when the protection, assistance or even residence permits for victims appears to depend on their role in the criminal procedure against traffickers or smugglers.

At the beginning of this chapter, I mentioned that the European policy on human smuggling and trafficking in human beings focuses on a human rights perspective both in their policy documents and in the popular media when arguing the approach to tackle these two phenomena. The increasing crimmigration evolution created an ideal environment to surreptitiously develop a political and strategic mechanism to protect the European security and identity and at the same time hold on to this human rights-inspired narrative. The victim has an important role to play as a corner stone in this European policy. Therefore, is this application of the victim-label clearly

not free from value judgements and there is even an unambiguous instrumentalisation of the victim and the victimising discourse to benefit the protection of the European borders.

There is a remarkable crimmigration evolution in the European migration policy these days. As mentioned before, the policy initiatives on HT and HS are strongly framed in an approach to ‘protect the human rights’. But especially with HS this is a thin cover for the protection of ‘Fort Europe’ through a security based approach (Cholewinski, 2000; European Commission, 2013; Lima De Perez and Vermeulen, 2015; Mitsilegas, 2012). This tendency was already present in the first initiatives but is even more relevant in the new action plans. Measures against migration, HS and even HT are consistently wrapped in a human rights cloak since this is easier to pitch (Berman, 2010). But the underlying objectives are detection and persecution the offenders and even criminalising the illegal migrants (Goodey, 2003). In addition to this crimmigration and alternative objectives, its negative impact on the real human rights approach is essential. Many of the protectionist measures do not have a positive impact on the so-called victims. The strong anti-migration agenda and the strengthening and criminalisation of illegal migration does not contribute to the protection of these people. If it is harder to cross borders, this will mainly result in an increasing demand for smuggling services. Developing a more restrictive migration policy without including legal migration opportunities rather feeds the organised, irregular migration than stop it. It simultaneously increases the vulnerability of the smuggled persons (Brouwer and Kumin, 2003; Gallagher, 2006; Koser, 2000; Lima De Perez and Vermeulen, 2015; Munro, 2008). One step further, it is even disputable whether these developments towards a strict border protection are even in agreement with the existing right to apply for asylum hence the Refugee Convention (1951) (Gallagher, 2002).

The double instrumentalisation of the victims of HT and HS inspires to ponder on how a real human rights inspired policy should look like in regard to the victims. Firstly, it is necessary to similarly approach all the victims based on their experiences of abuse or exploitation despite their role in or consent to establishing the crime. Furthermore, several protective and supportive measures should be introduced for all victims, not least to enable them to break contact with traffickers or smugglers without further instrumentally inspired strings attached (Agustín, 2002; Munro, 2008;

O'Neill, 2001). Additionally there is the need for a change in EU mentality whilst abandoning the unilateral focus on the traffickers and smugglers by also recognizing EU's own role in the victimisation of migrants (Mitsilegas, 2012).

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# The emergency business

## Migrants reception, mafia interests and *glocal* governance: from Lampedusa to Rome

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### Introduction

The dangerousness of mafia power is linked to the possibility that the employment and exploitation of personal and social networks might grant a fast-track access to both legal and illegal markets. In other words, a successful mafia presence in a territory leads to situations where corruptive pacts, malpractices and sleaze become a social norm so that for locals it becomes very difficult to qualify them as deviant or criminal. In this scenario, the more rooted the mafia group is on a specific territory, in terms of cultural bond with the community together with the availability of social and personal networks, the deeper will be its capability to exercise local governance, thereby increasing the vulnerability of local institutions and licit sectors.

Particular events or particular conditions can increase the likelihood or the speed of success of mafia involvement in the public and private governance of a given territory. Two examples can best illustrate this: first, the availability of (new/more) funding or diversified sources of capitals, such as new investment opportunities; second, emergency situations, such as natural disasters. When different or new sources of funding become available from public funding bodies, mafia groups – as predatory forces – use their networks to both participate in tenders and receive the funds while

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masking their use afterwards. This has been studied both in relation to public funds (Calderoni and Caneppele, 2009) and European Union's funding (Sergi and South, 2016). This is especially true when it comes to situations of emergency, such as the aftermath of natural disasters, *i.e.* earthquakes or floods. In these cases, not only special funding is likely to become available, but also – and more importantly – controls over transparency and due diligence tend to be overruled by the necessity to speed up the recovery (Green, 2005).

Authorities have confirmed the involvement of organised crime/mafia-type networks in the re-construction after the earthquake of 2009 in L'Aquila, in the Central Italian region of Abruzzo (Sergi, 2017a). Anti-mafia investigations (for example Operation Lypas in 2011) related to the Calabrian mafia – the 'ndrangheta – have shown how various clans had successfully obtained contracts and gained access and control to construction and development firms in the area. The contacts they used in the occasion of the earthquake had been previously secured for the cocaine trade as the clans were present in the area before the earthquake occurred. Moreover, as shown by Operation 'Isola Felice' – Happy Island – in 2015, due to ineffective regulation more and different clans are now involved in the re-construction in the area. The poor quality of their construction works (for example, because of the use of less secure and cheaper materials) as well as the costs associated to their presence in the industry (judicial, administrative and economic) are all elements that can contribute, and have contributed, to the poor environmental conditions of Central Italian regions.

In these scenarios, one fundamental aspect is the link between corruption and mafia groups. That corruption is an enabler and a systemic feature of the operations of many organised crime groups, especially when it comes to operations in the public and political sectors, is proved by the multiple cases recorded in the recent Italian history (Smith *et al.*, 2016; Lavorgna and Sergi, 2014; CSD, 2010). However, the degree to which mafia groups benefit from, and employ, corruption techniques requires a more refined discourse.

In dense mafia environments – territories where mafia clans are not just numerically more present and criminally active, but also socially and culturally more embedded – it is not unusual to observe overlapping of roles and functions between criminal groups and ruling classes. In some cases, criminal groups and ruling classes share the same individuals in different

functions or use the same networks. Ties between different people are indeed multiple as people are linked through multiple roles (Boissevain, 1974).

This is particularly true in small communities and in territories where local economy struggles. In Calabria, for example, the ruling class and mafia groups “*both consume resources without an intent to support innovation or development and allow a careless accumulation of debts in the name of personal gains*” (Sergi, 2015: 43). This is exacerbated in situations where there is an exceptional influx of capitals and/or a condition of emergency, which imply more predatory techniques on the one hand, and lower legal controls on the other hand. In these cases, together with local administration corruption – which presupposes an exchange of favours, a pact – there is a situation, which can be defined as “*concurrent predatory governance*”. Both legal and illegal actors such as politicians, administrators and mafia groups, act within an informal grey area, where the more a territory is prone to dense mafia presence, the higher the risk of such a grey area to resist. Different factors contribute generating such vicious circle:

1. The links between mafia clans and their community, from an economic but also social-cultural perspective; mafia power feeds on local relationships to exploit local opportunities, the stronger the former the more successful the latter.
2. The socio-cultural sets of behaviour of mafia groups and individuals include the ability to establish instrumental friendships and to maintain or gain proximity with local politicians and/or public administrators and/or entrepreneurs to access key functions and key offices. The more effective and the tighter are the links with the territory and the local culture of reference, the stronger will be the ability to establish forms of concurrent governance of the territory thanks to these connections and proximity.
3. Instrumental relationships and concurrent governance are particularly effective and can be used to foster new business ventures when, in situations of emergency, transparency regulations are partially or completely disregarded.

As discussed, when public funding reaches territories with these characteristics in response to an emergency, the risk of widespread corruption is

high. This is even more the case within the framework of a complex governance system as the European one, where funds are allocated by distant authorities.

One case which is extremely relevant to show how emergencies and European governance combine to favour mafias' access to public funding is the *migration crisis* which started in Italy already in the late 1990s (Apar and Carrera, 2003). Since Italy became part of the Schengen space of free movement of people, a series of migration emergencies started to unfold in a peripheral national territory: the Sicilian island of Lampedusa. As these crises became extremely visible both in Italy and Europe, the country turned into the main expense item for EU authorities in their attempt to manage migration at the border. This pushed officials located at different institutional levels – *i.e.* national, regional, local – to declare the emergency status with increasing frequency, as this officially allowed for a quicker and more efficient response to the various crises.

In order to show how the permanent migrant crisis in Italy and Europe works to enable mafia groups to illicitly access substantial public funding, we concentrate here on a primary case study and two corollary, but connected to one another, ones. First, and most importantly, we look at the iconic borderland of Lampedusa. The case of this tiny Sicilian island is extremely emblematic to show how emergency became the new normal of migration management in Italy – and in Europe. An analysis of the events involving the local migrants' and asylum seekers' reception centre demonstrates how emergencies attracted increasing EU funds to this otherwise isolated community. It also demonstrates how the emergency allowed for the expansion of a grey area which favoured corruption and, with it, the infiltration of mafias' interests in the local governance of migration.

Thus, we move northwards in Calabria, to concentrate further on the involvement of the Calabrian mafia in the management of the biggest reception centre of Europe, in Crotona. This case confirms how the inflow of substantial public funding in a territory with dense mafia presence favours concurrent predatory governance practices.

Finally, we briefly look at the Mafia Capitale case in Rome, which involved a local criminal group that, according to prosecutors, organised itself as a mafia group. This latest case shows how the availability of EU and national funds distributed within a declared emergency, provide a set

of opportunities for criminal groups with the right institutional connections – up to the office of the Ministry of Home Affairs.

## **Mafia groups and interests in the “migration crisis”**

As said, mafias are criminal networks that develop “*social ties providing access to profitable criminal opportunities*” (Kleemans and de Poot, 2008: 75). They exhibit a certain set of socio-cultural behaviours, which are highly dependent and embedded in local cultures (Sergi and Lavorgna, 2016). These socio-cultural conducts characterise the network, but also the way individuals in, or close to, the network exploit that “*concurrent predatory governance*”.

Additionally, mafias are criminal networks that necessarily rely on different forms of interactions with other powers across society to reach their goals. As noticed by Mische (2003) all networks are constituted through communicative interactions that we can understand through immersions in local culture.

Interactions, links and ties among individuals in and out of a network create different types of relationships, which are more or less beneficial to the network’s success. Mafias are understandable under this conceptualisation, even when their interests seem not to be local. The interests of different mafia clans and related networks in the management of the businesses and the money that surrounds the migration crisis in Italy provides an extremely significant case to study the interplay of this *glocal* dimension of the mafias’ businesses.

Recently the *Direzione Investigativa Antimafia* (Investigative Antimafia Directorate, DIA) confirms that elements of crisis and emergency are key in the way mafia groups work. The DIA (2016: p. 64), presenting some of its findings on Sicilian Cosa Nostra, notices how the various clans “*continue undisturbed in their short and long-term strategies, by exploiting emergency situations determined by the dysfunction of the overall system . . . at times creating the conditions of the emergency themselves*”. This *modus operandi*, continues the DIA, “*can be exported to the business of migrants’ reception centres . . . which could be among the sectors where Cosa*

*Nostra manages to allocate and distribute public contracts through synergies with white collar criminals”.*

Before moving to our analysis, however, we provide here a concise but comprehensive overview of the complex reception system that Italy has put into place since the 1990s. This brief description is indeed essential to understand the cases, which we will analyse afterwards.

## **Migrant reception in Italy: a complex and multi-layered apparatus**

According to the UN High Commissioner for Refugees, in 2016 there were about 181.436 sea arrivals in Italy. On 3 May 2017, the UNHCR counted 37.142 arrivals.<sup>3</sup> In the period between January and February 2017 the UNHCR has counted a 48% increase in numbers compared to sea arrivals in the same period last year (UNHCR, 2017: 1). Across the Southern Italian regions, which are placed closer to the external border of the EU, there are hotspot facilities that operate for the first identification of newcomers. These are located all in Sicily and Calabria. There, Italian and European officials monitor and assist procedures such as for instance the fingerprinting of third country nationals rescued at sea. After the identification inside the hotspots is concluded, migrants and asylum seekers are taken to other centres depending on their legal statuses. As such, Italian law provide for a 3- tier reception system, composed of:

1. first assistance facilities (so called CPSA) and hotspots;
2. first-line reception facilities, including first reception centres (so-called CPA) and regional hubs;
3. second-line reception facilities (so-called SPRAR centres, run by the National Association of Italian Municipalities).

If no spaces are available in first-line or second-line reception centres, the law stipulates that persons be accommodated in temporary facilities, also known as extraordinary reception centres, or CAS. Moreover, reception centres are of three types: CDAs are first-line support centres; CARAs are reception centres for asylum seekers and CIEs are centres for identification

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<sup>3</sup> UNHRC Operational Portal – Refugee Situations – Mediterranean Portal [accessed 3 May 2017]  
<http://data2.unhcr.org/en/situations/mediterranean/location/5205>.

and expulsion. By the end of February 2017, 174.469 asylum-seekers were accommodated in reception centres across Italy, 78% of whom were in temporary facilities (UNHCR, 2017: 1).

Over the years, such relatively complex reception system has undergone several reforms: it received increasing Communitarian funding, but still experienced a chronic state of crisis or, emergency due to overcrowding, and a series of scandals. As we discuss next, national investigators found mafia and mafia-like organisations being highly involved in the management of some of the country's biggest, and thus more lucrative, reception centres. In the following pages, we present three relatively different cases – *e.g.* in terms of type of mafia territories, size of corruption, the structure of the criminal organization, the involvement of institutional actors. These cases show how emergencies translate 'on the ground' into an expanding grey area which offers several opportunities for mafia groups to profit. According to our observations, this seems to be even more the case when emergencies are funded by distant authorities such as the EU Commission.

### *1. Governing migration through emergency: Lampedusa as a(n) (is)land of illicit business opportunities*

With Italy joining the Schengen space allowing for free movement of people in 1997, Lampedusa became part of the EU external border (DG Home Affairs, 2014; Friese, 2010). Migrants' arrivals in Lampedusa begun already in the 1990s. Yet, until the Schengen agreement entered into force, the few Italian law enforcement officials present on the island would largely overlook arrivals (Cuttitta, 2014). What changed with the Schengen space for the free movement of people encompassing Lampedusa was that arrivals started to be managed differently, as securitisation replaced the previous *laissez faire* and improvised approach (Léonard, 2011; Van Houtum and Pijper, 2007). A local activist described this shift:

“Once authorities started to organize themselves to deal with the issue – for instance with the opening of the first detention centre at the airport – the strategy aimed at separating the phenomenon from locals. Authorities' strategy was to hide all they could from the eyes of Lampedusans. As soon as migrants arrived on dry land, a bus took them to the centre and they disappeared from [the] islanders' sight.”

With the introduction of the Immigration Act 40/1998 Italian legislators adjusted the national rules to the Schengen parameters (Finotelli and Sciortino, 2009). Now, unauthorised migrants had to be detained so that new facilities were built in Lampedusa (Tsianos and Karakayali, 2010). Initially, migrants only occasionally encountered Lampedusa and landed there during their journey to Italy. However, since several European sea-border patrolling missions launched from and around the island (Giorgi and Pinkus, 2006), boat migrants started being detected and rescued many miles away from Lampedusa and were then also taken to the island. Thus, an expensive maritime border had been established around Lampedusa thanks to the use of navy and coastguard ships, helicopters and even drones. At the same time, the first migrants' reception and detention facility was opened in Lampedusa in 1996. At the beginning, authorities opened a gated camp for the migrants' temporary stay with a maximum capacity of almost 200 individuals, inside the area of Lampedusa's airport (Monzini, 2008). After authorities and medical teams had checked each person, direct flights would transfer migrants to mainland Sicily within a few days (Gatti, 2005).

Nevertheless, in 2005, the centre went under the lens of national as well as European media attention, as the inhuman conditions of migrants' detention had raised objections by the European Parliament and continental media (Andrijasevic, 2010; Gatti, 2005). Following these scandals, the Italian authorities began planning the construction of a new migrant centre in the inner valley of Contrada Imbriacola, the building of which started in 2007. This bigger facility, primarily used for medical checks and identification, had a maximum capacity of almost 400, and up to more than 800 people in case of 'emergency'. Today, the centre of Contrada Imbriacola is the first hotspot ever established in Italy, and it is the only facility used to detain migrants on the island (Dines *et al.*, 2015).

Overall, with the European external border placed on the island, public funding started arriving at an unprecedented speed on this territory of 26 square kilometres and less than 6.000 registered residents (Orsini, 2015). With national and Communitarian institutions busy fortifying the border, public investments came from both Brussels and Rome (Andersson, 2016; Völkel, 2014; Andrijasevic, 2010).

Concerning border control, public funding ends primarily in the hands of law enforcement agencies, the military, and a series of major corporations that develop surveillance technologies, which are used at sea (Bigo, 2000). Yet, substantial Communitarian transfers reached Lampedusa also to establish and run the local migrants' reception and detention centre. It is mainly there that a series of opportunities arose for mafia/illicit entrepreneurial networks to profit from the "borderisation" (Cuttitta, 2014) of Lampedusa, as an almost permanent state of emergency was declared on the island.

In fact, the Italian government declared first the state of emergency for Lampedusa in 2006 (*Gazzetta Ufficiale*, 2006). The official scope of such declaration was the necessity to deal with the many migrants' boats left on the island. Presented as an environmental threat and, therefore, based on the law number 225 of 1992<sup>4</sup> designed to deal with natural disasters, the emergency status allowed the Civil Protection Department to circumvent the public tender procedure and assign directly to private companies the contracts for the disposal of the wrecks (Friese, 2012).

In the following years, several other emergencies were declared, providing other opportunities to reduce transparency and public scrutiny. Possibly the most noteworthy emergency took place in 2011 when, due to the revolution in Tunisia and the civil war in Libya, thousands started reaching the island. Since the beginning, Italian authorities did nothing to transfer people to mainland Sicily, and simultaneously refused to offer accommodations to the newcomers. The island was soon packed with people forced to sleep in the open air. Soon, a humanitarian emergency exploded on the island and it was projected from there to the whole of Europe (Campesi, 2011). It is at this stage that the then Italian Ministry of Interior, Maroni, officially declared another emergency, demanding for extra Communitarian efforts – mainly economic – to deal with the situation. Brussels did not wait too much, and soon Italian authorities received "25 million euros of emergency funding" to address the situation on the island (McMahon, 2012: 6).

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<sup>4</sup> Available on the website of the Italian Civil Protection Department: [http://www.protezionecivile.gov.it/jcms/it/view\\_prov.wp?contentId=LEG1602](http://www.protezionecivile.gov.it/jcms/it/view_prov.wp?contentId=LEG1602) (accessed 8 June 2017).

It is in Lampedusa that emergency management was normalised with respect to the governance of migration in Italy. Since the tragedy of the 3rd of October of 2013, when almost 400 migrants lost their lives as their boat capsized at less than one nautical mile from the island, and throughout 2014, 2015 and 2016, Italy received a series of other emergency transfers from Brussels to cope with a migrant emergency that, as we have seen, lasts on the island from about two decades (Cuttitta, 2014; Perkowski, 2016). Overall, tens of millions of Euros of European taxpayers reached Rome, to be spent mainly in Lampedusa (European Parliament, 2016). Allocated within relatively short periods of time, no open tender was published, which allows for those with the right institutional connections to be selected. While only a few Lampedusan seem to have received any direct benefit from the inflow of money, the state of emergency is pivotal on the island to facilitate the spread of criminal practices carried out by local administrators. This is what a local lawyer, and personal assistant of the mayor of Lampedusa in 2013, Paola, explained:

“I collected several evidences of the institutional commitment to suspend the rule of law in Lampedusa with the excuse of the border [. . .] Many of the members of the last municipal administration [. . .] committed serious irregularities during their mandate. [After years of protests from locals] the provincial authority nominated an inspector who had the power of resolving the local administration in case she detected any irregularity. [. . .] After [. . .] more than two years of investigation, the inspector finally published a report where she denounced the administration’s numerous criminal offences – mainly related to corruption. However, she concluded her report with what [. . .] summarizes perfectly the relation between the border emergency and the rule of law on this island. [. . .] Reading from the original report<sup>5</sup>: ‘Given that the administration demonstrated the ability to maintain good relations and efficient cooperation with national and Communitarian authorities [...] during the serious emergency of 2011 [. . .] I nominate a superintendent’. This meant that she recorded irregularities and yet, she decided not to take any legal actions against local administrators. [Instead, she]

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<sup>5</sup> A version of which is available here: <https://www.scribd.com/doc/82861656/Commissariamento-Comune-di-Lampedusa-e-Linosa> (accessed 8 June 2017).

nominated a superintendent [who is] an unclear and unspecified legal figure [in the Italian legal system. As she reported, the superintendent role was] ‘to remove the irregularities carried out by the administration.’ [. . .] Over the two months the superintendent spent in Lampedusa, he did not take any single action against the former administration.”

The document mentioned by Paola confirms what most interviewees said they experienced daily. The emergency is used in Lampedusa to justify a system of connivance amongst national and local institutions. It creates a sort of stasis where no institutional actor felt safe enough to denounce the criminal activities of the other (Orsini, 2016). In fact, this proves to be an extremely fertile soil for mafia-type behaviours to flourish.

Here, the case of the management of migrants’ and asylum seekers’ reception and detention on the island is emblematic. Since 1996, a centre was opened in the local airport, and was run by the volunteers of the Italian Red Cross: migrants received first aid there and they were taken to mainland Sicily within few hours or days later. At the time, there were only limited financial transfers from Rome to Lampedusa. Nevertheless, a few years later, in 2002, as the terms of the contract to run the centre changed, at the national level the *Misericordia* – a Calabrian religious association /charity (under investigation by the Antimafia since the first half of 2017) replaced the Italian Red Cross. As noted by Cuttitta (2014: 103) this happened when volunteers became “*employees, and the volume of funds paid by the Ministry of Interior was made dependent on both the number of detainees and the number of days spent by each of them in the centre. Since then [. . .] migrants would remain for longer periods on the island*”. Clearly, a series of incentives was connected to longer detention of migrants, while providing them with the cheapest possible services (Martone, 2016).

Moreover, since the access to this facility was denied to journalists, activists and political actors of all kinds, public funding was handled basically without public scrutiny. This situation lasted until 2005 and until, first of all, the denouncements of a delegation of the European Parliament which was allowed inside the centre. Second, the inhuman living conditions in which migrants were kept were denounced to the public that same year, when an undercover journalist entered the centre as an undocumented migrant.

Following the scandal, the facility was changed again into a reception centre where migrants remained only for a few hours before being transferred to mainland Sicily. Here, the Red Cross took back the internal management and the centre was opened to public scrutiny, as journalists, researchers and politicians were finally allowed inside. After all, Lampedusa was to become a management model for the whole of Europe, and further funding became available within the Communitarian project ‘Praesidium’ (Cuttitta, 2014). With increased resources, in 2007 a new and bigger centre was finally opened in the island’s inner valley of Contrada Imbriacola to substitute the one in the airport.

With the opening of the new centre, a public tender was released and a consortium of cooperatives – *Lampedusa Accoglienza srl* – offered the cheapest price and won over the bid made by the *Misericordia*. Nevertheless, as noted by Friese (2012: 73), the cooperatives constituting the consortium “*had already sealed the deal before the tender was released and thus had excluded other regional competitors. In addition, both coops [could count on] political affiliations and clientelist relations*”. At the time the centre of Contrada Imbriacola was a CPSA, and migrants could be detained for only a relatively limited periods of time, that was anyway exceeded through institutional mismanagement.

In October, 2014, another scandal involved the management of the centre, as the Italian public broadcaster Rai 2 screened a video showing the inhuman ways in which detained migrants were washed in the open air by the personnel of *Lampedusa Accoglienza*. Following national and international protests, the consortium agreed with the then Ministry of Interior to consensually brake the deal. A new deal had now to be finalized, with national authorities opting for a negotiated procedure. Here a pool of few companies was directly selected by the Ministry to compete. According to the prefect of the Sicilian province of Agrigento – which includes Lampedusa – due to exceptional migratory pressures on the island only little time was left for authorities to proceed with a tender, making it thus necessary to opt for a transparent but faster procedure (Camera dei Deputati, 2015). Surprisingly enough, despite the scandal of 2005, the *Misericordia* was among the selected competitors. Even more surprisingly, the *Misericordia* won the bid and today runs the management of the migrants’ centre of

Lampedusa. This, despite an even greater scandal concerning the *Misericordia* involvement in the management of the biggest migrants and asylum seekers' reception centre of the whole Europe.

## 2. *The Misericordia case in Crotona, Calabria*

The migrant and asylum facility of Lampedusa is not the only reception centre managed by the *Misericordia*. Actually, the charity is one of the country's main contractors for reception centres of this sort. For the purposes of this work, here we focus also on the case of the *Misericordia*'s (mis)management of the biggest reception centres for refugees and asylum seekers of Europe, the CDA/C.A.R.A Sant'Anna of Crotona, in Calabria. It must be understood here that in Italy the allocation of funding to run migrants and asylum seekers reception facilities took place over various emergencies, which were declared by different national governments, increasingly since the crisis of 2011 in Lampedusa (Vassallo Paleologo, 2011; Marchetti, 2014).

The alleged involvement of the Arena mafia clan in the management of services for the Sant'Anna Centre and the *Misericordia* charity has led to 67 arrests made by the Antimafia on the 15<sup>th</sup> May 2017.<sup>6</sup> Charges include mafia association, embezzlement, and fraud. The *Misericordia* is officially under investigation by the Antimafia District prosecutors since the first half of 2017 and went under scrutiny by local and national media since 2014 for suspicious connections between its governor and the local mafia family – the clan Arena. While the governor of the *Misericordia* disclosed threats from the 'ndrangheta to a Parliamentary Inquiry in 2015 (Camera dei Deputati, 2015), an investigation into the charity's activities had actually already started in 2013. The charity – which is one of the largest employers in the region (Stranges and Wolff, 2016) – also participates as shareholder to a social enterprise called *Miser.Icr*, which invests in social activities in the local communities such as a cinema and a sport centre. This means that the association seeks to reinforce ties within the local community. As reported also by the national media (Pipitone, 2017), recently the *Miser.Icr* has invested in the local football club of the town, once directed

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<sup>6</sup> Fermo di Indiziato di Delitto, Proc. Pen. N. 4456/2013 RGNR mod. 21 DDA - Procura della Repubblica presso il Tribunale di Catanzaro - Direzione Distrettuale Antimafia.

by the son of the mafia boss in the Arena clan. Moreover, the same enterprise has also acquired shares of the local airport. These were all considered profiles of risk, red flags, for the Anti-mafia investigation. As declared in the arrest warrant<sup>7</sup>:

“[The Arena clan] was close to various entrepreneurs who, in exchange for participation in the financial gains of the business run by affiliates, could count on the enrichment of their client portfolio, often through imposition of mono-oligopolies and through an activity of credit recovery thanks to the force of intimidation of the clan – as they could be recognised as ‘friends’ entrepreneurs”

Moreover, the clan “*gained control over sub-contracts for the Misericordia, among which the catering services, through catering enterprises managed and owned by affiliates*”.<sup>8</sup> The local coordinator and founder (who is also a priest) and the Governor/President of the *Misericordia* have been arrested because of their “apical role of organisers” for the clan. As reported in the arrest warrant, they “*allowed for significant sums to enrich the clan’s wealth*”<sup>9</sup>. This was done thanks to the support of those, also under arrest, who managed the subcontracts for the *Misericordia* – such as the refectory services for the migrants’ centre in Crotona. Through a series of crimes, such as false invoicing and different types of fraud and the constitution of a shell company, they were able to “save” some of the allocated money for the services to the clan’s benefit. The evidence of this case in the territory and in relation to the asylum seekers and migrants’ centre, portray a scenario of “*concurrent predatory governance*” or, as defined by the Antimafia prosecutors<sup>10</sup>, of “*circular relationship between the protagonists of the commercial decisions of the CARA [the reception centre] and the local ‘ndrangheta families*”.

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<sup>7</sup> Fermo di Indiziato di Delitto, Proc. Pen. N. 4456/2013 RGNR mod. 21 DDA - Procura della Repubblica presso il Tribunale di Catanzaro - Direzione Distrettuale Antimafia, page 5.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, page 9.

<sup>10</sup> Ibid, page 1322.

A dossier published on the website<sup>11</sup> of the *Misericordia* in 2015 accounts for the various expenses and the supporting legal materials for both the *Misericordia* and the Miser.Icr, openly in response to allegations of mafia infiltration since 2013. Aside from the fact that these allegations now turned into arrests, the proximity of the manager of the *Misericordia* to the former Italian Minister of Interior, now Minister of Foreign Affairs, had raised doubts when the *Misericordia* was allocated the contract for the reception centre in Lampedusa for the second time, in 2015 (Tizian, 2017). Indeed, interceptions made public by Anti-mafia prosecutors in the arrest warrants of May, 2017 in Calabria, confirm that the destiny of the reception centres of Crotone and Lampedusa are tied together. The bond is to be found in the activities, the investments and the contracts of the *Misericordia* whose President/Governor in Calabria (now arrested) was also Vice-President of the charity at the national level between 2012-2015. This gives thus an insight of how concurrent predatory governance flourishes in times of emergency management, by efficiently operating within Europe's complex governance system where policies are implemented through a multiplicity of institutional levels: from the local to the regional, the national and the European. It is in fact thanks to the permanent emergency and within such complex net of criminal and institutional interconnections placed at different geographical levels, that the most infamous scandals related to the (mis)management of migration and asylum in Italy generated: that of Mafia Capitale.

### 3. *The Mafia Capitale case in Rome*

As reported in the arrest warrants issued by the Antimafia Prosecutors in Rome within the frame of the Operation "Mondo di Mezzo" in 2014, a local criminal network had invested heavily in the management of Rome's many reception facilities. Convictions in first degree arrived in July, 2017. Indeed, as recorded in one of the many taps collected by the investigators,

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<sup>11</sup> Misericordia Isola Capo Rizzuto - Dossier sull'organizzazione dell'accoglienza dei migranti e sulla gestione dei Centri d'accoglienza affidati alla Misericordia di Isola Capo Rizzuto – <http://www.misericordiaisola.it/wp-content/uploads/2015/05/Dossier-2015-pt2.pdf> (accessed 12 May 2017).

the involved criminals had profited from the business of managing migrants' reception in the Italian capital, more than they had from drug trade. One of the intercepted talks between one of the alleged bosses of Mafia Capitale and one of the brokers for the Mancuso 'ndrangheta clan sees the former revealing to the latter<sup>12</sup>:

“This year we ended with 40 million, but all the money, all the gains we have made on the gypsies, on the emergency of reception centres and on the migrants, all the other sectors end up with zero [gains].”

In the same investigation, one of the men in charge of the management of the network's interests in the reception centres discussed his role in “moving” migrants assigned to one of the CARA centres (the “Mineo”, assigned 2.000 places) towards other centres where his and the network's interests lie, due to the emergency situation. He says to his finance advisor<sup>13</sup>:

“In Rome [. . .] I can get centres, buildings that are available [. . .] thanks to my ongoing relationships at the Ministry I am able to direct the migrants coming from the South [. . .] as they often go through the Mineo centre and then [. . .] from the Mineo they are sent around Italy [. . .] some in Rome [. . .] so if they have buildings that can be turned into reception centres quickly, in emergency cases, without tenders, these buildings are occupied and I sent them [. . .] work [. . .]”

The participation of members of the Calabrian 'ndrangheta clans in the Mafia Capitale network, in the management of the funding for reception centres seems clear (Sergi and Lavorgna, 2016). Yet, for the purposes of this paper it is also interesting to notice that this investigation confirmed how emergency calls for speediness of responses, and how informality of relationships feeds into corruptive pacts and facilitates a systemic violation of laws and regulations (Dalla Chiesa, 2015; Sergi, 2016).

Here, one could conclude that this is a matter of business opportunities, a matter of profit-making more than anything else. However, the most worrisome part of the involvement of the Mafia Capitale criminal network in

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<sup>12</sup> Operation Mondo Di Mezzo, Ordinanza di Custodia Cautelare, Procura di Roma, No. 30456/10 R.G.N.R. DDA. P.1170.

<sup>13</sup> Operation Mondo Di Mezzo, Ordinanza di Custodia Cautelare, Procura di Roma, No. 30456/10 R.G.N.R. DDA. P.1136.

the funding of reception centres happens when and if resources are allocated within the framework of a declared emergency. This entails that there is no time to set public tenders so that companies are selected via direct call made by local and national institutional actors. Certainly, it does require (criminal) business acumen to capture and exploit the potential of this sector. Eventually, however, the network can successfully do all that thanks to its ties, to the political proximity and to the informality of contacts with key stakeholders. These networks of relationships could easily and promptly be activated in moments of crisis of a sector.

The cases of the centres of Crotona and Lampedusa described before mirrors many of the conditions, which allowed the criminal organisation to cumulate enormous illicit profits in Rome. In our view, the three cases constitute a sort of continuity, confirming the centrality of these complex intertwining criminal networks, together with institutional connections. Emergencies happen to occur in a complex governance system where power and accountability are blurred across multiple and geographically distant layers.

## **Discussion and conclusion**

More research is clearly needed to understand the relationships between different networks of power, mafia interests and state institutions when it comes to the business around migration mixed with the challenges of an EU border zone such as Lampedusa and, to a certain extent, the rest of Italy. From the materials assessed for this paper, we can, however, draw some preliminary conclusive remarks.

Our first argument is that in cases where following an emergency an influx of funds from distant and complex government structures takes place, the dynamics of mafia power are facilitated. There are of course differences between the ways in which such power works in mafia territories, like Crotona, when compared to territorially farther places, like Lampedusa. In the case of the *Misericordia* in Crotona, in fact, the high mafia density makes it possible to insert the destination of the (extra) funds during the emergency. This happened thanks to a network of friendships, alli-

ances and personal interests that are wanted, fostered and sustained by local mafia clans, who have social standing, political power and money in the area. In the case of Lampedusa, where, at first sight, mafia clans are not bound to the territory directly, still mafia interests and behaviours are favoured indirectly by a set of policies from above that are handled by institutions at high risk of infiltration from below. There are various manifestations of *concurrent predatory governance* of funds and territories: the grey area of illegality and unethical behaviours where personal contacts overlap with criminal and with entrepreneurial ones.

As said, the more a territory is prone to dense mafia presence, the higher the risk of such a grey area emerging as a direct qualifier of mafias' very existence. However, even in territories where mafia presence is not dense, forms of *concurrent predatory governance* can not only take the form of mafia behaviours but also attract mafia power from elsewhere. In the last case of Mafia Capitale in Rome, the mafia method – where a (criminal) group uses its reputation to intimidate and force into compliance and silence others, for financial or other gains – can emerge easily in cases where emergencies lead to lack of transparency and *ad hoc* measures and interventions. Similarly, the more a mafia group holds a strong grip on a specific territory, the more its links to local politics and local entrepreneurs can represent a springboard to reach out to possibilities beyond the immediate territory. In the case of the *Misericordia*, the grip on Crotona is the reason why the charity could access higher institutional levels: in Calabria first, then in the rest of Italy afterwards and especially in Rome. This grip could be observed in the various interests shared by mafia groups, entrepreneurs and the charity. In times of emergency, again, the relaxation of policies of control, the direct assignment instead of tenders, personal contacts overruling transparency vouchers, all contribute to the indirect acquisition of privileges elsewhere.

The recognition of this influence, therefore, would require a deeper understanding of how different mafia behaviours manifest and intertwine with local administration also outside their territories of origin. The more mafia clans are bound to their community from different perspectives (economic, political), the more we can assume mafia clans to feed on local relationships and opportunities. The more mafia clans feed on local relationship the more they are embedded in the socio-cultural contexts and main-

tain instrumental friendships of at least proximity to the key roles and institutions in those contexts. If mafia's grip on their territory through instrumental friendships is not just infiltration or corruption of administration, but rather a form of concurrent predatory governance then mafia power can extend to new business ventures in situations of emergency. The social and entrepreneurial landscape knows many grey zones in which everyone, administrators included, benefits from illegality. The emergence can be used to discard transparency regulations partially or completely. This can happen both at home (Crotone), where local opportunism is condoned by an already non-integer local administration and elsewhere (Lampedusa), where actors whose predatory skills have already developed elsewhere meet local opportunism given by the time and the funds of crisis.

Finally, the lesson we can learn from Lampedusa especially, that European integration seems to favour these types of behaviours of mafia-participated governance, because the EU's central institutions are far from the local territory and therefore there is a lack of control. In addition, this distance leads to an improper and/or scarce knowledge of the local territory in terms of social and cultural peculiarities in which policies are imposed and implemented.

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# Illegal migration, crime and the public response in the Czech Republic

*Miroslav Scheinost*<sup>1</sup>

## Introduction

Immigration, illegal migration, refugees – words that are being increasingly used. These words single or together resonate in the feelings and minds of a not insignificant part of the public with others: suspicious and dangerous aliens, associated with conflict, crime, terrorism . . . *etc.* This mixture results among people in the rise of fear of foreigners in general and hostility towards immigrants in particular.

This chapter does not want to deny risks connected with a massive migration wave that became evident in Europe over the last years. The aim is to analyse the relationship between the phenomenon of migration, the involvement of organised crime into it and the impact on public. This analysis is based on the research project that was carried out in the Czech Republic from 2016 till 2017.

It is true that the Czech Republic has not been typical for the migration wave. It was not strongly afflicted in the past or at present by the mainstream of migrants of later years. The horizon of this project is, therefore, limited by the experience of the CR. But still it is possible to study the forms of migration and its organisation, impact on the level of crime and – what is striking – the apparent difference between the factual state of migration and its reflection by public opinion.

This apparent disproportion between the factual state and the feelings and fears of public was over time again affirmed. During last two years the so-called migration wave even decreased in the CR but it did not lose the

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public interest and impact on the social and political processes and public life.

In the research project attention was paid to criminological aspects of this phenomenon, especially to the involvement of organised smuggling of migrants and in the same time to some social consequences in relation to the public opinion, attitudes toward migration and immigration and fear of crime.

Data sources included the quantitative data from the police statistics (Criminal Police, Alien Police), data from Czech Statistical Office, data produced by Centre of Public Opinion Research (CVVM) and the information from reports on the security situation in the CR. Data were complemented also by the information acquired by interviews with police officers and with NGO. In addition to that, the analysis of court files from cases prosecuted as organising migration, *i.e.* committed in an organised group was carried out.

As a part of the project the extent, forms and impact of the current migration wave was compared with the results of research that was carried out on illegal migration in the first half of 1990s, which was the period of Balkan wars and also the period when the migration from Asia countries to the Europe was quite strong.

## **The population of the CR and the proportion of foreigners in general**

The number of people of foreign nationality living on the territory of the Czech Republic (CR) was under the socialist regime very small due to diverse reasons. The chance to accommodate to different nationalities, cultures and ways of behaviour had not been too big due to this situation.

For many years the population of Czechoslovakia was largely composed of Czechs and Slovaks: two nations that are very close in terms of culture, language, and so on. The only exception was a small number of Germans and Poles living in the Bohemian region, some Greek political refugees in the 1950s, and a certain number of Romani, who mostly came from Slovakia and partly from Hungary. Thus, the ethnic composition of the society was not very diverse, which was further reinforced for years by

the fact that the borders were closed during the period of the Cold War. Only foreign students and tourists entered this structure, but not in any substantial numbers. The first significant influx of a new ethnic minority occurred in the 1980s with a wave of young Vietnamese coming to CR on the basis of a treaty between the Czechoslovak and North Vietnamese governments. Their number was estimated to around 30.000. They created the fundament for the later migration of Vietnamese people to the Czech Republic in the 1990s (Nozina and Kraus 2009: 21–23).

Due to these developments, there had been little need to adapt to different nationalities, cultures and ways of life. It was the so-called Velvet Revolution (1989) and the subsequent transformation of society, politics and the economy that opened the borders to people coming in increasing numbers from different parts of Europe and beyond.

The number of foreigners either with permanent or long-term residence (over 90 days) began to grow rapidly especially in the second half of 1990s. Between 1994 and 1999, their number increased twofold: from roughly 100.000 to about 200.000 of settled foreigners. Since 2008 the number of foreigners remained relatively stable, about 424.000 – 439.000 until 2014 after which the influx increased.

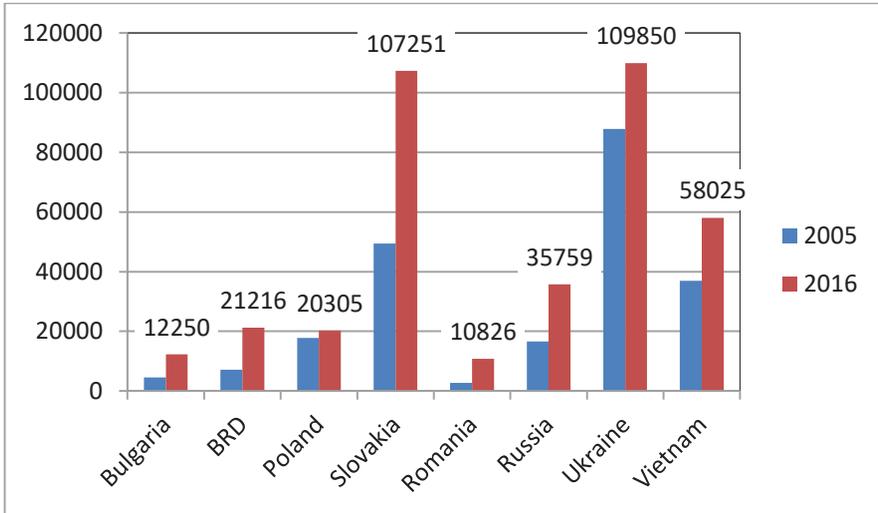
In 2016, the number of foreigners living in the CR reached 493.000. Up until June 2017, this number reached 510.000 including 278.000 foreign citizens with a permanent stay and 232.000 with long-term stay. The proportion of settled foreigners in the total number of the inhabitants of the CR (which is now about 10,5 millions) reached till June 2017 about 4,8%.<sup>2</sup>

Most of them are Ukrainians (112.000), Slovaks (109), Vietnamese (59) and citizens of Russian Federation (36). If we take into account people from Islamic states living legally in the CR their number are minimal – until June 2017 it was 1.228 people from Syria, 587 from Pakistan, 526 people from Iraq, 508 from Iran and 455 from Afghanistan.

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<sup>2</sup> See Czech Statistical Office,  
[http://www.czso.cz/csu/cizinci.nsf/datove\\_udaje/ciz\\_pocet\\_cizincu#cr](http://www.czso.cz/csu/cizinci.nsf/datove_udaje/ciz_pocet_cizincu#cr)

**Figure 1.**  
**Foreign nationalities in the CR over 10 thousands of people –**  
**comparison 2005 - 2016**



Source: Czech Statistical Office

**Table 1.**  
**Foreigners from Islamic states with long-term or permanent stay in**  
**the CR**

State	2005	2015	June 2017
Afghanistan	359	419	455
Iraq	269	496	526
Iran	159	414	508
Pakistan	243	543	587
Syria	378	1.071	1.228

Source: Czech Statistical Office

Of course, these numbers do not include foreigners coming to the CR for a short stay nor the people that stay in the CR illegally.

## Illegal migration

Since 2008 the CR is a part of Schengen as well as all our neighbouring states. It means that the control of Schengen borders in the CR took place only at airports. Illegal stay or entering is usually determined by controls within the territory of the state.

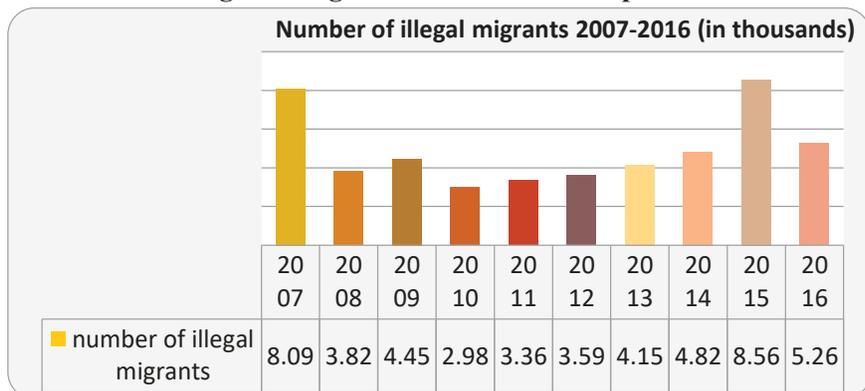
In this project, we used the following definitions:

- *illegal migration* is the movement of people across the state border without valid documentation, *i.e.* permit to enter or to stay;
- *smuggling* is the organisation of such illegal movement; from this point of view it is not substantial whether the goal of this movement is the stay or transit.

Illegal crossing of the state border itself is under the Czech law not a criminal offence: it is misdemeanour that is handled under the administrative law and could be sanctioned by deportation. Only the act of smuggling is a crime.

Until 2007, smugglers could be punished if this offence was committed in an organised group or for payment with a prison sentence of up to 3 years. Since 2007, it is possible to impose a more severe penalty: as member of an organised criminal group an imprisonment of up to five years can be imposed. If in addition to being a member of an organised criminal group and for payment the maximum prison term is eight years or even twelve years if the profits made are large. What is the situation?

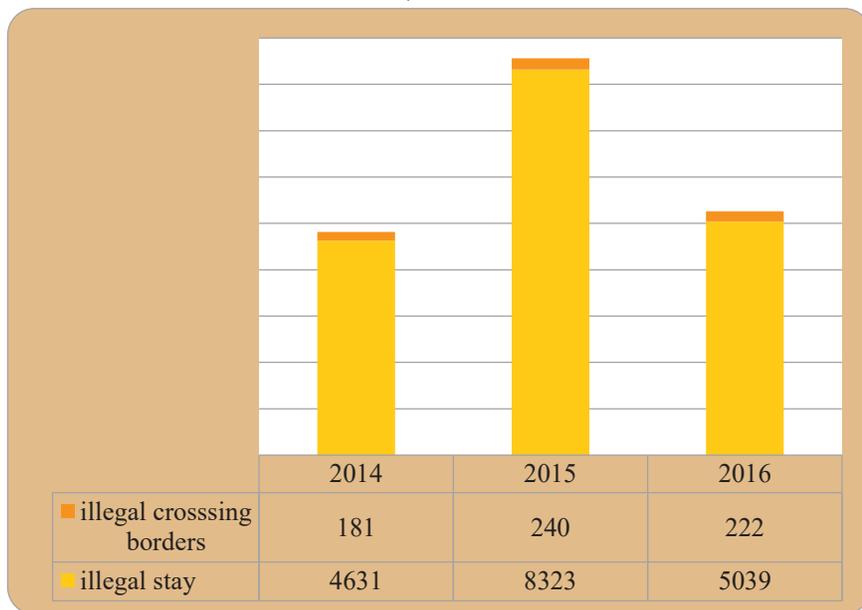
**Figure 2.**  
**Illegal immigration in the Czech Republic**



It is clear that the number of illegal migrants grew in 2015 but still 8,5 thousands per year was really minimal, especially in comparison with the 1990s (when in time of Balkan wars only on the territory of CR the number of captured migrants reached in 1993 43.000) and even in comparison with some other European countries.

The following Figure shows the number of migrants captured on the borders (airports) and on the territory during last three years.

**Figure 3.**  
**Migrants captured illegally border crossing and on the territory of the CR, 2014 - 2016**



With regard to the nationality of people found being illegally present in the CR the non-EU citizens dominate. In 2016 the Ukrainians were the most frequent (1.552 people, *i.e.* 30,8 % of the total number of observed foreigners, an increase of 328, *i.e.* +26,8% in comparison with the year 2015). To be precise: as for Ukrainians, they are mostly workers staying in the CR after the expiry date of their permission to stay and work.

The second most frequently registered people were citizens of Russian federation (402, *i.e.* 8%). On the third place were citizens of Kuwait (336, *i.e.* 6,7 %), but this group forms rather a matter of delayed spa guests who

do not leave the CR in time. On the fourth position were Vietnamese people (269, *i.e.* 5,3 %). On the fifth position were people from Afghanistan (155, *i.e.* 3,1 %). In contrast to previous nationalities, Afghan people are mostly discovered during their transit across the CR.

If we look at the people from Islamic countries transiting the CR illegally during the year 2016, their number is really not very high (Afghanistan 155, Syria 153, Iraq 109, Pakistan 55, and Iran 35).

In 2015, 234 persons controlled for their ID appeared to possess forged or invalid travel documents (passports); in 2016, 271 persons were in possession of false documents. Most often they were citizens from Ukraine (175 persons) and Moldova (41).

## **Organised illegal migration**

In 2016, the police investigated 56 persons that were involved in smuggling of illegal migrants.<sup>3</sup> That means a decrease of about 67% in comparison with 2015. The smugglers were mostly Czech citizens (38), followed by Ukrainians (6).

Interviews with Czech experts were carried out (there were seven interviewed experts from Security Information Service, Organised Crime Police Task Unit, Directorate of Alien Police, Section of Security Policy of the Ministry of Interior and one NGO). In addition, we analysed case files from eight cases that were prosecuted and sentenced as organised crime at respective courts in 2015 and 2016. What can be deduced from these qualitative data? In general, we can say that there is no prove of the presence of huge international smuggler nets on the Czech territory.

As mentioned, the Czech Police detected during last year 56 cases of organised illegal migration. Illegal migrants were transported across the CR mostly by cars, vans and lorries.

Now, in contrast to the 1990s, the Czech Republic was not situated on main routes of migration; the Czech route is rather a lateral route. Among transiting migrants detected in the CR Moslems coming via South-Western route are most frequent (coming via Turkey, Greece, Balkan countries and

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<sup>3</sup> Statistics of the Czech Police

Hungary). The organisers of smuggling are not found in the CR; they develop their activity in countries along the road, especially in Turkey, Greece, Balkan countries and Hungary or even in the home countries of migrants and refugees. Their activity may begin – and was noticed – already in refugee's camps in the Middle East.

Special Czech cells/groups for covering the part of the migratory route across the CR are not established (as it was in the 1990s). Organisers of migration and their helpers/assistants are usually compatriots of migrants. There is an important supporting role of family ties; migrants often rely upon their relatives already settled in target countries.

Czech citizens are hired usually only as drivers or as providers of forged documents. Czech drivers were found several times working for the organisers: not only in the CR but they were discovered in other countries (*e.g.* Germany, Great Britain).

This migration wave offers for organisers very profitable business, because migrants usually pay for each part of the route and the total amount is estimated to be in tens of thousands Euros.

Migrants coming from Asian countries combine various ways of transport: by trains, buses and cars, but some parts of the way may be even perform on foot.

What is growing is the use of forged documents and misuse of requests for asylum. But those asking in the CR for asylum use these requests mostly in order to extend the stay in the CR before continuing to the target country. Basically, it was proved that the CR is not attractive target country for migrants and refugees. They want to move farther away to Germany or to other countries in the Western Europe following commonly their relatives living there.

The identity of migrants has been often quite doubtful and cannot be verified; it is rather characteristic feature. Many of them received substitute documents during their peregrination but these documents were frequently lost or destroyed. NGO's workers are of the opinion that the reason to destroy or throw documents away is usually the fear of being identified, which may imply to be sent back.

These findings are basically in agreement with the reports of Europol. According to Europol, 90% of the migrants coming to the EU is facilitated, mostly by members of criminal networks. The key migratory routes are known and identified even if they are fluid and changing depending on the

external factors and measures of countries along the route. Very loosely connected networks of smugglers are stretched along the migratory routes. The communication among organisers consists rather in sharing contacts to other persons involved in the net. Instead of escorting migrants from the start-point to the target country, there is rather a transmission of connections (usually phone numbers) to migrants and they then contact smugglers who organise the particular part of the way. Migrants of course pay for these parts of the route. The organisers themselves do not usually accompany the groups of migrants, but rather organise the transport by cars, vans *etc.* operated by drivers. Persons (mostly drivers) at the executive level are hired but do not know the identity of organisers (Joint Europol-Interpol Report 2016).

The routing of refugees and migrants from Islamic countries across the Central Europe goes commonly via Turkey, Greece, the Balkan states and via Hungary to Austria and Germany. For the minority of migrants who decide to travel across the CR this country is only transit section of their total journey. Migration movement from Northern Africa and from sub-Saharan region has not afflicted Czech territory until now.

Another case is the migration from Ukraine to the CR that has been the largest for more than 15 years during which the CR has been the target country for Ukrainian migrants. Economic reasons, such as work are the most important, but also security reasons in the mother country is an important push-factor of Ukrainian migrants. For years the basic motivation for influx of Ukrainian people was to search and find the job in the CR and to be able to support (or simply to ensure) the livelihood of their families living in Ukraine. Within the last years, a new factor started to operate: the need to move from the areas of war conflict that also worsened the economic conditions of living and the security situation. Being in this situation the Ukrainians sometimes stay the CR after the validity of their stay permit or try to come illegally. Of course, due to this they are more vulnerable and they are willing to accept quite disadvantageous condition of work and payment without the chance to complain.

The problem with regard to Ukrainians is that, apart from being sometimes badly paid by Czech employers, they often become the victims of their compatriots operating as unofficial employment agencies whose services are compulsory or, to be more precise, foisted on the workers. These organising persons are called 'clients' and quite unscrupulously misuse the

disadvantageous situation of Ukrainian workers that do not want to risk any conflict either with 'clients' or with Czech administration especially being in the situation of an illegal or semi-legal stay. The term 'client' seems to be inappropriate because it is used normally in the sense near to 'customer'. But for Ukrainian people it is the traditional term. We may compare such a client to the 'small entrepreneur' who uses the cheap and temporary Ukrainian manpower. This 'client' organises the workers to a group, he organises the employment, negotiates with employers, hires workers to the employers, he collects their salaries and pays them some part of the salary, sometimes organises the transport from and to Ukraine. Client ensures for his workers protection against being robbed or racketeered from criminals ('bandits') and pays for it to organised criminal groups (it means that 'clients' are somewhere 'in-between' classical organised crime and 'normal' entrepreneurship). Clients also help to solve the problems of workers in relation to the Czech administration and regulations. Their traditional position and reputation is based to a great extent on the mistrust of Ukrainian workers to official authorities, either Czech or Ukrainians. Some authors compare the relation between 'clients' and 'workers' to some kind of 'quasi-serf' system (Černík, 2005; Nožina 2003).

In fact these 'clients' take nearly total control of Ukrainian workers and take away a substantial portion of their salaries. Workers are pushed to buy goods from 'clients' *etc.* If we look for an example of parasitising on economic migration, this form of 'arrangement of job' consisting in nearly total control, huge profit and misuse of difficult situation of workers (in collaboration with organised crime groups).

Numerous members of the Vietnamese minority may be characterised as 'inconspicuous'. They have been in permanent and intensive contact with the majority population, above all as small merchants and shopkeepers. In this economic function, they are more or less tolerated and conflicts between the majority and Vietnamese minority occur very rarely. Vietnamese have been somewhat recognised for their diligence, despite their different culture, traditions and history.

Even their involvement in some forms of economic crime (tax and custom frauds, breaking of trademark regulation, counterfeiting of goods *etc.*) and despite this was commonly well-known, this did not significantly damage their reputation. However, recently the attitude of Czech majority starts

to become more critical because some Vietnamese engage in drug crime, especially in cannabis growing, but they also got involved in the production of synthetic drug (Czech specialty pervitin) in a quite large volume.

With regard to immigration cases of documents forgery within the Vietnamese community have been discovered. All these criminal activities are quite well-organised by flexible organised groups (Report on security situation in the CR 2017; Nozina and Kraus 2009). Still the Vietnamese are not at all the target of hostility or a substantial negative attitude of the majority.

## Case studies

Let us illustrate some typical '*modus operandi*' of organised migration on concrete cases.

First there is the case of *migrants from Middle East* being captured on the territory of the Czech Republic.

Two drivers – Hungarian citizens – were detained at the Czech-German border. They transported 76 persons including 23 children under 18 from Budapest via Slovakia and Czech Republic to Germany in a small lorry (IVECO). This means that people were in the freight space in very cramped conditions and during the travel any breaks were made. According to the statement of drivers they did not know anything about the load in car. They borrowed the car from another person in Hungary and went to Germany to do some shopping. In fact they were hired in Hungary by not identified persons, probably of Pakistan nationality as drivers and transporters. It was not their first 'trip' to Germany. The refugees paid € 400 per person to the Pakistan organiser in Hungary for the transport from Hungary to Germany. They were contacted by this organiser in the refugee camp in Hungary.

They were mostly from Pakistan and Afghanistan and their prior route went across Iran, Turkey, Greece and Serbia to Hungary. They contacted individual smugglers separately for the particular stages of the route and paid them for this service. During the journey refugees travel most often by cars, but also on foot (in one case the way afoot from Afghanistan to Turkey took one month), by ship from Turkey to Greece, by different means (train, bus, car, foot) via Balkan countries to Hungary. The payment

for one 'stage' was about € 400 per person, but from Turkey to Greece some of them had to pay \$1.000. In some cases they were 'on their way' for nearly one year. Most of them wanted to go to Germany because relatives were living there already. Many of them did not have any personal documents despite the fact that on the way they were provided by 'papers' from local authorities. Sometimes they throw the documents away themselves or they were advised from organisers to destroy them.

The second case concerns the *forgery of documents*. The offenders were members of an organised group that comprised ten people of Vietnamese nationality. They arranged the Czech citizenship for children of Vietnamese mothers with limited stay in the CR (as mothers of children with *Czech* citizenship they may ask for permanent stay). One way of solving this problem was to submit a declaration of paternity made by a Czech citizen who was paid for giving such a statement (e.g. a homeless Czech man signed such declaration for about ten thousands Czech crowns). Some other documents of a different purpose were simply forged.

The subject of the third case was a Ukrainian citizen that bought for 1.300 Euros a *modified Rumanian ID card* where the photo was replaced. He worked in the CR without valid visa and work permission. That is why he wanted the ID card from EU country.

## **Comparison with the situation in the nineties**

Comparing the migration that afflicted the Czech territory now with the situation in 1990s, the difference is obvious. The number of illegal migrants in the former Czech and Slovak Federal Republic at that time was quite huge: in 1991, over 18.000 illegal migrants were recorded. In 1992, it 32.000 refugees were counted and in 1993, only on the territory of the Czech Republic 43.000. Of course, these concern only known cases. The real number must have been substantially higher.

The majority of these migrants originated from the Balkan states, especially from former Yugoslavia (70-80%) but within the total spectre there were people from more than 70 countries all over the world.

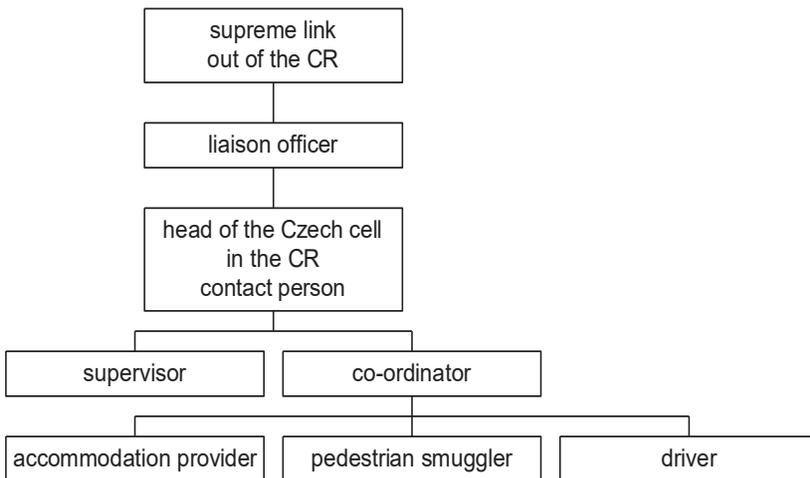
The CR was not the target country: it was a transit country, which it still is. The "*modus operandi*" of smuggling differed from the present: there were smaller groups of migrants smuggled mostly on foot via Slovakian

border. At the border they are waited for by Czech smugglers, loaded into cars, escorted and transported to the Czech western border. The transport was very carefully organised and secured. Near the western border were migrants accommodated for a couple of days and then at convenient time and circumstances transferred to Germany – by cars but more often on foot over a ‘green border’.

The groups of smugglers were relatively stable and composed usually from the Czech citizens. They covered only one part of migrants journey, *i.e.* that within the Czech territory. If there were higher links of the organisation, these were not situated within the CR. The number of detained smugglers was higher than at present: about 1.500 people per year, mostly Czechs (drivers, pedestrian smugglers, accommodation providers). Figure 4 provides a scheme of such a developed smuggler organisation of this time:

**Figure 4.**

**Scheme of smuggler organisation**



The payment by migrants reached hundreds or thousands of dollars or German marks, and that only for the Czech part of route. As a supporting criminal activity border police officers detected falsification of documents and sometimes corruption of fellow officers.

The comparison of the nature of organised crime now and in the 1990s indicates some apparent differences. At that time in the CR the number of illegal migrants was roughly ten times higher. Criminal organisations were involved in organising illegal migration and smuggling of people in those

days as well as at present. But the functions and roles within groups were clearly arranged and delineated. Groups were relatively stable as well as the connections between individual groups. Separate local groups of organised smugglers covered the Czech part of the route and these groups were attached to international networks. This affiliation to some international organisation probably did not mean the direct subordination with regard to the managing links of international organisations but the relationship consisted in fulfilling the task of covering the separate part of the route, of course for a reward. The involvement of Czech perpetrators was higher and the number of prosecuted smugglers was also higher.

At present, according to Europol confirmed by findings of our research project, the organisation of smugglers is looser and flexible. Relatively stabilised interconnected cells were not identified. The communication among organisers consists rather in sharing contacts and in transmitting them to migrants. Instead of personally escorting, migrants just provided by these contacts of new information. Of course, this way of organising is also enabled by the current level and possibilities of communication (mobile phones, Internet, social nets).

This way of organisation seems to confirm the thesis about the gradual transformation of organised crime or at least its part from fixed and stabilised structures to more loose and variable networks based on contacts among participants (maybe the term 'participant' is now more adequate than 'member'). These variable networks are more adaptable and may flexibly react on the situation and chances (or threats).

The substantial difference may be seen also in the fact that massive migration in 1990s took place without any significant attention paid by public, media or politics. A reason for this may consist in the fact that any group or nationality of the then migrants was not labelled as risk for European security, culture and society, although among the migrants there were Muslims and civil wars warriors as well. Now migration (especially the immigration from Middle East and Northern and sub-Saharan Africa) is designated as substantial threat for the Europe.

## Migration threat?

It would not be wise to deny security risks that may stem from migration movement in particular now that the movement of people has risen to an unprecedented level. Moreover the security risks may be related not only to target states or territories but also to the transit and to the source countries as well.

It is not possible to analyse all potential risks from the point of view either political science or economy *etc.* From the point of view of criminology, which is of course only one of the possible angles, the impact of ‘mishandled’ migration may occur:

- in the rise of criminality of foreigners/immigrants,
- in conflicts between majority and immigrants/minorities that may arise and increase,
- the growth of so-called hate crimes that stems from hatred, in this matter caused by aversion against certain religions, cultures or nationalities.

In compliance with so-called Audit of national security (Audit národní bezpečnosti, 2016) it is possible to consider the origin and growth of these problems basically as result of two mistakes, *i.e.* as a consequence of uncontrolled *mass migration* and as a consequence of *unsuccessful integration* of newcomers. The knowledge of countries much more experienced in migration matters than the Czech Republic points to the interpretation that it is often a matter of unsuccessful integration of the second or third generation of immigrants.

It is also necessary to take into account that criminal problems potentially related to migration are incorporated into the broader context of social atmosphere and mood of the majority population. Migration is now a sensitive topic discussed in the public space with strong emotional content and with strong impact on the policy, not only the security policy but public policy in general. The election campaigns and elections themselves around the European future during last two years were significantly influenced by the migration and immigration topics. It was up to the political actors in what way these topics were presented to the voters using either a more realistic picture or a more demagogic one. The Czech Republic is not an exception.

This is something like a circle. The phenomenon of migration can cause tensions and social or even criminal problems in the society. These problems begin to be a topic of public and political discussions. The manner of discussion and the manner of presentation of problems related to migration may help to solve the situation or on the contrary to worsen it and make the problems and conflict sharper. The latter modality may produce the destructive spiral heading towards collapse.

In any case the atmosphere in the society creates not only the general frame for conceptualising the problem but it is very powerful agent in the process of searching for solutions and adopting measures.

## **Reaction of the public**

The impact of migration movement on the public opinion and attitudes to migrants and on fear of crime is significant. Again, it is incomparable with the situation in 1990s when the number of illegal migrants was substantially higher but the reaction of public, politics and media was rather flat. Thus, let us have a look at the attitudes and fears of the Czech public.

With regard to criminality of foreigners surveys of public opinion shows the tendency of people to overestimate the proportion of foreigners in the number of crimes committed. In our research carried out in 2008 respondents supposed this proportion to be about 20% in average (Zeman 2011). In fact, only in 2016 did the share of foreigners in the number of committed crimes reach the highest level of 9,1% while their share in the number of prosecuted offenders was 8,1%. For years the range of this share was between 6 and 8%. It is also necessary to say that the total number of registered crimes has been decreasing during the last years. It means that the percentage of crimes committed by foreigners has been calculated from a lower baseline.

Most of convicted foreign offenders in 2017 were citizens of the Slovak Republic (33,9% of sentenced foreigners), by respectively Ukrainians (19,6%) and Vietnamese (6,9%).

The following table shows the development of the number of cleared crimes (it means successfully investigated, *i.e.* when the offender is

known) and within this total the number of these crimes committed by foreigners and their share in the total number in the period 2013 to 2015. Further we may divide crimes committed by foreigners to two categories: crimes committed by foreigners from EU countries and crimes committed by citizens of so-called third countries (non-EU states).

**Table 2.**  
**The development of cleared crimes committed by foreigners**  
**2013-2015 by foreigners from EU and non-EU countries.**

	<b>2013</b>	<b>2014</b>	<b>2015</b>
<b>Total number of cleared crimes</b>	117.596	114.392	101.597
Total number of cleared crimes by all foreigners	7.470	7.385	7.264
non-EU countries	2.857	2.849	2.717
EU countries	4.613	4.536	4.547
% of all foreigners in the total number of cleared crimes	6,4%	6,5%	7,2%
% of non-EU countries of the total of cleared crimes	2,4%	2,5%	2,7%

Source: [www.policie.cz/clanek/statisticke-prehledy-kriminality-za-rok-2014.aspx](http://www.policie.cz/clanek/statisticke-prehledy-kriminality-za-rok-2014.aspx); <http://www.ok.cz/iksp/docs/425.pdf>; [www.czso.cz/csu/cizinci/2-ciz\\_kriminalita](http://www.czso.cz/csu/cizinci/2-ciz_kriminalita)

This trend shows that the share of foreigners from non-EU countries is strictly speaking minimal at the level not exceeding 3%.

But the meaning of public is different from the statistics. The survey of public opinion towards foreigners made regularly in March each year by the Centre for Public Opinion Research (CVVM) showed that 67% of respondents designated foreigners as a reason of growth of crime; only 9% disagreed (the rest did not express any opinion). Table 3 shows that the tendency to attribute to foreigners the negative impact on the level of crime is long-run. This means that – except of relative stable share of foreigners in committed crimes and prosecuted offenders – the public does not take into account that the total number of registered crime has been decreasing for the past few years. There is not any growth of crime, therefore the opinion of public is totally incorrect.

**Table 3.****“Foreigners are the reason for the increase in crime”**

Year	2009	2011	2012	2013	2014	2015	2016	2017
<b>Answers</b>	%	%	%	%	%	%	%	%
Agree	74	70	62	67	65	66	66	67
Disagree	6	7	10	6	7	9	8	9
Agree nor disagree	17	20	24	23	25	22	22	20
Don't know	3	3	4	4	3	3	4	4
Total = 100%	1139	1306	1053	1059	1061	1069	1079	1045

Source: CVVM 2017: <https://cvvm.soc.cas.cz/cz/tiskove-zpravy?limitstart=0>

This opinion about negative influence of foreigners on crime of course strengthens an already not very friendly attitude to potential settlement of foreigners in the CR.

In March 2017, 39% of respondents stated that in the CR there are too many foreigners; 50% thought that their number is adequate; and, only 2% were of the opinion that the number of foreigners is too small.

We may suppose that the fear associated in public opinion with the ‘migration wave’ and nourished by the media and some political presentations may be identified as the reason for these attitudes.

In 2012, the survey (made by CVVM) about how are people satisfied with the different areas of public life showed that 43% of respondents were quite satisfied with the state of immigration (44% dissatisfied); 17% were satisfied and 49% dissatisfied with the level of security (for comparison: with the state of unemployment there were 77% dissatisfied people). After that came the change: in 2015 fear of unemployment was expressed by only 9% respondents, but fear of migration by 31%, fear of the Muslim world 12%, and fear of crime 11%.

The results from 2016 showed that the matter of immigration was seen as very urgent by 93% of people, and as a matter of security by 89%. In May 2016, 61% of respondents stated that the CR should not accept refugees at all, 34% only as long as they will be able to return home. Only 2% were of the opinion that refugees could be allowed to settle in the country.

In June 2015, 70% of the respondents were against the acceptance of refugees from Middle East and Northern Africa; in May 2016, this has increased to 78%.

With regard to the attitude to different nationalities in 2016, 75 % respondents expressed that Arabic people are not sympathetic (CVVM: March 2016).

In December 2016, people were asked if they have fear of something and if so, of what. In the first place, they stated to be afraid of migration and refugees (31%); in the second place afraid of terrorism (22%). The Czech population is still strongly worried about migration and terrorism. These phenomena seem to be apparently closely interconnected in the collective consciousness. As for the opinions on the possible security threat that stems from the 'refugee wave' the survey shows that people perceive refugees as a security threat, not only for the Czech Republic (75% of the respondents) but for the whole of Europe (89%) and even the whole world (80%). Nevertheless, the results show a moderate decrease of these fears in comparison with 2015 (CVVM, 2016).

Partly as a result, and reflective of the mood of people, new figures appeared on the political scene that based their programme on slogans about the threat from Islam, about dangerous migrants presented in general as potential terrorists and on the necessity of adopting strict measures against them. The accompanying vocabulary of these figures is sometimes more aggressive than the usual political language but this way of wording is well-known in many countries.

Fortunately, these slogans and appeals have not led to more numerous violent deeds against immigrants or the Muslim community. In 2015, there were five criminal acts qualified by the police as motivated hate crimes against Muslims and 5 criminal acts motivated by hatred of Arabic people. In 2015, 175 criminal offences in a so-called extremist context were recorded, which represents 0,07% from the total number of recorded crimes in the CR (Report on Extremism, 2016).

What seems to be clear is that the reaction of public in the CR does not correspond to the real state of migration and of involvement of organised crime; it reacts rather on the general threat presented as a global or even a danger to the civilisation.

## Conclusions

Migration movements towards the Europe Union that takes place in this decade seems to be extraordinary as seen by eyes of the majority of the Middle Europe population. Nevertheless, it is only the part of migration processes in the contemporary history and from a bird's eye view not limited to Europe only. We have seen diverse explanations of this influx; some of these explanations were apparently constructed in order to gain political profit, *e.g.* explanation given by the Czech EU opponents (especially before elections) that blamed Germany and EU that their policy meant the decisive incentive of this influx regardless the catastrophic impact.

The influence of organised crime was also sometimes mentioned as a driver of this migration process. But despite the large extent of this migration wave and despite it has organised features it is not possible to simplify its causes to an organised crime explanation, however defined, as a determining factor of this massive mobility.

Our knowledge of the nature of organised crime allows us to conclude to a phenomenon with big economic and subsequently also politic power. There are examples of countries where organised crime amassed so much power that its leaders succeeded in influencing by various ways economic processes and public administration. But it also holds true that organised crime predominantly does not strive at taking over political power and public administration directly but that its main effort is to exploit or consolidate opportunities, such as existing demand of (illegal) services and goods. Of course, these opportunities and demands can be deliberately created or stimulated.

Migration can be such a demand too, stimulating illegal travel services. But causes of migration including the illegal one are deep and manifold and do not only result from organised crime activities. Organised crime uses the migration processes and pressures for its profit. Namely, it organises transport provisions, including crossing the borders, forged documents and exploits the circumstances in which migrants cannot organise their journey themselves. In the countries of origin existing aspirations of people to leave to other countries may fanned by organised crime. Migration flows may be influenced by activities of organised crime. But this influence cannot be interchanged for a kind of management and control of migration as

a certain social process. It would ascribe to organised crime a greater power than it really possesses and attributes that do not fit to its nature.

Migration is a natural and permanent historical phenomenon, whether individually or on a large-scale. As was said, the causes of migration are deep and manifold. Of course, it implies that migration movements cannot be simply solved by some isolated administrative measures in target or transit countries. In this sense, we may compare organised crime to an overgrown parasite conduct that profits from the phenomenon caused by substantially broader reasons.

With regard to the CR: Criminality of foreigners does not represent such a serious problem as allegedly in some other European countries. At the same time, illegal migration had not led to serious problems. Foreigners currently do not count for a substantial security threat as well. The issue of terrorism is another matter: the risk of terrorist attack is not directly depending on the number of foreigners on some territory.

Nevertheless, public opinion perceives foreigners as a substantial factor influencing the level of crime in the CR although this idea is counterfactual. Crime committed by foreigners in the CR does not reach the level of an important security risk. Despite this, half the interviewed people considered foreigners as the threat for our lifestyle.

The concern of public in relation to foreigners and immigrants does not originate at this point from facts but is rather a reaction to the presented picture of migrants as a global security and civilisation threat. At the same time the media and public basically identify the migration in general with migration from Islamic states.

It would not be correct to deny that uncontrolled immigration, moreover illegal or transit migration (if being too high) may bring serious risk of potential destabilisation of social and security situation. But reactions corresponding with reality should be based on the evaluation of this reality, not on emotions and false pictures if it should not lead to even worse situation. Existing basic documents adopted in the CR (especially Audit of national security 2016, Strategy of migration policy 2015 and Concept of integration of foreigners 2016) may be considered to be realistic and adequately reflecting the situation. But it seems that they are not sufficiently communicated and explained to public. Of course, the influence of official documents and concepts to the shaping of the public opinion is never so

strong as the influence exerted by the media and various populist manipulators.

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# The role of the Internet in the process of trafficking humans in the UK

Parisa Diba, Georgios A. Antonopoulos and Georgios Papanicolaou<sup>1</sup>

## Introduction

The aim of this chapter is to present an account of the role of the Internet and digital technologies in the processes of human trafficking in the United Kingdom. It addresses a country-specific empirical gap in the literature considering the role of digital technologies, a special field that is rapidly emerging and significantly extends the study of human trafficking, an issue that has attracted considerable policy and research interest in the past twenty years.

Human trafficking is not a new phenomenon (see Antonopoulos and Papanicolaou, 2018) but the global geopolitical changes of the post-Cold War era have exacerbated conditions conducive to clandestine population flows and the development of ‘transnational’ illegal enterprises associated with those flows. The increased awareness of the issue, and the recognition that it presents a major area of focus for the effort to address and suppress transnational organised crime, has resulted in a new global prohibition regime against human trafficking and clandestine cross-border movements (Andreas and Nadelmann, 2006; Papanicolaou, 2011). A key moment in this development has been the introduction of a major international instrument (supplementing the 2000 United Nations Convention against Transnational Organised Crime), namely the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*. The Protocol defines trafficking in persons as “the recruitment, transportation,

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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” (United Nations, 2000). Exploitation in the sex and labour markets constitute the core criminal activity in human trafficking cases, however, several other types exist, such as domestic servitude, organ ‘harvesting’, forced begging, forced marriage and illegal adoption.

In the past decade or so, human trafficking may have arguably received a considerable boost due to the development, advancement and proliferation of digital technologies (Hughes, 2014; Latonero *et al.*, 2011, 2012; Sarkar, 2015). According to a recent Europol report regarding the trafficking in human beings in the European Union (EU), online interactions and encounters have been observed as facilitating

“several aspects of human trafficking and exploitation: targeting of potential victims; access to personal data; arrangement of logistics and transportation; recruitment through social media, chat forums and other websites; advertisement of victims; their exploitation and surveillance” (Europol, 2016a: 12; see also Europol, 2016b).

This view sustains the opinion that the burgeoning of digital technologies<sup>2</sup>, and the Internet in particular, has engendered new and creative opportunities for individual and collectives of criminals. The expeditious dissemination and usage of the Internet and other digital technologies such as ‘smart’ phones, that is, mobile phones whose capabilities are akin to those of a handheld personal computer, have added a new dimension to the trafficking of human beings. They have arguably created new ways and means of facilitation, as well as affecting various aspects of trafficking, including the recruitment, control and exploitation of victims (Sarkar, 2015).

At present, however, there is relatively limited scholarly work investigating the role that digital technologies play in the processes of human

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<sup>2</sup> These technologies include software applications, or ‘Apps’ as they are popularly referred to, which are programmes that run on smart phones and other mobile devices, such as tablets. Most popular are instant messaging and Voice over Internet Protocol (VoIP) communication apps such as WhatsApp, Viber and Skype.

trafficking or the particular ways in which the Internet has been used to shape the criminal strategies of traffickers (see Di Nicola *et al.*, 2013; Latonero *et al.*, 2011, 2012). Researchers across several academic disciplines including Computer Science, Information Science, Sociology, Criminology, and Law (Bach and Dohy, 2015) have begun to address this scarcity of empirical research and knowledge, employing various methodologies and theoretical frameworks to do so.

A study undertaken by Di Nicola *et al.* (2013) regarding the use of the Internet and social networking sites to explore possible occurrences of human trafficking and sexual exploitation in Italy, has provided some interesting insights. The authors conducted an analysis of a sample of prostitution advertisements placed on the most popular adult sites in Italy, as well as of those placed on Twitter pages for five of the most important adult portals. Within these advertisements, the authors discovered a set of indicators that could suggest the presence of human trafficking, and by extension, victims. These four indicators were (a) the nationality of the prostitutes; (b) the listing of a young age; (c) professional images of the women in the advertisements; and (d) surface misspellings in the text of the advertisement (Di Nicola *et al.*, 2013: 222).

According to this research, if these four elements were present in an advertisement, they could strongly suggest that the featured woman in the advertisement was a victim of trafficking. Moreover, their research found that, out of 502 advertisements that were listed on the popular Italian adult websites, 61,4% of the women featured were non-Italian and described as being from areas such Eastern Europe, the Far East and South America, with 23,9% of these women demonstrating the four aforementioned indicators in their advertisements. Additionally, 77,2% of the advertisements featuring these non-native women contained errors in reference to spelling, grammar and punctuation (Di Nicola *et al.*, 2013: 224). The researchers note that this is a striking finding, as it may indicate either that these women have poor knowledge of the Italian language and are recent arrivals to Italy, or that these advertisements have been created and written by an exploiter or trafficker, who may also possess a limited grasp of Italian vocabulary. Overall, Di Nicola *et al.*'s (2013) research provides a useful starting point for the study of online sex trafficking.

Nevertheless, as Latonero *et al.* (2011) emphasise, identifying incidences of human trafficking on the Internet is not a straightforward task,

and remains a challenge for researchers and law enforcement alike. On this point, Latonero *et al.* (2011) cite a Council of Europe report (Sykiotou, 2007), in which researchers undertook an Internet search for potential trafficking sites. The latter pointed out that a website can only be delineated as ‘suspect’ (p. 32), since there is no evidence that the women featured in such advertisements for sexual services are in fact victims of trafficking.

Our research takes up the preceding important considerations and issues in the UK context. In particular, we undertook an extensive examination of the role of the Internet and digital technologies in the facilitation of the recruitment, transportation and exploitation in both the UK sex and labour markets. The ensuing analysis of our findings explores and addresses the phenomenon along these lines. Before proceeding, however, we outline the methods and data used in our research.

## Methods and data

As part of our exploratory analysis, a number of methods were used to collect data on the role of the Internet and digital technologies in the processes of human trafficking in the UK. Firstly, 18 semi-structured interviews were undertaken with a range of key informants in the UK, including:

- 3 representatives of non-governmental organisation (NGOs) namely *Barnardo’s SECOS* (Sexual Exploitation of Children on the Streets), *ECPAT UK* (Every Child Protected Against Trafficking UK) and *Unseen*;
- 9 law enforcement agents (LEAs) such as police officers, detectives operating within the organised crime and cybercrime units in the country as well as a representative of the UKHTC (United Kingdom Human Trafficking Centre);
- 2 Kurdish human smugglers; and
- 4 experts on cyber-crime and/or human trafficking.

All of these experts are based in UK universities, and 2 of them have conducted research internationally.

Secondly, *intelligence reports* by the Metropolitan Police were used. These intelligence reports are essentially problem profiles on either human

trafficking in particular or ‘organised crime’ in general with the purpose to inform tactical tasking and coordinating groups within the police.

Thirdly, *open sources* on the topic have been used. These open sources include reports by academics, research institutes, the government (Home Office), national and international law enforcement agencies, and NGOs. Open sources include media sources and press releases from law enforcement agencies.

Finally, we conducted a UK-based *virtual ethnography* to acquire primary data between November 2015 and February 2017. As a research method, virtual ethnography “*transfers the ethnographic tradition of the researcher as an embodied research instrument to the social spaces of the internet*” (Hine, 2008: 257). Transferring the traditional ethnographic methodology to the internet entails that virtual ethnographers immerse themselves in the online environment (a ‘virtual world’), observing and interacting using media relevant to that environment for an extended period of time (Turney, 2008).

As a starting point to the virtual ethnography, online searches were conducted on Google to ascertain the most popular websites and online classified<sup>3</sup> advertising sexual services in the UK, which were: ‘AdultWork.com’, ‘Backpage.com/uk’ and ‘Vivastreet.co.uk’. In addition, we also accessed social networking sites, such as Facebook and Twitter, as well as online discussion sites on which users develop conversations by exchanging messages (web forums) relevant for our investigations. Part of the virtual ethnography was conducted on the ‘Deep Web’. This is a part of the world wide web that can only be accessed by means of special software or requires special authorisation and whose contents are not visible to search engines.

In addition to the above sites, we examined the role of the Internet and digital technologies in facilitating human trafficking for labour recruitment and exploitation by investigating popular online classified and recruitment

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<sup>3</sup> ‘Classified advertising’ is a form of advertising, which is particularly common in newspapers, periodicals, and online outlets that may be sold, distributed or provided free of charge. Classified advertisements are significantly cheaper than display advertisements used by most businesses (Wells *et al.*, 2006). In this chapter we use the term ‘online classifieds’ for online classified advertisements.

websites that were advertising jobs and employment in the UK labour markets. Relatedly, we also inspected native online classified websites in countries where significant trafficking activities to the UK with the intention of labour exploitation has occurred, according to official accounts (NCA, 2016). This was a viable way of trying to detect any suspect advertisements recruiting for jobs in the UK that had been listed on these sites. We used keywords for advertised jobs in these sectors that possess a high risk of exploitation, such as: ‘agriculture’, ‘construction’, ‘au-pair’, ‘nail technician’, ‘escort’, ‘masseuse’, ‘charity collection’, ‘waiter/waitress’, ‘cleaner’ and ‘dancer’. Such search terms we translated into various languages, and then we performed searches, either via a generic search engine such as Google, or by using the integrated search tools on different job sites (in-search). Overall, approximately 400 relevant items were identified during the course of the research.

Further sources of useful information came from our analysis of content posted synchronously or asynchronously on web forums. In particular, we examined the free, independent and not-for-profit ‘www.ukpunting.com’ forum, which is the most popular paid sex review and discussion site in the UK. With approximately 104.000 registered members, this forum constitutes a very large, dynamic and vibrant virtual community. Here, we took an unobtrusive, non-interactive approach. We did not actively contribute to the forum through posts to any discussions or ‘threads’, which are textual conversations that are arranged chronologically on the forum’s webpages. On these online discussions a member is able to read the statements and questions posted by other members of the forum, then add their own articulations to the discussion, by way of interaction, if so inclined.

We concentrated our research on trying to find topics and discussions of potentially trafficked women, and we were also able to conduct in-searches on the forum to this aim, using search terms such as ‘brothel’, ‘gangs’, ‘pimps’, ‘profiles’, ‘trafficked’ and ‘trafficking’, and we selected threads with a high degree of relevance. We also made efforts to explore whether certain women we had identified as being possible victims of trafficking were discussed or reviewed on the forum, usually by searching for their aliases. Such discussions did, in fact, occur and it emerged that they compellingly illustrated how cognizant the punters were of the *modus operandi* of pimps and traffickers in online contexts. These users also appeared to be aware of the process involved in the setup and presentation of

profiles on online advertisements and adult sex websites that may indicate that the advertised woman (or women) could be sexually exploited victims of trafficking.

Some researchers have made the point that the online context may make it difficult to collect trustworthy and representative empirical data. The issues affecting the online research methods relate to authenticity, validity and reliability (Hall and Antonopoulos, 2016). In particular, such concerns regard the assessment of the quality of information that has been acquired from web forums, given that they are communicative, unregulated, user-created and active social arenas. This may have the consequence that the data collected may be inaccurate, and, whether intentionally or not, misleading. Moreover, the data reliability is undeterminable. Nevertheless, Hall and Antonopoulos (2016) underscore that data collected from online web forums (as well as social media sites) can, in fact, produce rich empirical evidence from groups and communities that are normally hard to reach, such as punters in this case. They can also provide substantial insights into the ‘everyday life’ of these individuals and social groups. While some information may be false and delusive, the data obtained online should not lead to a general disregard of their quality (Hall and Antonopoulos, 2016). Compared to online, the accumulation of data through *offline* methods does not always produce consistently valid findings either. Face-to-face interactions can function to inhibit one’s true feelings. In some cases, the latter are more likely to be revealed in an online realm, which offers more reassurances of anonymity. In short, the powerful influence of online communities, such as forums, on the decision-making processes and ideas of punters cannot be ignored or dismissed (see also Cauduro *et al.*, 2009). Apart from that, the use of a particular data source must be determined by the content of the research question.

# Findings

## 1. Recruitment

The recruitment of victims is an integral aspect of the human trafficking process. A plethora of websites, including social networking and microblogging services such as Facebook and Twitter, as well as online advertisements, dating and international marriage agency sites (see Jones, 2011), have been documented as recruiting people into trafficking and advertising the sale of their services, for the purposes of sexual or labour exploitation (see Hughes, 2014; Latonero *et al.*, 2011, 2012; Mendel and Sharapov, 2014; Sarkar, 2015; Sykiotou, 2007). To lure and recruit victims online, traffickers frequently place spurious, promising advertisements on employment, dating and marriage websites for jobs including: administration, cleaning, home help, child care, waitressing, hostessing, pole dancing, transportation, the collection and delivery of charity bags, agricultural farming and construction roles, educational courses or work in the tourism sector (see also Europol, 2014). Our online research revealed some distinct examples of suspected deceptive recruitment (n=32), in that we found advertisements of women selling sexual services on online classifieds that were written in very poor English, advertising women as working in several areas of the UK, such as in Birmingham, Oxford, Newcastle and London, under various aliases. In one instance, on performing a google search of the telephone number listed in the advertisements, we discovered that the same number was present on general employment sites in Lithuania, advertising and recruiting for jobs available in the UK. Such jobs listed were for charity collection and waitress work in the cities of Manchester and London for a high salary of £150-200 a day, in which accommodation and transportation to work were included. There was no mention of the company, organisation or the name of the person recruiting for work or the requirement of any qualifications, but rather the only other information available in the advertisement was the mobile phone number.

In another occurrence, we found that the mobile phone number connected to a dubious advertisement on an online classified website for a woman selling sexual services in London, was also present in the employment section of an online Romanian newspaper for available work in the

UK. This particular listing was for ‘unskilled labour’, and mentioned that ‘conversational English’ was desirable. Again, the name of the company or the person posting the advertisement was not disclosed, nor, more importantly, was the specific job role.

In her extensive examination of the role of the Internet in the facilitation of the trafficking of human beings for labour exploitation in several EU Member States, such as the Czech Republic, Ireland, Romania and the UK, Muskat-Gorska (2014) identified the presence of ‘red flags’ that may indicate that a posted job offer was untrustworthy, and could lead to an unwitting candidate’s exploitation. Such common ‘red flags’ include: the promise of an unrealistically high salary for an unqualified job, the particular advert possessing only a general description of the job, no address of the company or organisation and the associated contact details of the advertisement containing only a mobile phone number or a general e-mail address for further enquiries. Our findings agree with these ‘red flags’, and we suspect that these adverts are spurious and act as a means to lure and traffic women to the UK for purposes of sexual and/or labour exploitation. The mobile phone numbers may belong to a trafficking group or network based in the UK, who post bogus advertisements on online classified advertising websites in their native countries and may also arrange the transportation and travel of their targeted victims to the UK (Interview with LEA 1, 2, 3).

The production of sites that are used to recruit and lure victims for sexual exploitation overseas possesses a distinctive consistency. It appears that websites are frequently created and organised by suspected traffickers in the countries of origin and in the languages of potential victims, with these sites then fostering others, which are built up to form national recruitment networks. As such, the content collected through the first website is then used on a second one, the aim being to attract clients. Information on the sex workers or victims that have been recruited is then translated into English, as well as the languages of other sex markets where the traffickers aim to trade (Interview with NGO1).

We discovered the presence of a potential trafficking network operating between Bulgaria and Greece, recruiting for young women between the ages of 18-35 to work as escorts in the UK. To a lesser extent, advertisements were also posted in English, recruiting for women of any nationality

and physical body shape to work in the Oxford area of the UK, predominantly on the adult jobs section of [www.backpage.com/uk](http://www.backpage.com/uk). Our analysis and translation into English of the content of the Bulgarian and Greek advertisements revealed that each of the listings, despite the differences in language, contained a very similar layout and written information, with the full text of one of the advertisements outlined below:

*Ad: Escort for England*

*£200 – 500 tii (sic) a day*

*attractive and sexy girls profesionaliski [sic] and not, at the age of 18 to '35 to work in England. knowledge of English is an advantage but not essential. We are looking only serious girls who want to make a lot of money in a short time. for more information, please send current pictures and write to that email address mxxiq1lxx@gmail.com*

*City: Sofia, Bulgaria*

*Tel: 004407596475xxx*

A google search of the e-mail address posted in the advertisement above revealed the presence of ten more advertisements placed on both Bulgarian and Greek online classified and adult sex websites. This is an indication that this e-mail address may be accessed and used by criminal groups or individuals based and operating in Bulgaria and Greece. The owners of the e-mail address respond to enquiries made by potential aspirants regarding the advertisements and may also organise travel and transportation from and between the two countries to the UK. Although all of the advertisements are recruiting women for sex work in the UK as escorts, there is no disclosure of the recruiter, thus it is impossible to determine whether it is an agency, a company or an individual who posted the advertisement. Moreover, there is no description of the terms of the job role, nor the location of the place of work, and neither is there mention of the daily working hours involved. In one of the other advertisements, we noted the offer of “free accommodation”, yet there was no reference to the location of residence or the type of dwelling, nor whether the accommodation was tied to the workplace.

According to a report published by the National Crime Agency, victims exploited for labour originating from Eastern European countries such as

Hungary, Latvia, Lithuania and Romania stated that they were offered accommodation as well as transportation to the UK as part of an employment package (NCA, 2016).

We also noted that all advertisements of this nature emphasised that there was “no experience necessary” for the job, and although knowledge of the English language would be advantageous, it was not an essential factor. This would suggest that women recruited may be advertised as being new to the UK sex market and to working in the sex industry. Moreover, emphasis placed on their lack of experience as an escort to attract potential customers or clients. Furthermore, a salient aspect of these advertisements was the aim to recruit “*serious women looking to make a lot of money in a short period of time*”, with the promise of unrealistically high amounts of money – for an unqualified job and a basic grasp of English – to be earned each day, ranging from £200-500, acting as an effective form of enticement.

What is also remarkable about this assortment of Bulgarian and Greek advertisements (n=10) is that all of them exhibit all of the ‘red flags’ identified, as mentioned above, by Muskat-Gorska (2014). The distinctive name and assortment of phone numbers enabled us to perform a more concentrated investigation of the authenticity of these Bulgarian and Greek advertisements. We used Google to search for the e-mail address, as well as the first half of the e-mail address, and we discovered profiles of women on adult online classified websites in the UK including [www.backpage.com/uk](http://www backpage.com/uk), [www.vivastreet.co.uk](http://www.vivastreet.co.uk) and [www.punternet.com](http://www.punternet.com). We found that up to 10 sets of profiles for each particular woman featured the same written information and style of writing, which signifies that these sets of profiles have not been written by the women themselves. It would not be unreasonable to assume that these profiles may have been created, penned and posted on different online classified websites by the same criminal group or individuals who also manage the aforementioned advertisements for recruitment. All of the women in the profiles were advertised as working in Oxford under various mobile phone numbers, although each profile did also feature the same e-mail address as listed in the recruitment advertisements as another means of contact.

A multitude of motivations may have influenced the decisions of these women to travel and perform sex work, by applying for escort jobs abroad.

Much of the literature pertaining to migration for the purposes of performing sex work has highlighted that such decisions to migrate are often motivated by a desire for personal advancement, following friends who are perceived as being ‘successful’ and wealthy abroad (see Agustín, 2005; Europol, 2016b). Other reasons include: supporting family members back in one’s country of origin; wanting to attain a degree of independence, seeking opportunities to travel and see the world (see Siegel, 2012, 2016). In addition, as a matter of fact many of the women were already working as prostitutes in their native countries. These women are recruited to socialise and mingle in clubs, pubs, night-time economy (NTE) establishments or in parties of the same ethnic groups (for example Romanian, Bulgarian, Czech, Russian). The traffickers use social media sites such as Facebook and Twitter, as well as digital mobile phone apps, such as WhatsApp, to locate other women who could work in the sex industry. Once potential victims are discovered, they are brought to the pimp or trafficker, who then introduces them to various sex industry venues throughout the country.

At this stage, the women are usually aware of the type of work they are going to be introduced in. Maljević (2005) and Petrunov (2014) note that there has been an evolution in the trafficker-victim relationship concerning recruitment and relocation over the years, where ‘soft’ methods are now most frequently used, rather than the coercion that was typical in the 1990s. In the majority of cases, the consent of the trafficked person is acquired, and the division of earnings is pre-negotiated, with most individuals having been informed about the purpose of the trip, and the type of work they will be undertaking when they have arrived to the destination country.

Obviously, the main factor in the recruitment is finances: the division of the revenues with coercion does not usually take place during the recruitment process. One of our interviewed experts recounted a discussion that had taken place with a sex worker who had travelled from her native country of Moldova to work in the sex industry abroad, wherein the woman was receptive of potential risks regarding personal safety and working environment. Yet, such dangers were seen as tolerable, as her performing sex work was an investment that would lead to a better life in the future (Interview with Expert 2, 3).

As some scholars, such as Petrunov (2014), assert, one of the main reasons for working in the sex industry is the relatively large amount of earnings, compared with what these women would earn if they stayed in their home countries: more money in less time. However, the women's agreement to work in the sex industry for monetary gain does not mean that exploitation does not occur. In their research examining the recruitment and migration of women to Italy for sex work, Cauduro *et al.* (2009) argue that while the women understand that they will be working as prostitutes, they undergo sexual exploitation by their traffickers or pimps, and they do not exercise their will in an 'autonomous manner'. Petrunov (2014) also appears to agree to some extent with this view: his research on over 117 trafficking victims from the three largest ethnic groups in Bulgaria (Bulgarians, Roma and Turks) found that a sizeable number of respondents reported that they had experienced some coercion after they began working in the destination country. It is important to note, therefore, that whilst these recruited women may have applied to the advertisements listed on the Bulgarian and/or Greek websites with an awareness of what the work in the UK will entail, the possibility exists that these women may have underestimated the risks involved and they too, through coercion and threats, may be placed in exploitative situations by their pimps or traffickers.

All of our interviewees discussed the "lover-boy" method, in which a recruiter or trafficker, either operating alone or as part of a larger group, feigns romantic interest in a girl or young woman. He then seduces her with promises of marriage and an auspicious future by travelling abroad from the country of origin. As the relationship develops further, the recruiter or trafficker manipulates or coerces the victim into sexual exploitation through prostitution. This is reportedly a common tactic in the recruitment of victims to the UK:

"Generally, you've got 'loverboy' situation, people falling in love, then "let's go travelling, let's go abroad" and then the other way was just the promise of a job, so an agent or someone in a village would come and offer work, playing on vulnerabilities of poverty, lack of education, et cetera, to try and offer people things that actually don't really ever exist" (Interview with NGO 3).

In addition, direct contact is also initiated with victims in chat rooms or via social networking sites, where traffickers pose as friends or lovers to recruit victims, often exchanging e-mails, messages, photographs and videos with their victims to build a relationship and gain their trust and confidence. NGO 3 stated that in the grooming and recruitment of children for the purposes of sexual exploitation, instead of initial physical contact with the victim, the Internet has enabled manifestations similar to the ‘lover-boy’ tactic to take place online, on a range of social media websites and digital applications. Another interesting point raised by NGO 3 concerns the usage of social media applications by traffickers to determine how close in proximity a potential victim is to them, in terms of a nearby town or city, or even within the same locality, thus enabling them to easily track, meet and build up a relationship to gain their targeted victim’s trust:

“I think probably ID’ing [*identifying*] locations, so if someone [*victim*] is using Facebook and had their location on, it’s very easy for someone [*trafficker*] to start assessing whether or not they are local to them, so do they invite them for a coffee or do they invite them to meet them and their friends, so I think social media is used like that, something we’ve observed is that lots of people we’ve worked with aren’t particularly internet savvy, which means they don’t have security settings on correctly” (Interview with NGO 3).

Many electronic devices such as mobile phones and tablets have, within their settings, built-in location services functions. The latter enable any third-party applications and websites to use information based on the user’s current location in order to provide numerous location-based services, such as finding nearby amenities that include parks and restaurants. On this point, if a user has enabled location services, knowingly or unknowingly on their device, then such action would allow social media applications, such as Facebook, and/or Twitter to gain access to and publicly display the user’s location to their ‘friends’. Such location data can be included in the user’s status updates, uploaded photographs and messages sent via Facebook’s Messenger feature. Interestingly, this information may be visible to a much larger number of people, as the user’s privacy settings may extend the visibility of the user’s profile beyond their Facebook ‘friends’ – posts may even be set to be ‘public’, *i.e.* accessible to everyone. Consequently, the visibility of one’s location to others can have negative implications for

a targeted person, and possesses much benefit for a trafficker searching for women to recruit. The NGO representatives interviewed mentioned that many of the victims they had worked with were not shrewd in their use of the Internet, and were neglectful in checking their location services settings on their mobile phones. Thus, an aspect of victims of trafficking support work involves advising them on the importance of Internet safety, ensuring that they understood what kinds of data they were sharing and who could see it. Such advice could hopefully work as a preventative measure against the occurrence of re-trafficking.

## **2. Transportation**

The Internet has been used for obtaining travel documentation in several types of transportation. In this regard, traffickers operate like any other internet users. Tickets are purchased online by traffickers often by using compromised credit card data (McAlister, 2015), in order to conceal their identities and thereby add another layer of anonymity and distance to their criminal proceedings. Furthermore, the use of stolen credit card information beneficially ensures that neither the tickets nor the victims are able to be easily linked back to the traffickers. Various methods of conveyance are utilised in the trafficking of victims, such as travelling from the origin country by air direct to the UK via budget airlines, or transport by road through international bus, coach, minibus services (NCA, 2016), or by truck and private car, which has been noted as offering more flexibility than air or train (see Dimitrova, 2006).

It is salient to acknowledge that transportation to the destination is frequently executed *legally*, as during the transportation phase, the victims move voluntarily and co-operate with the traffickers. In particular, for countries in Europe that are part of the EU, the principle of freedom of movement within them has granted a legal possibility for nationals of EU member states to enter and cross the border of transit and destination countries legally, with their own travel documents, which has resulted in difficulties in prevention within the transportation stage. After the accession of a number of former Eastern Bloc countries to the EU, female nationals from Eastern Europe could freely and legally travel to the UK – among other countries – to study at university or work in various sectors of the

economy. These opportunities obliged traffickers to alter their approach since their potential victims were empowered to approach the authorities as the possibility of deportation was not present. This has been the case with the rise of the Internet and mobile phones, which gave more freedom to sex workers to work independently. At the same time, it also gave criminals more opportunities for control of their sex workers by, for instance, allowing them to communicate directly with clients as well as giving them the capacity to regularly control the women (Interview with LEA 2, 3; Expert 1, 2, 3).

An ICT-related issue associated with the transportation part of the process is *forged documents*. We identified much evidence of forged documents as a possible means of facilitating the transportation of trafficking victims to the UK, through conducting part of our virtual ethnography on the deep web. Using the Tor web-browser and search engines such as ‘Grams’, ‘TorSearch’ and ‘TORCH’, in the same manner as we would with the surface web, we found a deluge of darknet markets, such as ‘Fake ID’, ‘Forgery Store’, ‘Onion Identity Services’ and ‘Valhalla’, that were selling counterfeit travel documents. There are also markets that were advertising the sale of other identity papers, including drivers’ licenses, ID cards and birth certificates that were available for all nationalities.

Aside from being able to cross borders under legal pretences, such documentation is highly useful for acquiring bank accounts, applying for loans or being able to rent property, particularly after arrival in the destination country. Although such documents are also available to purchase on the surface web, the assurance of anonymity and the protection of the users’ identities, resulting in a lower risk of detection from law enforcement within the infrastructure of the dark web, has a high appeal to potential buyers and marketplace sellers who partake in illicit (or licit) web transactions and/or communication exchanges. As one of our interviewed experts on cybercrime trenchantly asserted, in such online endeavours, there may be a broad range of criminal actors involved, ranging from those with rudimentary experience of the Internet, to those who possess much technological adeptness, such as accessing the dark web to engage in illicit trade (Interview with Expert 1).

Traffickers buy forged documentation for themselves to accompany their recruited victims, as a way of obscuring their real identities when

travelling abroad (see LEA 4, 6, 7). We noted that, depending on the particular vendor, the means of payment for the purchase of such documentation was through traditional forms of currency such as the Euro, or via Bitcoin (B)<sup>4</sup>, a decentralised peer-to-peer payments network and a virtual currency that essentially functions as online cash (see Brito and Castillo, 2013). Sellers on various DarkNet markets (in the Deep Web) claimed that many of the counterfeit documents on sale possessed very high levels of authenticity. Three stated that their documents had been “*tested and working fine all around the world*”. They thus enabled one to travel freely without triggering suspicion, to pass standard cursory inspection procedures at post offices, and to use person-to-person payment transfer services in which money can be sent or received, such as MoneyGram and Western Union. Similarly, sellers of passports available for purchase stated that there were no issues with travelling and entering another country, as the passports could also, for extra money, be affixed with visa stamps as well as being registered within official government databases of the destination country to avert suspicion and discovery. Technological capabilities have enabled further counterfeiting to take place, because not only can better fakes be developed at reduced prices, but advancements in ICT links dispersed locations in global trade relations. This linkage makes the formation of networks of buyers and sellers and the exchange of money relatively straightforward. This has become especially discernible since the Internet and e-commerce by producers and consumers became widespread, with the Internet acting as a “*time/space compressor, on the one hand connecting sellers with large numbers of consumers in dispersed locations and on the other offering the formation of transient relationships between (cyber)criminal entrepreneurs*” (Hall and Antonopoulos, 2016: 23) (Interview with Expert 1, 2, 3; Interview with LEA 3, 4, 5).

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<sup>4</sup> Since its inception in 2008, the usage of Bitcoin has grown to such an extent that it is now able to be used as a form of payment for the purchase of sexual services, as evidenced by one UK-based escort agency in the city of Birmingham, *Passion VIP*, accepting payments in bitcoin as an alternative and discreet payment method, in what has been termed as “the world’s first bitcoin brothel” (Blue, 2013).

### 3. Exploitation

In 2016, the most common type of human trafficking recorded for both adult and child (minor) victims in the UK was trafficking for the purposes of labour exploitation (National Crime Agency, 2017). Labour traffickers operate across the UK and exploit workers in low-skilled areas of work such as car washes, cleaning services, nail bars, restaurants as well as seasonal agricultural work. In addition, the wages of these victims, alongside any state benefits that have been fraudulently claimed in their names are frequently paid into bank accounts that are controlled and managed by traffickers (National Crime Agency, 2016). In our interviews, representatives of both LEAs and NGOs brought up the issue of labour trafficking and exploitation as a common occurrence in these sectors of work and establishments (Interview with LEA 1, 2). In instances where children have been trafficked to the UK there appears to exist a striking degree of convergence and overlap within the types of exploitation that child victims have experienced (Interview with NGO 1, 2; LEA 1, 2, 3 etc.; Expert 1, 2, 3).

From the virtual ethnography, we identified a multitude of advertisements recruiting for work in the UK, placed on numerous online classified advertisement websites and Facebook pages in numerous languages that were consistent with the red flags as outlined earlier, in an array of fields, such as construction, agriculture, health and beauty. We also found that the mobile phone number listed in the advertisements was, when searched for on google, connected to profiles of women in the UK that were selling sexual services, either on online classified websites or adult entertainment sites. However, the original advertisement made no mention of sex work and was in a completely different job sector.

It is important to state that, despite the widespread use of the Internet and digital technologies, not all victims of trafficking would have been recruited and exploited through the use of these mediums. Informal '*offline*' forms of recruitment, such as word-of-mouth, or through friends and relatives remain still a very pervasive and efficient method of trafficking individuals into situations of exploitation. This type of recruitment is still extensive in rural areas or among particular communities, such as Roma or other ethnic minority communities with traffickers often going to the fam-

ilies of victims directly (e.g. Interview with LEA 4). Such tactics were reportedly deployed by traffickers recruiting and transporting targeted victims to the UK for labour exploitation:

“In our experience in Nigeria, you’ll have someone who befriends a family, offers the opportunity of education and employment abroad . . . so it could be a male person or someone not directly related to the criminal organisation that is paid to befriend the family and offer these opportunities and then smuggle them into the UK for purposes of exploitation . . .” (Interview with NGO 2).

Moreover, Vietnamese minors have been frequently trafficked to the UK for purposes of labour exploitation to work on farms and coastlines to cultivate plants and cockles. The traffickers are visiting impoverished families to recruit young victims, and exploiting sociocultural factors of family honour and providing for one’s family through working in potential forms of debt-bondage (e.g. Interview with LEA 2). Discussing trafficking for purposes of labour exploitation, one NGO asserted that this type of trafficking possessed a distinctly offline dimension, where it was most likely to be shrouded in secrecy, most probably due to the illegal status of some trafficked victims (Interview with NGO 4).

The Internet has also augmented the nature of sex work from a predominantly physical environment to an increasingly virtual landscape to such an extent that most prostitution is currently advertised and solicited online (see also Ibanez and Suthers, 2014; Finn and Stalans, 2016), in what has been referred to in the literature as “virtual red light districts” (Cauduro *et al.*, 2009: 59; Ibanez and Suthers, 2014; Perer, 2012). Correspondingly, there has been a significant shift in human sex trafficking activity to the virtual sphere, with both the supply and demand side having benefitted, with trafficked victims often being advertised online. The majority of our findings gleaned from the virtual ethnography pertain to *sex* trafficking, in particular the exploitation of young women.

We noted that typically, each advertisement of a woman posted on the online classified and adult sex websites we were researching included: a title, the name or alias of the listed woman, a textual profile description which would often include information on the physical attributes of the woman, such as her height, weight and breast size, photographs of the featured woman, the location of the town or city she was based as working in,

and a mobile phone number for contact purposes. More infrequently, we also noted that advertisements contained videos of the advertised woman dancing or posing in a provocative manner, stated nationality and/or ethnicity of the woman, the woman's age, and whether the woman was listed with another woman in the advertisement, for example as a 'duo', sometimes with corresponding photographs of the two to demonstrate this was the case, and the inclusion of an e-mail address as another means of contact, alongside the mobile phone number. On this specific issue, it has been emphasised by researchers such as Konrad *et al.* (2016: 6) that great difficulty lies in "*discerning whether the [suspected] victim is in any capacity a willing participant rather than a victim of fraud, threat, or coercion through posted advertisements and personal encounters*", and remains to be an assignment that is fraught with complications. As we could not be entirely sure of whether the women featured in such advertisements and websites were actual victims of human trafficking, we were careful to use cautionary descriptions, such as 'potential', 'possible' or 'suspected' victims. Moreover, our findings demonstrate a wide assortment of nationalities, including Hungarian, Czech, Spanish, Moldavian, Ukrainian, Brazilian, Italian, Chinese, Japanese and Romanian women. However, it is important to note that even though these women are listed under these nationalities, in reality, this may not be a true representation.

Our study, and specifically the virtual ethnography, revealed that, during exploitation, there are a number of patterns and themes that emerge. Predictably, the first theme is the very visibility of online sexual exploitation as part of the trafficking process:

"People are purchasing sexual services, and the Internet is a really easy place to use that, mobile phones. So you're in a new city for work, you log onto your phone, download an app and say 'oh yep, I can visit X, Y and Z', so I think there is definitely technology being used to facilitate the supply and demand. Yes, for labour, because of the recruitment sites, but I think the sexual exploitation is more apparent, because there are actual pictures of women online that someone purchasing a service can make a decision on, so that's using the technology" (Interview with NGO 3).

Our virtual ethnographic research in human trafficking and exploitation in the UK sex markets revealed the importance of the mobile phone number listed within advertisements on online classifieds, for three key reasons.

Firstly, the mobile phone number serves as the nexus between the virtual and real-world physical environments, as it enables a prospective purchaser of sex browsing *online* to connect to a potential seller of sex and plan an *offline* (and almost certainly sexual) encounter.

Secondly, we detected in advertisements that the listed mobile phone number, when searched for on google and also by using the search function available on various online classifieds sites, revealed the existence of several more women (n=205) also advertised as selling sexual services, frequently in various cities across the UK as well women also working in the same locality.

Thirdly, in numerous instances (n=100), a google search of the mobile phone number also demonstrated that the same woman had multiple other profiles on various online classified and sex sites, in which she was listed under numerous aliases, ages and, in her earlier profiles, as working and based in various cities in the UK.

As such, the mobile phone number listed in such advertisements can serve as an important indicator of potential human trafficking activity. The advertisement of more than one woman under one number, either within the same city or multiple cities, suggests a ‘shared management’ situation, in which the women do not work as independent escorts, and may be under the control of a trafficking gang or network or a pimp, who controls their profiles, are in charge of the mobile phone as well as subsequent bookings made. Likewise, a google search of the phone number of a sole woman advertised is also useful to discern whether the woman has been previously advertised in different locations in the UK, indicative of frequent movement to various locations across the UK, which can signify that the woman may be a victim of trafficking (see also Interview with LEA 2).

Further highlighting the significance of mobile phone numbers in our virtual ethnography was our use of a digital app and corresponding website called ‘TrueCaller’ ([www.truecaller.com](http://www.truecaller.com)), which allows mobile phone numbers to be searched for in a database of over two billion mobile phone numbers, to see the name of the person that the phone is registered to, as well as the location of the phone and the mobile phone carrier that the phone is connected to. Whereas our google search of the numbers listed in

advertisements revealed the presence of other advertisements of women who are listed under the same number, we were able use TrueCaller to search for the mobile phone numbers we had highlighted in our research as being linked to suspicious advertisements. We discovered that frequently, the number was registered to a person that was not listed in the advertisements, and in many instances the name of the person was male (see Figure 1). This discrepancy between the name or names of the women in the advertisements where the number is listed as a point of contact, to the number being registered in the name of another, male person, strongly suggests that the person may be a trafficker or pimp who manages and controls the women, and may arrange bookings for them. Although we stress that using TrueCaller did not result in all of the highlighted numbers being registered in another person’s name, or even registered at all, we did find that many (n=20) of the numbers were listed under the Lycamobile phone operator, a large and popular ‘Pay-as-you-go’ network. The possession of ‘pay-as-you-go’ phones has been observed as being used by criminal networks such as traffickers and/or smugglers for operational and co-ordination purposes, as well as to maintain constant contact with their victims to facilitate their exploitation. The advantage is that mobile phones are often prepaid, or ‘Pay-as-you-go’, so that they are unable to be connected to a specific individual through a service contract (see also Ibanez and Gazan, 2016a; 2016b).

**Figure 1.**  
**List of women advertised under a sole mobile phone number registered in the name of another person.**



Source: Authors’ research

## Conclusions

This study addresses an important gap in the scholarly research of the use of the internet and other digital technologies in the process of human trafficking in the UK context. As we have seen, computer-related criminal activities have been identified as the ‘new’ threat or the ‘new’ frontier by law enforcement, policy makers, the media and an increasingly large number of academics. Our findings nevertheless indicate that traffickers use the internet in a similar way to other, non-criminal, users. In reality the internet-facilitated human trafficking is largely based upon a set of established criminal acts, which have existed for centuries. McQuade (2011) would define these criminal activities as *adaptive* in the sense that they constitute technological variations of ordinary crimes. Human traffickers using ICTs “*resemble many professional criminals in their ‘adaptive pragmatic organisation’*” (Shover *et al.*, 2003: 501), and continue to evolve while responding to ‘shifting terrains’ (Hobbs, 2001), new and frequently mutating technologies, and, very importantly, the opportunities offered by constant (irregular) migratory flows. Within this context, our findings would support the view that the implications of digital technologies are pervasive. They apply to every phase of the trafficking process from recruitment to exploitation, and seem to offer to traffickers considerable possibilities for a renewal and diversification of the approaches and techniques they use in the process. Similarly to what other studies suggest about the situation in other contexts (e.g. Di Nicola *et al.*, 2013), such technologies open up a virtual world which amplifies and expands the potential of human traffickers to lure victims into their trade, and, particularly in the exploitation phase, to attract and identify clients.

Firstly, the widespread use of digital technologies and of the related media can be thought to remove an important physical barrier in the recruitment process, as both traffickers are able in the online context to reach a significantly larger pool of potential victims and, conversely, potential victims may become aware of the ‘opportunities’ offered by the former via the same avenue, independently of location. At the same time, the online context, particularly the use of social media, facilitates both the obfuscation of the traffickers’ identities, and the manipulation of the nature and amount of information made available to the potential victims, since the latter interact with a website and not with a person in the first instance.

This would still be the case when interaction takes place on social media platforms. The online context significantly increases the possibility of deception, and it can therefore be detrimental to the potential victims' ability to evaluate the nature of the 'opportunities' and the risks involved, when they enter the process as decision makers. It is true that the online context can be taken to empower the potential victims, in the sense that the nature and amount of information available from suspicious websites or from their online interactions may alert them to possible risks. Clearly further research is needed to explore the exact dynamics of the interactive processes, but on the basis of our findings we would suggest that the online context involves a position of advantage for the traffickers.

Secondly, this advantage can be seen more clearly in the transportation and exploitation phases of the trafficking process. Again, the online context significantly expands the market place from which traffickers may procure the necessary means to sustain the process, from ID and travel documents to travel bookings, under conditions of enhanced anonymity. It is, however, in the exploitation phase that the online context clearly amplifies and diversifies the possibilities available to traffickers, since it offers not merely an additional layer of anonymity but also considerable flexibility in the operation of their business. The online context removes important barriers in the process of targeting and attracting potential customers, and considerably speeds up the entire process. Beyond the facilitation of the offline sexual transactions, the online context may also open up new possibilities for the exploitation of the victims entirely on the virtual environments that digital technologies enable. Importantly, as we have seen, this activity on the traffickers' side is now linked with the online environments and communities relating to sexual services and the sex market that, ultimately, organise the demand side of the trade.

An implication of our findings, which may be of particular importance in the UK context, is that a reappraisal of the prevalence of human trafficking may be necessary. There is no doubt that the extent of public awareness and the prioritisation of these issues for both policy makers and law enforcement in the UK is significant (NCA 2016; 2017). Nevertheless, as regards trafficking for sexual exploitation more specifically, the virtualisation of sex markets may have the consequence that a great deal of illicit activity, exploitation and victimisation may remain undetected. While our virtual ethnography approach has produced a series of indicators that could

be used for the development of tools for the prevention, detection and suppression of criminal activity, there is clearly a need for a larger scale research effort targeting specifically these online sexual markets.

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# The role of Vietnamese criminal networks in drug crime: the Czech Republic case

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## Introduction

Particularly since 1975, when the war in Indochina ended and the communists seized power in all of Vietnam, there has been a rise in the number of Vietnamese living abroad. Currently, approximately three million Vietnamese live outside of Vietnam, spread across more than 100 countries (Mazyrin, 2004: 159). The majority of the Vietnamese migrants are looking for an opportunity to improve their lives and ensure a better future for their children in the ‘new homeland’, or back at home in Vietnam. However, criminal activities connected to local Vietnamese diasporas have also been recorded in many countries (OCTA, 2011: 17, 19; Nožina and Kraus, 2012: 11).

Vietnamese criminals have found it easy to cross state borders, creating networks and introducing new *modi operandi* of criminal activities to the host countries. As a result, Vietnamese crime has become a serious problem in Southeast Asia, Australia, the USA, Canada and the Russian Federation (Adamoli *et al.*, 1998: 26, 88–90; Emmers, 2002: 6; Mazyrin, 2004: 172–73; AOC Canada, 2003; AOC Australia, 1995).

In the EU we find a similar situation with Vietnamese and Chinese groups being the most active Asian criminal organisations (Siegel-Rozenblit, 2011: 7; OCTA, 2011: 10, 16, 17, 21, 22; Bąkowski, 2013: 3). With

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respect to Vietnamese organised crime groups in Western European countries, during the 1990s, their presence was mainly recorded in the United Kingdom and in France (Nožina and Kraus, 2012: 42–51; MPS, 2010; OGD, 1998). However, since 2008, growing activity by such groups has also been noted in Belgium and the Netherlands (Siegel-Rozenblit, 2011: 9). As for the Central European countries, Vietnamese criminal activities have been frequently detected in Germany, the Czech Republic, Poland, Slovakia and Hungary (Nožina and Kraus, 2012: 56-75).

Vietnamese criminal networks are engaged in a broad spectrum of criminal activities, including human smuggling, economic crime, violent crime, usury, theft, human trafficking, prostitution, counterfeiting activities, trafficking in weapons and trafficking in drugs. Of particular interest to EU security forces in recent years have been the Vietnamese organisations' activities in the areas of managing the trade in illicit commodities, smuggling of people, large-scale cultivation of cannabis and money laundering (Siegel-Rozenblit, 2011: 7, 9-10). In November 2013, Europol issued a special report warning about the then recently increased activities of Vietnamese organised crime groups in Europe (Europol, 2013).

In the Czech Republic, the local Vietnamese diaspora has existed since communist times and their numbers have steadily grown since the opening of the country after the democratic revolution in 1989. According to official statistics, approximately 58.000 Vietnamese citizens and Czech citizens of Vietnamese origin were legally living in the country in 2013 (Český statistický úřad, 2014). The number of illegal immigrants from Vietnam is difficult to ascertain, but estimates range from 5.000 to 10.000 (PCR-OCDU, 2015). The Vietnamese community represents the third most numerous immigrant community in the country.

Together with the new immigrants from Vietnam, new kinds of crime have appeared as well. Vietnamese crime-entrepreneurs have started to organise illegal markets and to develop strong criminal networks in the Czech Republic. Vietnamese criminal networks have become highly developed in terms of their structures and *modi operandi* and have deeply penetrated the society of the local Vietnamese diaspora. They have been 'traditionally' engaged mainly in the smuggling of people and economic crime, such as the trade in goods with fake trademarks and the illegal production of, and illegal trade in, commodities such as alcohol and cigarettes

in violations of customs and tax laws. These criminal revenues are managed through various forms of money laundering, including illegal financial transactions.

Vietnamese drug-related crime has likewise seen a dramatic increase. Especially since mid-2007, the Czech security forces have been recording a growing engagement of Vietnamese criminals in the illegal production of cannabis. In addition, from 2010, there has been a dominant Vietnamese organised crime presence in the methamphetamine market. Vietnamese offenders have come to dominate the production of the commodity in the Czech Republic and its growing exports from the Czech Republic. According to the Czech Police Drug Headquarters, Vietnamese drug crime currently represents the most dynamically developing phenomenon on the Czech drug scene (PCR-NADH, 2016a).

## **The basic framework and methodology of the research**

The problem of Vietnamese crime has so far not been widely studied. While there exist numerous important studies on the problem of the Vietnamese diaspora in the world, some of them dealing with the Czech Republic (see *e.g.* Viviani, 1984; Kibria, 1993; Coughlan, 1998; Dorais, 2000, 2005; Rutledge, 2000; Gilles, 2004; Blanc, 2005; Thomas, 2005; Fritsche, 1991; Bui, 2003; Wolf, 2007; Grzymala-Kazłowska, 2002; Halik and Nowicka, 2002; Iglicka, 2005; Vasilijev, 1989; Brouček, 2003; Martínková and Pechová, 2010), most of them discuss the economic, social and cultural aspects of Vietnamese migration and the diasporas' life, with little attention being paid to the problem of Vietnamese criminality. Cross (1989), for example, focused on Vietnamese criminal networks, Okólski (1999) studied Vietnamese illegal migration, Zhou and Bankston (2006) analysed Vietnamese delinquency as a general phenomenon, English (1995), Klein-knecht (1996), and Du Phuoc Long and Richard (1997) studied Vietnamese criminal gangs, and Silverstone (2010) focused on the policing of Vietnamese crime. In the sphere of drug crime, Silverstone and Savage (2010) studied the Vietnamese drug trade in the United Kingdom, and Schoenmakers *et al.* (2013) that in the Netherlands.

In the Czech Republic, the problem of Vietnamese criminality was formerly studied in the broader context of the topic of international organised crime penetrating the Czech Republic's territory after the democratic changes at the end of the 1980s (Macháček and Rumpel, 1997; Nožina, 2000, 2003a, 2003b, 2004). An important subject was the trafficking of humans (Pechová, 2007). The drug trade as a special criminal activity was studied by Nožina (2010b). However, in general, there existed a considerable shortage of published information in this field. To address this problem, the Institute of International Relations (IIR) in Prague carried out a research project from 2007 to 2016 which looked into the criminal structures existing within the Czech Republic's Vietnamese diaspora and their criminal activities, including the production of and trafficking in drugs as two criminal phenomena which are rapidly gaining in importance in the Vietnamese criminal underworld. In the course of the research, several related studies were published (see, e.g., Nožina and Kraus, 2009, 2012, 2016; Nožina, 2010a, 2010b, 2013; Nožina and Vaněček, 2016).

The IIR researchers relied mainly on primary sources: unpublished reports and documents, interviews with members of the security forces as well as with members of the Vietnamese community in the Czech Republic. Six field assistants of Vietnamese origin and fluent in both Czech and Vietnamese were engaged at various stages of the project. They helped collect relevant information and carried out a series of structured interviews with other members of the Vietnamese community.

The information obtained through the Vietnamese assistants contributed mainly to gaining a general understanding of the drug problem. More concrete information related to the structures of Vietnamese drug networks and the *modi operandi* of their criminal offences. Other data were collected through an analysis of security reports. These were provided by various police units. In addition, interviews with members of the Czech security forces were carried out, mainly the *Národní protidrogová centrála Policie České republiky* (National Drug Headquarters of the Police of the Czech Republic) and the *Útvar pro odhalování organizovaného zločinu Policie České republiky* (Organised Crime Detection Unit of the Police of the Czech Republic).<sup>2</sup>

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<sup>2</sup> In 2016 it was reorganised and renamed the *Národní centrála proti organizovanému zločinu* (National Headquarters Against Organised Crime).

The main limitation of these kinds of sources lies in the fact that much of the information was considered confidential as its publication could negatively affect ongoing investigations. Because of this, the information that was obtained from police sources frequently described commonly known facts, pertained to already solved criminal cases (which ended with one or more individuals being convicted of a crime), or involved outdated or fragmented data.

Another problem was that virtually every interview had to be authorised by the responsible leadership of the security agencies. This made the research process extremely inflexible and in many cases censorship led to a certain devaluation of the information source. The problem was partly overcome by the personal experience and contacts of one of the research team's members, who has served as a police expert on Vietnamese organised crime in various police units in the Czech Republic over the course of 16 years. Moreover, the data and information that came from his previous work became an important resource for further analysis. But in some cases, the use of data and information was restricted due to the fact that it had been obtained in the course of operative investigations and therefore classified as secret.

Another valuable source of information for the project were Vietnamese informers cooperating with the Czech Police. These individuals provide the police with information from the Vietnamese criminal underworld and some of them were also willing to cooperate with the authors. The main problem with using such sources in the research, however, is their motivations for cooperating. These motivations range from a certain kind of patriotism and beliefs about the need to fight crime to a personal desire for revenge and attempts to abuse the Czech security forces for personal purposes or in order to obtain some form of benefit. The information was frequently tendentious because of these motivations. These individuals also often reported only vague hearsay or rumours that were commonly shared in the Vietnamese community. This kind of information has only limited value for an analysis.

Because of the different levels of quality of the sources, the collected field data were triangulated with information from other sources. The research in the Czech Republic was complemented by materials from and

interviews with various experts mainly from Poland, Germany, and Slovakia.

## **Drugs as a deep-rooted problem in the Vietnamese diaspora**

In general, between 1990 and 2000, the illegal production of and trafficking in drugs perpetrated by Vietnamese offenders did not attract the interest of the Czech security forces. It was considered to be a marginal problem and there was almost no information about the situation on the Vietnamese drug market and the numbers of Vietnamese addicts. However, in the following decade, the drug problem within the Vietnamese community in the Czech Republic appeared to rise dramatically, which prompted the IIR researchers to look for explanations. The interviews with the members of the Vietnamese community, which were carried out mainly in the years 2007 – 2009, revealed that, in fact, this was not a new phenomenon: drug delinquency was deeply rooted in the Vietnamese diaspora in the Czech Republic and the Czech authorities had simply failed to become aware of it. In the difficult and stressful living conditions in the Czech Republic of the 1990s, many of the Vietnamese immigrants had turned to drugs. Sellers of goods in the street markets, workers, teenagers, members of the criminal underworld, prostitutes, and also businessmen were among the Vietnamese drug addicts.

There are several reasons why drug abuse and drug dealing have had a tendency to stay “hidden” inside the Vietnamese community. First of all, drugs are universally rejected and condemned in the Vietnamese community and Vietnamese drug addicts and drug dealers have a tendency to hide their activities even from their fellow countrymen. Equally, community members are usually not interested in communicating their problems with the outside world due a traditional tendency to isolate themselves from the majority society and due to a desire not to present the Vietnamese community in the Czech Republic in a bad light. For the very same reasons, Vietnamese drug addicts usually are not inclined to seek help from Czech drug treatment centres.

In the sphere of drug trafficking, especially in the 1990s, drug imports organised by Vietnamese traffickers were insignificant. Vietnamese dealers usually bought drugs in gram quantities, for example, methamphetamine from Czech dealers or heroin from Kosovo Albanians, and then selling these within their community. This usually does not happen on the streets. Rather, drug distribution takes place inside the Vietnamese markets, in brothels, in karaoke bars, *etc.*, and due to this strategy Vietnamese dealers are not ‘visible’ to the Police.

Another typical phenomenon is the existence of special places called ‘*šlehárny*’ (literally ‘hit places’ or ‘flick places’) in the Czech drug underworld. A Vietnamese drug addict usually comes to some flat or house which functions as a ‘*šlehárna*’, buys the drug, consumes it, and spends the maximum intoxication period there. For extra money, he can also sleep in the ‘*šlehárna*’, and receive food and drink, *etc.* So again, the Vietnamese addict remains hidden, is not visible on the street and does not attract the uncomfortable attention from the police. This practice of drug use is probably based on the Asian tradition of opium dens which operated in Indochina in colonial times and then was simply transferred to Europe in modern times.

In the years 2008 – 2009, when we focused on the problem of ‘*šlehárny*’, there were at least 15 places of this kind in Prague alone; and others existed in bigger cities like Ostrava and Brno, and in cities in Western Bohemia close to Germany and Poland, such as Ostrov nad Ohří, Děčín, Česká Lípa, Karlovy Vary and Cheb (Nožina and Kraus, 2009: 90-91).

## **The “industrialisation” of the Vietnamese drug trade**

The first networks that connected the Vietnamese drug underworld with the Czech drug underworld and the international drug underworld operating on the Czech territory during the 1990s became the basis for the subsequent expansion of Vietnamese drug crime in the Czech environment and then across Central Europe. After 2000, the engagement of Vietnamese nationals in the production of, and trade in, drugs grew dramatically. This growth can probably be attributed to two main factors.

First, the demand for imported cheap Asian goods on the Central European market gradually declined and Vietnamese businesses that were heavily engaged in selling such goods, saw their profits dwindling. The “Era of Golden Rain”, as the profitable period of the 1990s is referred to in the Vietnamese business community in the Czech Republic, ended. However, the expectations of many Vietnamese immigrants who came to the country with the goal of improving their economic situation were still high. It led many of them, including the members of the criminal underworld, to seek out alternative avenues towards maximal profit in the shortest possible time regardless of their legality (Nožina, 2010a: 232).

A second factor that potentially played into the growth of Vietnamese crime in the Czech Republic was the fact that in the 1990s, the Vietnamese in Central Europe had been able to derive substantial profits from the unlicensed sale of counterfeit products and high excise goods such as alcoholic beverages and cigarettes. This kind of illicit trade was on a significant scale, for example, in Berlin, Germany, where an extensive illicit cigarette market developed (von Lampe, 1999; von Lampe, 2003); but it was widespread in Poland, Slovakia and the Czech Republic as well (PCR-NDH, 2010). Illegal drugs were the next ‘logical’ step in the expansion of the assortment of profitable illegal commodities, not least because drug trafficking networks had already been established in the course of 1990s; and there was space for their further expansion. The sources of drugs and *modi operandi* of the Vietnamese drug networks were flexibly modified to fit the new situation (PCR-NDH, 2010; 2016b).

Going into the 2000s, Vietnamese dealers continued to buy a wide array of drugs from dealers of other ethnic backgrounds. For example, criminal networks operating on the so-called Balkan Route from Afghanistan remained the main source of heroin for Vietnamese drug dealers in the Czech Republic, while only 10% of the Vietnamese heroin supplies were smuggled from Southeast Asia. Other sources of supply were drug traffickers coming from such countries as the Russian Federation, Armenia, Bulgaria (mostly Bulgarian Turks), and China. Likewise, supplies of cannabis and methamphetamine were acquired from other, mainly Czech sources.

However, in parallel to the continuing older *modi operandi*, various criminal cases during the 2000s provided evidence that Vietnamese criminal networks increasingly became involved in the production end of the drug trade as well (PCR-NDH, 2010). It also became evident that unlike

their Czech counterparts, who produced drugs in small amounts and were usually not well organised, Vietnamese ‘industrialised’ their drug production. They started to use large pieces of equipment that allowed to produce cannabis and methamphetamine on a much larger scale (PCR-NDH, 2012).

The rise of Vietnamese drug crime led the Czech police to launch a series of operations against Vietnamese traffickers in 2001 under the code-name ‘Mau’. The situation seemed to improve during the period from 2003 to 2005, but only temporarily. The Vietnamese drug dealers then adapted to the new situation, vamping up their security measures, expanding their activities and establishing new networks (Nožina and Kraus, 2012: 180–181). It was the beginning of a new era of the Vietnamese involvement in drug trafficking that saw a dramatic rise in the production and distribution of drugs organised by Vietnamese drug networks. Today cannabis and methamphetamine are the main vehicles of the Vietnamese drug business in Central Europe. Vietnamese traffickers have skilfully exploited the demand for these drugs on the one hand and the production and distribution gaps on the Central European drug market on the other hand.

### ***Cannabis cultivation and trafficking***

From 2007, the Czech security forces have been registering a strong involvement of Vietnamese offenders in the illegal production of and trade in cannabis, especially in the outdoor, hydroponic cultivation of cannabis and its trafficking (Nožina and Kraus, 2016: 524). This practice coincides with the recent spread of hydroponic cultivation of cannabis in several other European countries, such as the United Kingdom and the Netherlands (Silverstone and Savage, 2010; Schoenmakers *et al.*, 2013).

According to rumours from within the Vietnamese drug scene, the hydroponic technology of cannabis cultivation was imported to the Czech Republic from the Netherlands by a Vietnamese drug dealer nicknamed Binh Con, or “Little Binh” (PCR-OCDU, 2007) at a time when an organised marijuana market in the Czech Republic virtually did not exist. Reportedly, Little Binh was able to produce more marijuana at a much better quality than what was previously available. The locally produced non-hydroponic marijuana had a content of only 5 to 6% of the active ingredient THC (tetrahydrocannabinol). In comparison, in the case of marijuana pro-

duced with the hydroponic method, the police detected THC levels of between 7 and 23%. Since then, the potency of cannabis has increased further. In 2014, the Czech Police came across several perpetrators who by using special technology and processes of production managed to grow marijuana with record levels of THC of up to nearly 50%. This kind of cannabis is not a “soft drug”; at these high THC levels, it is already considered a ‘hard drug’ (PCR-NDH, 2014).

The Binh Con name became a trademark of the high quality marijuana distributed on the Czech drug market, and many Vietnamese traders in drugs followed his successful business strategy (PCR-OCU, 2007). The number of detected cannabis plantations started to rise dramatically. While the police discovered only one Vietnamese hydroponic cannabis farm in 2005, they came across eight Vietnamese cannabis farms in 2007, 55 in 2008, 84 in 2009 and 145 in 2010 (PCR-NDH, 2011).

The *modi operandi* of the establishment and operation of the cannabis plantations are usually quite similar. They are mostly set up in one-family homes, agricultural farms, abandoned warehouses and factories. The technologies for hydroponic production of cannabis are imported mainly from the Netherlands, but also from Great Britain, China, and Canada. A particularly important source of technology for the cultivators are the so-called ‘grow shops’, or shops selling plant cultivation technologies. In several cases, Vietnamese owners of companies selling these technologies were also involved in the illegal growing and follow-up distribution of cannabis (PCR-OCU, 2007, 2008).

Once the necessary technology is obtained, the bosses hire “gardeners”: the workers who are to take care of the farms. Formerly, the people in this position were usually illegal immigrants, previously jobless people, *etc.* However, in recent years, there is a clear trend of professionalisation of “gardeners”. Today many of them have previous experience with the growing of cannabis from other European countries, such as the United Kingdom and the Scandinavian countries, and they are much better paid as well. Formerly, they received salaries of € 400 – 500 per month, but now it is € 1500 – 2000. After their contracts expire, many of them cross over to other grow farms in the Czech Republic or leave the country to continue with the same kinds of jobs abroad – in Poland, Great Britain and other West European countries (PCR-NDH, 2016b; Frydrych, 2010: 15; Nožina and Kraus, 2012: 187; Výroční zpráva, 2010: 9).

The plantations vary in size from 600 to 5000 plants. In one case, in the course of the police operation CUKROVAR (“Sugar Mill”), which was carried out in the years 2012-2014, a record 12.000 cannabis plants were seized (PCR-NDH, 2016b; Kudláčková, 2014; Nožina and Vaněček, 2016: 66).

The profits from cannabis cultivation are high. 1 kg. of dried cannabis costs approximately € 160 on the Czech drug market. In the cases of plantations with 600-800 plants, the profits are around € 120.000, and usually, already the first three-month growing cycle covers all expenses for the plantation’s establishment and brings a significant profit to the investor.

A relatively new trend due to police pressure, is that investors have been abandoning the setting up of high capacity farms, and now prefer to run a number of smaller installations with a growing capacity of approximately 300 to 500 plants each. These operations tend to be run as joint ventures. In this way, an individual investor lowers the risk for himself, and in case one plantation is detected, the investor loses only a fraction of his investment and profit.

Most of the cannabis in the CR is grown for the domestic market. However, perpetrators also engage in trafficking cannabis abroad in high volumes, especially to neighbouring countries, such as the Slovak Republic, Poland, and Germany, but also to more distant destinations like Ukraine, Hungary, Great Britain and the Scandinavian countries (PCR-NDH, 2016b).

### ***Production of and trafficking in methamphetamine***

In 2013, for the first time, the Czech Police observed a decrease in trafficking in cannabis organised by Vietnamese criminal networks (PCR-NDH, 2016b; Nožina and Vaněček, 2016: 46). This decline was caused by a steady trend of the Vietnamese criminal groups moving away from the illegal cultivation of cannabis towards the illegal production of methamphetamine. The shift to the trafficking in methamphetamine can be ascribed to bigger and faster profits at a lower risk of detection. At the same time, this trend reflects the growing demand for stimulant drugs on the European drug market. Some inspiration for this may also be found in Southeast Asia, where the illicit production of and trade in methamphetamine has been dramatically rising in recent years (SMART, 2015).

As mentioned before, trafficking in methamphetamine had existed in the Vietnamese community for years. The Vietnamese drug dealers were buying methamphetamine from Czech ‘cooks’ in small amounts to supply addicts in the Czech Vietnamese community. Approximately in around 2000, they started to hire the Czech ‘cooks’ for the production of meth and to supply chemicals (mainly ephedrine) to them. Then they learned how to produce methamphetamine on their own. Their engagement in this activity quickly increased and from 2010, it has been Vietnamese organised crime dominating the production of methamphetamine in the CR and its exports from the CR to other countries (Výroční zpráva, 2012: 5)

Due to the former Czech patterns, the conversion of pseudoephedrine into methamphetamine through the use of iodine and red phosphorus, the so-called “Czech way”, has remained the prevailing manufacturing method of the Vietnamese producers. However, they started to produce methamphetamine in bigger labs, in bigger amounts and with a higher quality. In one lot, labs now produce dozens of kilograms of methamphetamine. For example, in the course of the police operation BAT in 2015, a group of thirteen suspects, eleven Vietnamese and two Czechs, was arrested. It was found that they were operating a laboratory producing 30 to 50 kg of methamphetamine in one production cycle, which lasted about five days (PCR-NDH, 2016b; Kudláčková, 2015).

A persistent trend in the production of methamphetamine has been the extraction of its precursor, pseudoephedrine, from prescription pharmaceuticals, mainly Cirrus, but also Acatar, Sudafet, Solutan, Modafen, Nurofen, Stopgrip, Paralen Plus Grip, Paralen Plus, *etc.* Pharmaceuticals containing pseudoephedrine were sold freely over the counter in the Czech Republic until 2009, when their regulation was introduced. However, the local drug market did not experience any serious shortage of the methamphetamine precursors as a result, since pseudoephedrine pharmaceuticals continued to be sold without any limitations or checks in Poland, the Slovak Republic and Hungary, and the drug dealers started to import them from these countries.

It took six years, until 2015, before Poland introduced similar restrictive measures for pharmaceuticals containing pseudoephedrine. But again, the effect of these measures was limited. The drug traffickers started to smuggle Cirrus and other pseudoephedrine pharmaceuticals from other countries. Currently, the main road for the pharmaceutical smuggling leads

from Turkey, across the Balkans (namely Romania, Bulgaria, Hungary and Slovakia) and Poland to the Czech Republic. Especially Bulgarian traffickers in drugs are active on this trafficking route, and they flexibly cooperate with Poles, Czechs, and Vietnamese. In Poland, the main centre of pseudoephedrine pharmaceutical dealing is the Wulka Kosovska Market in Warsaw (PCR-NDH, 2016b).

On the Czech drug market, there are various pseudoephedrine pharmaceuticals with different brand names which are not registered in the EU countries and are coming, for example, from Asia. The first cases of imports of pseudoephedrine pharmaceuticals of this kind from Vietnam were registered in 2010, and such import has continued until now. In addition, at the end of 2016, the smuggling of the pseudoephedrine pharmaceutical CET-DER from India to the Czech Republic and Poland came to light.

The production of methamphetamine directly from the precursor ephedrine represents another rising trend. For example, drug gangs from the Balkans supply ephedrine to Vietnamese producers. Another source which has been growing in importance is China, where there are numerous factories producing ephedrine. Attempts to produce ephedrine with the help of technologies imported from Asia were uncovered in the Czech Republic as well.

Similarly, hundreds of kilograms of chemical substances in the form of so-called pre-precursors are imported from Asia, mostly from China. Pre-precursors are chemicals from which chemical substances necessary for the production of drugs are produced. They are not usually included on the lists of controlled substances, and their importation is legal. In the target countries, they are used for the preparation of precursors, the chemicals directly used for the production of illegal drugs. This process is safer and cheaper than the production of drugs from pharmaceuticals or from smuggled controlled substances.

Pre-precursors are imported wholesale in hundreds of kilograms. In the course of the international operation called Operation APAAN in 2013, which was carried out in cooperation with the police and customs services of the Czech Republic, Germany, Poland, and the Netherlands, 30 tons of the pre-precursor APAAN, which is used for the production of the methamphetamine precursor BMK, were seized. The shipment was organised by a Vietnamese company based in the Czech Republic and it was directed

from China to the Czech Republic and then to the Netherlands and Belgium. From this amount of APAAN, 24 tons of methamphetamine could have been produced (PCR-NDH, 2016b; Nožina and Vaněček, 2016: 45-46).

In June 2017, a vast Vietnamese network of importers of precursors for methamphetamine production was broken up by the Czech police as part of the operation codenamed 'KIWI'. The group actively cooperated with the official producers of chemicals and pharmaceuticals in several countries of Europe and Asia and was able to regularly supply at least 20 big methamphetamine laboratories, each of them able to produce, on average, 60 kilograms of high quality methamphetamine per month. The chemicals for the labs were supplied in multi-ton shipments (Kudláčková, 2017).

In the sphere of methamphetamine production, the Czech police detected a trend of a sophisticated shuffling of laboratories from one rented property to another. Perpetrators tend to use rented residential property or warehouses for cooking several batches before leaving the contaminated property. The "cooking" of methamphetamine in mobile laboratories hidden in cars was registered as well. To further eliminate the risk of detection, the perpetrators have moved some of their production abroad, mainly to Poland (PCR-NDH, 2016b).

A substantial part of the methamphetamine manufactured by Vietnamese in the Czech Republic is bound for users in Germany, where the demand for methamphetamine has been rising in recent years. The border trade in methamphetamine is highly developed at the Vietnamese market places located in close vicinity to the border, and is controlled by Vietnamese and Western Balkan organised crime groups. The situation is especially serious at the market places situated near the former Czech–German crossings in Rozvadov and Svatý Kříž.

Some other important destination countries are Austria, France, Norway, and Sweden. There are also relatively recent cases of methamphetamine smuggling from the Czech Republic to Japan and Australia,

The production of and trafficking in methamphetamine are highly profitable. The organised groups mentioned above manage to produce 1 kilogram of methamphetamine at a cost of approximately € 6.300 and then sell the same amount at a wholesale price of approximately € 10.000 on the Czech drug market. Methamphetamine exported and sold in Germany is traded at four times that price, and when exported to the Scandinavian

countries is even eight times more expensive. In the cases of Japan and Australia, the price levels are 10 or 15 times higher (PCR NDH, 2016b; Nožina and Vaněček, 2016: 45-46). According to Police estimates, the Vietnamese drug networks in the Czech Republic produce and traffic 10 to 12 tons of methamphetamine a year, and the volume of detected methamphetamine has been reaching its historical maximum in the recent years (Výroční zpráva, 2016: 6).

## Conclusions

Vietnamese networks are present on the drug markets in several European countries, including the United Kingdom, the Netherlands, Norway, Germany, Slovakia, and Poland, and their activities have been rising in recent years.

In the Czech Republic, after an initial period in the 1990s when the drug dealing organised by Vietnamese nationals was not very widespread and was focused mainly on the Vietnamese diaspora, the Vietnamese drug networks dramatically entered the drug business at a national and international scale in the 2000s. Around the beginning of the new millennium, they started to engage mainly in the production and trafficking of cannabis and methamphetamine. Both these activities organised by Vietnamese offenders are highly industrialised and include operations of technically well-equipped hydroponic “gardens”, which produce hundreds of kilograms of high quality cannabis.

In addition, methamphetamine laboratories organised by Vietnamese are able to produce substantially bigger amounts of the drug than ever before. Hundreds of kilograms of chemical substances necessary for the production of methamphetamine are imported into the Czech Republic.

The illegal activities of the Vietnamese groups are highly conspiratorial and organised. Vietnamese criminal networks use a kind of ‘division of labour’ between different groups. They have contacts with other Vietnamese criminal groups operating abroad and use complex drug courier networks. The frequent use of occasional criminals or unemployed Vietnam-

ese workers as menial workers in illegal cannabis ‘farms’, as drug and precursor couriers, or as distributors of drugs is characteristic of these networks as well.

Drugs of Vietnamese provenance are popular among Czech users because of their good quality and low price. Vietnamese made high quality cannabis is especially in high demand. Of the methamphetamine manufactured by Vietnamese in the Czech Republic, a substantial part is exported for consumption in Germany which has seen an increase in demand in recent years. The border trade in drugs is highly developed at Vietnamese market places located in close vicinity to the border with Germany and Poland, and is controlled by Vietnamese and Western Balkan organised crime groupings. Vietnamese networks in the Czech Republic are also engaged in exports of drugs to other European countries, and, on a lesser scale, to Asia and the Pacific region. They operate well-developed production and distribution networks, which are able to respond very quickly to the high demand for drugs. They represent a dynamic phenomenon on the European drug market, which should not be overlooked.

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# **On the persistence of an open illegal market Explaining the continued existence of street-vending of contraband cigarettes in Berlin since 1990**

*Trang Nguyen and Klaus von Lampe*<sup>1</sup>

## **Introduction**

Germany is known as a nation where people customarily wait for a green light before proceeding, even in the middle of the night at a deserted intersection. In such a law abiding culture, widespread and open law breaking appears unthinkable. Yet this is exactly what one encounters in the case of the illegal cigarette market in Berlin. Since 1990 the situation in Berlin is such that large volumes of illegal cigarettes are sold by vendors in public places, including entrances to metro stations and supermarkets, with the vendors being primarily, and in recent years exclusively of Vietnamese origin.

As has been described elsewhere (von Lampe 2002; 2005), the origins of the cigarette black market in Berlin can be traced back to early 1989, some months prior to the fall of the Iron Curtain. In January 1989 a reform-minded Polish government loosened travel restrictions for its citizens which made it possible to travel to the then capitalist enclave of West Berlin where, under Allied control, no visa requirements existed for citizens of Eastern European countries. This gave rise to an anarchic cross-border trade. A wide range of goods were acquired by Polish tourists in their home country and brought over to West Berlin - legally or illegally - in hopes of

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selling these for a profit on the street or at make-shift open air markets. Informally imported goods included a wide range of products such as electronic appliances and tools, but also goods that were subject to high taxation in West Berlin, namely alcoholic beverages and cigarettes which could be bought cheaply for hard currency in Poland. For example, a few bottles of vodka purchased for \$1,20 each at a branch of the “Pewex” valuta store chain could be sold in West Berlin for the equivalent of a monthly salary of a Polish school teacher (Hartung, 1989; Irek, 1998).

In June 1990, along with the introduction of the D-Mark as the official means of payment in East Germany ahead of German reunification in October 1990, the open market shifted and spread to East Berlin and other parts of the German Democratic Republic with cigarettes emerging as the main commodity. In West Berlin, meanwhile, rigid police intervention dramatically restricted the selling of illegal cigarettes. By 1991, the illicit sale of cigarettes had become an established part of the economy in the Eastern parts of unified Germany, supposedly accounting for up to one third of the cigarettes consumed by East Germans (*Der Spiegel* 26/1991). Within the same time span of a few months, Vietnamese living in East Germany had begun to massively replace Polish tourists and other Eastern Europeans in the open selling of illegal cigarettes. According to some estimates, Vietnamese vendors soon held a share of about 80% of the illegal market (Gosztanyi, 1994). Importantly, there is no indication that the transition from mostly Polish to mostly Vietnamese vendors between 1990 and 1992 was the result of displacement competition. Rather, it appears that members of other national and ethnic groups quite gladly quit the field to let the Vietnamese take over the highly exposed part of retail selling while Polish market participants increasingly confined themselves to the roles of smuggler and wholesaler of contraband cigarettes (Gosztanyi, 1994; Irek, 1998). Likewise, there is no indication that the dominance of Vietnamese vendors has been challenged by anyone ever since.

In this chapter we seek to shed some light on how it is possible that this open, visible illegal market exists, and has continued to exist within the same basic parameters for more than a quarter of a Century.

## **Methodology**

In discussing the open market for illegal cigarettes in Berlin as it has formed in the early 1990s, we bring together various lines of research. First of all, we further pursue the research that was begun by the second author in 1999 and that has examined the illegal cigarette trade in Germany as a case study of organised crime, based primarily on data from open and law enforcement sources (von Lampe, 2002; 2003; 2005; 2015; von Lampe & Johansen, 2004). Second, we draw on preliminary findings from ethnographic research the first author has been conducting in the Vietnamese community in Berlin since February 2015. This includes semi-structured and unstructured interviews with 9 retired vendors, 3 former wholesale dealers, 2 former smugglers of cigarettes as well as 2 academics, 2 business people, 3 journalists and 3 political activists with knowledge of the illegal cigarette trade and its embeddedness in the Vietnamese community in Berlin. In addition, we adopted an observational approach to understanding the geography and mechanisms of the selling of illegal cigarettes in Berlin and report preliminary findings from the monitoring of behaviour of sellers and buyers in public places at various vending locations. Finally, the first author who is fluent in Vietnamese, analysed Vietnamese language social media posts pertaining to the illegal cigarette trade.

## **The basic parameters of the open illegal cigarette market in Berlin**

Berlin is a centre, if not *the* centre, of the illegal cigarette trade in Germany. For example, surveys of discarded cigarette packs commissioned by the tobacco industry suggest that Berlin tends to have the highest shares of illegal cigarettes in the country. The most recent survey conducted in the first quarter of 2017 indicates that more than half of the cigarettes smoked in Berlin have not been legally purchased inside of Germany (Fig. 1).

The basic picture that has not changed since the early 1990s is that illegal cigarettes are openly sold at various locations in the city, that this market, with few exceptions, is confined to former East Berlin, and that the vendors originate from Vietnam (see Image 1). This is not just a perception

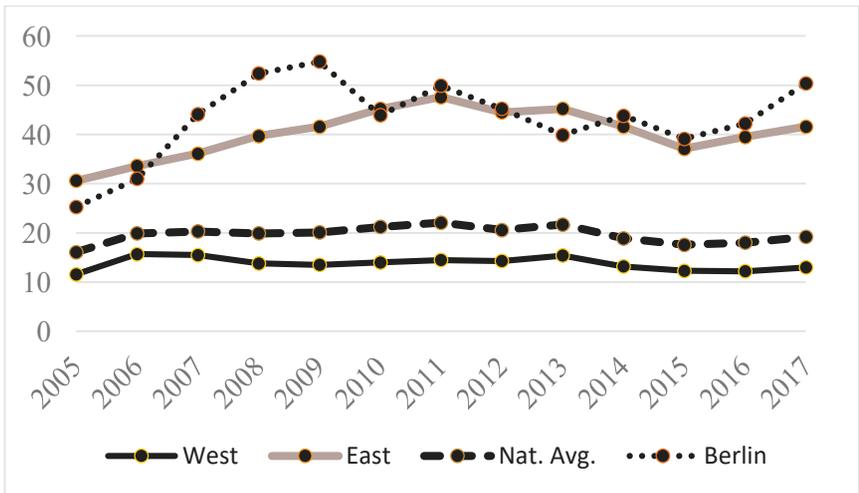
held by outside observers, *i.e.* law enforcement, the media and the general public. It is also a view shared within the Vietnamese community in Germany. For example, one former illegal cigarette vendor notes:

Only our people do this type of job. There are hundreds [of vending places]. There were a lot more in the past, everyone did this job, all my friends, all my co-workers. (Interview V1)

A political activist added:

For some reasons, Vietnamese people are more suitable for the job than any other immigrant groups. They are willing to take over the riskiest roles in the market while the Eastern European partners are likely to play a less conspicuous role. (Interview, P1)

**Figure 1.**  
**Share of illegal cigarettes, discarded pack surveys 2005-2017**  
**(1st quarter)**



Source: Ipsos GmbH, Hamburg/Deutscher Zigarettenverband (DZV)

The vending places have in common that they are accessible by the general public and that they – in line with Eck’s (1995) General Model of the Geography of Illicit Retail Marketplaces – are located where a large number

of persons congregate or pass by in the course of day-to-day routine activities. We identified two types of places that are likely to attract illegal vendors of cigarettes:

- metro train stations belonging to Berlin's two systems of mass transportation, S-Bahn and U-Bahn, and
- supermarkets and shopping malls.



**Image 1:** Press photographs (cutout enlargements) from the early 1990s (1), mid-1990s (2), late 2000s (3), and 2016 (4). Sources: Der Spiegel, der kriminalist, Berliner Morgenpost, BZ Berlin (Olaf Selchow).

Vendors may position themselves on parking lots adjacent to train stations or retail stores, directly by the entrances, or even inside train stations and, in one case, inside a shopping mall. Vending spots inside train stations are located at stairs or in tunnels leading to the platform. Interestingly, in some cases the vending spots are much closer to the platform than to the nearest exit which means that escape should be rather difficult in case of a raid by police or customs officers (see Image 2).

Another pattern we observed is that vending places often are near legitimate businesses operated by other Vietnamese, such as fruit stands, flower shops and restaurants. We also noticed that these stores sometimes provide logistical support for the selling of illegal cigarettes. For example, in one instance we observed that a vendor was able to get change from a fruit stand a few meters away when a buyer wanted to pay with what appeared to be a too-high denomination bill. In another case we witnessed how a vendor retrieved cigarettes stored behind the outside display of a Vietnamese-run floral shop. The same person was on an exceptionally cold winter

day also able to find shelter from the cold every 15 minutes or so in a nearby Vietnamese restaurant without having to buy anything. Interviewees also stated that these Vietnamese operated businesses might serve as lookouts or help vendors with the safe-keeping of money.



**Image 2:** Sale of illegal cigarettes by vendor (in circle, right) to customer (in circle, left) inside an S-Bahn station in East Berlin, November 2016

The illegal cigarettes that are being sold in Berlin come primarily from Eastern Europe. This includes cigarettes that pass through Eastern European countries in transit and cigarettes that are legally or illegally produced in Eastern Europe. It is treated as common knowledge in the Vietnamese community that most illegal cigarettes come from Poland, as Polish suppliers are widely considered the major suppliers of Vietnamese wholesalers. However, several interviewees pointed out that in the early 1990s when Russian troops were still stationed in Germany, Vietnamese were able to obtain large amounts of contraband cigarettes from Russian military personnel. These business relations were reportedly facilitated by the fact that Russian was taught in Vietnamese schools during the Cold War.

In contrast, East Asia has not been an important source of illegal cigarettes marketed in Germany or, more specifically, in Berlin. This is somewhat surprising because cigarette black markets in other parts of Europe, namely the UK and Ireland, have been a major destination for counterfeit cigarettes from China. Germany in this respect is a transit country rather than a country of final destination (Transcrime, 2015; von Lampe, Kurt, Shen, & Antonopoulos, 2012). Remarkably, despite the social proximity to the illicit cigarette trade in Berlin, Vietnam does not seem to play a prominent role in the illegal supply chain either. Even though Vietnam has been ranked third among the main countries of provenance for tobacco products smuggled into the European Union behind China and the United Arab Emirates (European Commission, 2013). In contrast, smuggling of cigarettes from Vietnam to Germany has only been rarely documented. For example, in January 2016, the German Customs Service announced the seizure of 10,5 million contraband cigarettes that had arrived at the port of Hamburg in a container from Hanoi (Zollfahndungsamt Hamburg, 2016).

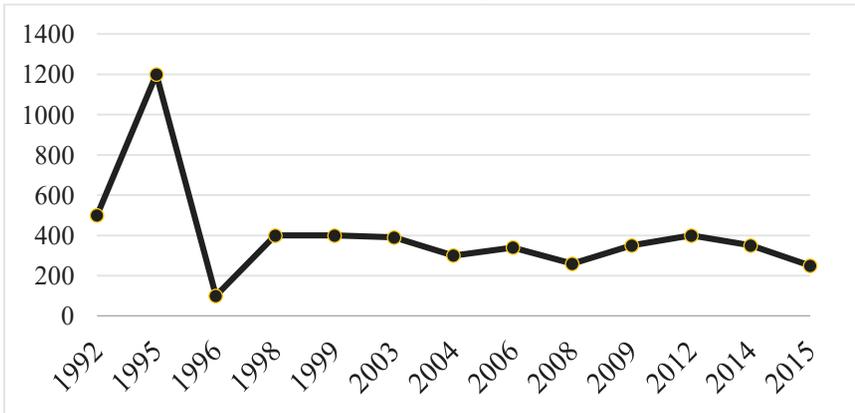
The Vietnamese involvement, thus, is largely confined to the bottom of the market pyramid. One interviewee explains the position of the Vietnamese in the illegal cigarette trade as follows:

It's a complicated picture. I talked to quite some Vietnamese sellers here, but they almost have no connection with the factories or the big bosses behind the supply. Vietnamese people in Germany are just at the lowest level in this business, working mostly as vendors and peddlers in the street. (Interview P1)

## **Changes over time**

The continuity of the Vietnamese dominated illegal cigarette market in Berlin does not mean that it has been entirely resistant to change. In fact, over the years there have been some substantial variations in the prevalence and organisation of open selling of illegal cigarettes, in the gender of vendors, and in the types of illicit cigarettes that have been available.

**Figure 2.**  
**Official Counts/Estimates of Vending Places in Berlin, 1992-2015**



Source: analysis of various media reports

Over the years, police and customs service have provided counts and estimates of the total number of public vending spots for illegal cigarettes in Berlin. According to these figures, the open selling was most prevalent in the mid-1990s with some 1.200 vending locations and, following a massive crackdown in response to a series of homicides in connection with the illegal cigarette market (von Lampe, 2002), the number of vending places declined rapidly and since then has remained rather stable at around 250-400 (Fig. 2). More recently there are indications that a further drop to about 100 vending places has occurred. In fact, one of the journalists among the interviewees suggests that this marks a diminished importance of the open market compared to other illegal distribution channels:

In recent years there are less and less Vietnamese vendors in the streets, but it seems that there are more tobacco factories set up in the East, even underground factories. I thus assume fake and contraband cigarettes are also distributed through other ways, not only being sold by Vietnamese vendors in the street. They probably have a more advanced distribution network to legalise those cigarettes in the western market. I observe there are around 100 Vietnamese cigarette spots around Berlin, each sells around 60-80 packs per day, so the whole of Berlin consumes 6.000-8.000 packs per day which makes around 3.000.000 packs per year. This number is nothing compared to the real number of illegal cigarettes in the Berlin market, as well as to the production capacity of

tobacco factories (. . .) around 200.000 packs per day by a small-scale underground factory. (Interview J1)

There are no data available on the relative importance of street vending for the distribution of illegal cigarettes in Berlin so that we are not in a position to verify the claim of a shift from street vending to other, more clandestine retail schemes. We are only able to comment specifically on the open illegal market and how it has developed over time.

Apart from the number of vending locations, there have been changes in the way illegal cigarettes are sold in public. One change pertains to the number of individuals involved in a single vending operation. From various sources, including investigative files, video footage and photos published by the media over the past 27 years it appears that there had been a shift from individual vendors to vending in groups with a rather complex division of labour in the mid-1990s. These complex organisations may have involved more than a dozen individuals operating and cooperating at the same place and the same time, and included specialised roles for those doing the actual selling, those who retrieved cigarettes from remote hiding places, those who handled the cash proceeds, and those who served as lookouts (von Lampe, 2003). Such organisational growth and sophistication was likely a response to increased law enforcement pressure (Gosztonyi, 1994; von Lampe, 2003). Subsequently there appears to have been a trend back to individual vendors or smaller groups, consisting of designated vendors and individuals who deliver new cigarettes and at the same time pick up cash proceeds from the vendors. We noticed that vendors typically wear earphones and they seem to continuously communicate via these earphones which may indicate that they are in communication with other members of a group that is involved in the selling operation.

The only exception to less complex and smaller organisations in recent years, interestingly, is provided by one of the few cases of selling illegal cigarettes in West Berlin, a gang operating at a train station where up to five members have been collaborating at the same time in a division of labour between sellers, lookouts, an individual delivering cigarettes and collecting money, and what appeared to be a manager giving orders.

Another significant development has been a decline in female participation. While in the beginning, female cigarette vendors were a common sight, today illegal cigarettes are almost exclusively sold by male vendors.

In fact, in the course of our observational research we were only able to identify one woman selling illegal cigarettes. In recent years, thus, the typical seller of illegal cigarettes has been a male Vietnamese who passively waits for customers at a fixed public location. There is now even some uniformity in attire which is an additional signal to passers-by that the person is selling cigarettes. For example, we observed that many vendors wear the same kind of shoulder-strapped bag and hat (a baseball cap during warmer months and a woollen cap in winter).



**Image 3:** A legal pack of Marlboro with tax stamp (1), and various counterfeit Marlboro packs sold by Vietnamese street vendors in Berlin (2, 3 & 4).

Interestingly, there have been fundamental shifts in the types of cigarettes that have been available on the black market in Berlin. Throughout the 1990s and into the 2000s, genuine brand cigarettes dominated the illegal market (von Lampe, 2002). Then, around 2004, so-called cheap whites (or illicit whites), namely ‘Jin Ling’, were the cigarettes that street vendors typically had available (Spiegel Online, 2009). These cigarettes are legally produced but they are primarily or exclusively produced for distribution on the black market (Candea, Campbell, Lavrov, & Shleynov, 2008; Ross, Vellios, Clegg Smith, Ferguson, & Cohen, 2016). However, in the past two years ‘Jin Lings’, once among the most popular cigarette brands in Germany overall, seem to have disappeared from the market and have been replaced by other cheap whites and by counterfeit cigarettes, including counterfeit ‘Marlboro’ (Image 3), ‘L&M’ and ‘West’, but also, ironically,

fake ‘Jin Lings’ (Image 4). These counterfeit cigarettes are said to be produced in Europe rather than in China or other East Asian countries (KPMG, 2017).



**Image 4:** Cheap whites sold by Vietnamese street vendors in Berlin, including genuine (1) and fake (2) Jin Ling, MG (3), and Palace (4).

## The Vietnamese community in Germany

There are two groups of Vietnamese that need to be distinguished when discussing the illegal cigarette market in Berlin.

The first group consists of former contract workers primarily from the northern parts of Vietnam. They came to East Germany during the 1980s and began to sell illegal cigarettes after they lost their jobs as a result of the collapse of the Soviet economic system following the fall of the Berlin Wall.

The second group comprises illegal immigrants mostly from the underdeveloped centre of Vietnam who came to Germany only after German reunification and who from 1991 onwards have largely replaced former contract workers in the illegal cigarette trade.

A third group of Vietnamese in Germany has not been linked to illegal cigarettes: refugees from South Vietnam, so-called *boat people* who escaped the Communist regime after the end of the Vietnam War and who settled in West Germany and West Berlin. In contrast to the former two groups, boat people were given the status of political asylum seekers and

were granted residence and work permits right away, and are generally considered to be well integrated into German society (Schaland & Schmiz, 2017; Wolf, 2007).

## **Vietnamese migration and the illegal cigarette trade**

The first Vietnamese who started selling illegal cigarettes joined the market that had initially emerged in West Berlin in early 1989 and later spread to East Berlin and other parts of East Germany. It was fuelled by price differentials between stores in Eastern Europe that sold western brand cigarettes for hard currency and retail stores in Germany (von Lampe, 2002). The illegal cigarette trade offered quick profits in a situation where Vietnamese contract workers saw themselves confronted with lay-offs and the loss of legal residence status once their East German labour contracts expired. As one interviewee explains:

That was a hard time for us [contract workers]. Everyone was uncertain about their future, didn't know when they would be deported back to Vietnam. So all tried to make money as much as possible, doing all jobs, including selling cigarettes and other illegal stuff. (Interview V2)

Another former contract worker recalls how lucrative selling illegal cigarettes was during that time:

A pack went for 1,7-2,5 DM while it cost 4 DM in the tobacco store. An untaxed carton made 10 DM in profit and if someone sold 100 cartons per day, he would make 1000 DM, a huge amount compared to the life of Vietnamese people back home; that's how Viet people started to join the team (Interview V3).

One interviewee also linked the involvement in selling illegal cigarettes to a "communist mentality":

The Vietnamese community in the West is a lot more integrated and not involved in illegal activities. But the Vietnamese workers in the East are communist people. They mostly came from the middle or northern Vietnam, under the communist regime, then moved to East Germany,

also under the communist system. After they lost their job, with difficulties in integrating into the new system and social structure, they did not have many options to seek new income. They suffered social deprivation, language barrier, plus their 'communist mentality', you know what I am talking about, many of them started to follow and take over the job of Eastern European tourists selling contraband cigarettes in Germany. (Interview P1)

Most of the former contract workers withdrew from the illegal cigarette business once they were able to establish a legal existence in Germany. This gradually became possible with a change in policy initiated in 1993 that permitted legal employment in addition to legal entrepreneurial activity (Wolf, 2007).

But of course most people just did this job for some time; then once we got work papers, we all tried to go back to legal jobs again like you see now, working in a restaurant or having a flower shop. (Interview V4)

The cigarette black market today is described by various interviewees as characterised by a constant influx of newly arriving Vietnamese illegal migrants who replace those leaving the market. They sell cigarettes to repay the debts owed to human smugglers, which according to various sources may amount to some 20.000 Euros that have to be repaid in cash as soon as they arrive in Germany. For example, one former contract worker and cigarette vendor remarks:

The cigarette vendors you see now in the street they are the young generation coming from the centre provinces in Vietnam, especially from Nghe An, and Ha Tinh. They all came here illegally by paying lots of money to smugglers. (Interview V3)

Another interviewee draws the same connection between illegal migration and the selling of illegal cigarettes:

Basically, lots of Vietnamese people do this job as either in the past they lost their job after the break-up of the Soviet Union in 1989, or recently they came to Germany illegally by paying money to a company or a group who brings people to Europe. In order to have money to pay back their debt, many chose (or have to) sell contraband cigarettes. (Interview P1)

However, one needs to be cautious not to draw too close a link between human smuggling and the illegal cigarette trade. Not all illegal migrants come to Germany with the intention or under the obligation to sell illegal cigarettes. Discussions on Facebook groups and other social media platforms show that some illegal immigrants from Vietnam are deeply disappointed after arriving in Germany. They claim that smugglers did not provide the jobs they were promised and that they were left alone to fend for themselves. There is evidence that these illegal migrants are recruited into the cigarette business only after their arrival in Germany. Cigarette selling jobs are openly posted on the Internet, and in a few cases, migrants actively seek employment in the illegal cigarette market through online postings.

The mechanisms of illegal migration help explain why men now far outnumber female cigarette vendors. As one interviewee points out, both men and women come to Germany illegally. However, the avenues to legal residency are different by gender:

Until now, there are still many people coming to Germany every year, like a thousand each year, both men and women, by different ways. Then men try to stay by selling cigarettes, and getting legal papers through fraudulent marriage. Women too, they look for someone to get married, or they get pregnant in order to stay. Half the people eventually find a way to stay legally after a few years. (Interview V5)

Importantly, the respective costs are much higher for men than for women. Various interviewees uniformly stated that in order to gain legal residence status through, for example, fraudulent marriage, male migrants have to pay up to 40.000 Euros, whereas the costs for a female migrant entering into a bogus marriage, or gaining residence rights through a German citizen or permanent resident falsely acknowledging paternity, costs only between 4.000 and 5.000 Euros. Accordingly, the pressures to enter the cigarette trade are much stronger for men than for women.

## **The Vietnamese experience of selling illegal cigarettes in Berlin**

Newly arriving illegal immigrants find it easy to get access to the selling of illegal cigarettes in Berlin. “Everyone who wants to participate” can do so as long as they “follow the rules” (Interview P1). “The rules” is a reference to the power structure that overarches the market. The open illegal cigarette market in Berlin is a regulated illegal market which means that ‘property rights’ are recognised and enforced for specific vending locations. This governance system emerged out of an initial phase of predatory exploitation of cigarette sellers by way of robberies and pure extortion, and a phase of violent conflicts over territory between rivalling Vietnamese gangs. Eventually, gangs were able to establish exclusive control over territory and to ‘tax’ vendors in exchange for protection against other gangs and predatory criminals (Gosztonyi, 1994; von Lampe, 2002). Today, the gangs are reportedly much less prominent, but the regulatory system they established remains in place. As one former cigarette vendor notes:

Now there is not much competition and violence between the groups anymore. Things are settled and newcomers just need to obey the rules. As long as you pay money to those smugglers, you can come to Germany. And of course, as long as you pay enough ‘tax’, you can sell cigarettes. (Interview V5)

Similarly, a former smuggler explains:

Today, there are no obvious gangs anymore, but still, the market is well structured and territories are controlled by certain people. Someone who owns a spot could hire a guy to sell cigarettes. He can stay with him, eat with him and each month gets a certain amount like a thousand Euros to pay for the smuggling costs. Then later, once this guy has enough, could keep staying or buy the place or quit the business. (Interview S1)

Apart from making arrangements with existing groups and obtaining cigarettes, the practical hurdles for selling cigarettes are relatively low. Namely, no extensive German language skills are required to successfully complete transactions with customers. During the research period 2015-2017, there was a uniform price of 2,20 Euros per pack irrespective of

brand or type of cigarette (genuine or counterfeit). This leaves very little room for negotiations and much can be accomplished by sign language and a rudimentary vocabulary. In fact, the transactions we observed typically took only seconds and involved little to no verbal communication between seller and buyer. Customers apparently either know, or strongly expect that a Vietnamese individual positioned in a public place is an illicit cigarette vendor. This makes lengthy explorations into whether or not he or she might sell cigarettes redundant. Further, the display of the packs the vendor has on him or her makes elaborate explanations of the available merchandise dispensable. This occurs either by vendors placing the packs in an open bag so that passers-by are able to see them, or by opening the bag with the packs when a customer approaches.

As far as the social context is concerned, cigarette vendors appear to be operating in a fairly *non-hostile* environment. In particular, there is no indication that widespread xenophobic violence that in the early 1990s was directed against Vietnamese in East Germany, including Vietnamese street vendors (Panayi, 1994), is still prevalent today. Passers-by for the most part do not seem to attach any importance to the selling of illegal cigarettes even though it is highly visible and, arguably, common knowledge. During our observations we did not witness any expressions of disapproval, let alone signs of hostility. On the contrary, if there was any communication with vendors, it consisted of friendly greetings and what appeared to be amicable small-talk. The only threat illegal cigarette sellers face, therefore, comes from the authorities, namely the customs service and the police and also from the immigration service. However, the available resources of agencies at the city and federal level are limited. In the media, unnamed law enforcement officials are being cited who surmise that in the absence of violent acts reminiscent of the gang wars of the 1990s, the illegal cigarettes are given low priority. The few customs and police officers designated to combat the cigarette vendors reportedly see themselves overwhelmed by the problem (Hansen, 2012; Oldenburger and Pletl, 2014). Indeed, we were only able to witness once that a cigarette vendor was arrested. The arrest occurred towards the end of our two-year observation and was carried out by undercover police agents.

Even when arrests occur, the perceived risks are low. A Vietnamese store owner observing the mentioned arrest from across the street commented:

No problem, they will free him soon, probably overnight, because police stations don't have enough space to keep these kinds of criminals. (Interview B1)

Another interviewee explains with reference to street vendors and wholesale dealers:

Vietnamese cigarette dealers are not afraid of getting caught or being in jail, as they can get at maximum a few year sentence, but living conditions in jail might be even better than back home in Vietnam where they come from. (Interview J2)

In fact, it is widely known among the Vietnamese community that once being arrested, vendors just need to claim to have no passport or identity card, report a fake address and all what custom officers and police officers can do is to take the vendor's finger prints and free him or her.

Another interviewee added that the street vendors are not the most appropriate targets to begin with:

Police know that if they [vendors] are caught, some others will take over the job, as the problem is not with the street vendors, but the providers and distributors from factories in Eastern Europe. You know that cigarettes pass through three or four different levels of distribution before getting to Vietnamese sellers here. (Interview J1)

## **Discussion and conclusion**

There appears to be a combination of factors that help explain why this open market for illegal cigarettes continues to exist even after 30 years. First of all, there is obviously a continued demand for, and a continued supply of cheap illegal cigarettes. The central point, however, is that supply and demand can be effectively linked by Vietnamese street sellers. We hypothesise that the decisive factor is that early on, Vietnamese vendors became iconic for the selling of illegal cigarettes in Berlin. A Vietnamese looking individual standing close to a supermarket or metro station is a widely understood signal for the availability of illegal cigarettes. This has several implications:

1. It facilitates the initiation of illicit transactions.
2. It makes the selling of illegal cigarettes independent from any particular location. Eck (1995) in his *General Model of the Geography of Illicit Retail Marketplaces*, has suggested that the effect of displacement of open illicit retail markets is limited because of high place attachment. However, from our observations it appears that wherever a Vietnamese vendor sets him- or herself up in a public location, a viable vending spot is created. This means that the Vietnamese cigarette market is highly adaptable to environmental change, for example crack-downs at particular vending places or changes in the flow of pedestrians.
3. The third implication of the iconic nature of Vietnamese cigarette vendors is that it establishes a threshold for members of other ethnic groups to enter the market, so that barriers to market entry exist for potential competitors.

The established system of retail distribution of illegal cigarettes is not only effective but also sustainable. There is a continuous supply of vendors through illegal migration, and there are only relatively low perceived risks associated with market participation, certainly none that show a sufficiently deterrent effect. In addition, the illegal cigarette trade is to a certain degree embedded in the Vietnamese community. For example, legitimate stores operated by Vietnamese may provide logistical support for the selling of illegal cigarettes, and social media forums popular among Vietnamese migrants facilitate networking and the exchange of information relating to the illegal cigarette trade.

In other words, Vietnamese have created a viable, adaptable retail distribution system for illegal cigarettes in Berlin since the early 1990s. Apart from a brief period in the mid-1990s, when German police invested extensive resources to crack down on Vietnamese cigarette vendors and Vietnamese extortion gangs, the system has not been substantially threatened by law enforcement, by market forces, or by competing providers of illegal cigarettes. Without a comprehensive, targeted and sustained response by law enforcement, or a substantial change on the demand and/or supply side, the open illegal cigarette market in Berlin is likely to survive for many more years.

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# The normalisation of arms trafficking in times of conflict: the Ukrainian experience

*Anna Markovska and Alexey Serdyuk*<sup>1</sup>

*“What did I do wrong? Nothing.  
I behaved unethically, for ethical reasons.”*

*Adnan Hashoggi (1935-2017),  
Saudi arms trader*

## Introduction

Writing about the trafficking of arms is more straightforward when one does not engage with the moral issue of the killing of one’s fellow human beings, which inevitably is the purpose of all lethal weapons. It is simpler to consider the issues of legality and illegality, and, the organisation of legal and illegal arms trading when abstracted from actual harm and suffering. Nevertheless, reports of civilians trapped in conflict zones, such as in Eastern Ukraine, inevitably lead to the realisation of how morally wrong it is to trade in such arms. When asked who bears responsibility for the conflict and the consequent devastation in the region, one local resident replied: “Those who provide the weapons” (BBC, 2018). However, it is not known whether the same resident was asked what they might do when under attack while not themselves in possession of arms. One possible response might be that one has to buy weaponry, clandestinely or otherwise. This was certainly the case during the break-up of Yugoslavia and the subsequent imposition of an UN arms embargo, a move that stimulated clandestine arms trading rather than restraining it (Glenny, 2012).

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For many years after the collapse of the Soviet Union Ukrainian officials were engaged in selling weapons in conflict zones such as Nigeria (BBC, 2009), Sierra-Leone (Human Rights Watch, 2001) and ex-Soviet states. The reason for this trade is that at its independence in 1991, Ukraine inherited a huge stockpile of Soviet military-grade weaponry, in addition to the capacity for the production of new weapons. At this period, the international demand for cheap if obsolete weapons had also risen (Human Rights Watch, 1999). While the Soviet Union had supplied weapons to further its strategic political ambitions, Ukrainian officials primarily engaged in legal and illegal arms trading for commercial profit.

From an ethically neutral perspective, one can consider arms as merely another commodity, even a controversial lethal one. However, there remains a fundamental moral dilemma related to the *application* of arms: namely intimidation and violence. This is stressed by Ruggiero (2010), who argues that in the 21<sup>st</sup> Century, wars should be considered as a form of state and corporate criminality. An opinion which reflects Sutherland's (1939) original concepts of white collar and corporate crime. Taking this principle into account seems to address central criminological concerns regarding the issue of crimes committed by powerful elites. But it does not necessarily criminalise the arms trade as such. This general moral statement has little explanatory power as it does not take into account legitimate national interests and related foreign policy decisions, in addition to commercial and 'personal' issues.

In practice, the political, commercial and 'personal' aspects of the trade are often linked. When Ukraine increased its capacity to produce lethal weapons, it consequently also expanded the market for them. Most markets have a shadowy or criminal fringe surrounding the main field, and the arms market is no exception (Lijn, 2018). Categorisation of the trade is not easy as it depends on the nature of the customers. States as customers are usually not in need of secret, clandestinely supplied arms, unless they are operating under an arms embargo. More normally, the clandestine trade is with unofficial belligerents and of course with plain criminals. All are, however, customers for arms, ammunition and related equipment. The question as to how they are being supplied. This concerns our experience of the Post-Soviet Ukraine's dealing with customers abroad and at home.

As mentioned above, at independence Ukraine had large redundant supplies of arms which were badly guarded, many eager customers (most recently in the East of Ukraine) and endemic corruption amongst its officials: all being risk enhancing factors. Therefore, there were reasons of concern. Until 2014, this was mainly a dilemma for the international community, regarding the ‘undesirable’ locations in the world to which Ukrainian arms might be sold, sometimes with the help of other countries. For example, a 2009 investigation by the House of Commons revealed that UK registered brokers had aided the Ukrainian State Service for Export Control in facilitating sales from ex-Soviet stockpiles to countries that were embargoed destinations for such exports. In 2014, however conflict broke out in Ukrainian territory, which made the issue of its arms trade and trafficking an urgent domestic affair.

Understanding the supply and the demand for legal and illegal weaponry requires clarification of a number of aspects. The concept of war as being a state and corporate criminality may offer a rationale for the supply and demand for illegal weapons. However, that is only partial; in times of conflict, strong ‘personal’ patriotic attitudes might also be counted as a factor in facilitating the arms trade. Arsovska and Zabyelina (2014) studied the demand for weapons in post-conflict zones. Their findings suggest that cultural attitudes, socio-political complexities, and the range of ‘personal’ emotions that exist in conflict and post-conflict regions need to be considered. The authors identify three factors that can stimulate the demand for weapons.

- Firstly, a “conflict mentality”: “Kosovars have learned from the Kosovo Liberation Army that you get international attention if you have a gun’ (*Ibid.*, p. 413).
- Secondly, the presence of “a good patriotic bandit”, for example, a criminal who turns from drug trafficking to arms trafficking when the country needs weapons (*Ibid.*); and
- Thirdly, a gun culture with a positive image of gun ownership, as discussed in their example of “the concept of honour in traditional Albanian culture” (*Ibid.*, p. 416).

These three cultural factors together constitute an important addition to the market based understanding of arms trafficking.

This chapter aims to identify and critically analyse the nature of the arms trade in post-Soviet Ukraine, paying particular attention to post 2014 developments. Specifically, we consider the following three levels of the arms trade in post 2014 Ukraine:

1. Upper level: the state and its negotiators;
2. Middle level: organised criminal and /or paramilitary formations;
3. Lower level: ordinary citizens.

We develop our analysis under the framework suggested by Ruggiero (2010) considering the issue of arms trafficking primarily as a business, and discuss the upper level of trafficking in the light of its comprising business opportunities and possible corporate or individual gain. We also explore the cultural factors identified by Arsovska and Zabyelina (2014) as conducive to the demand for legal and illegal weapons within the remaining two levels, by acknowledging the importance of ‘conflict mentality’, ‘gun culture’, and ‘patriotism’ (*Ibid.*, p. 417).

Our chapter is based on secondary data analyses, including news and policy reports from April 2017-September 2018. We acknowledge significant limitations: (1) the politicised nature of the media representation of the conflict in the east of Ukraine and associated controversial discussion of military capacity in the light of ongoing military conflict; (2) difficulties in obtaining reliable statistics on the military capabilities of the Ukrainian private battalions in early 2014; (3) changes in police crime recording practices in pre-and post-2014 Ukraine.

## **Corporate criminality and harm: the ‘respectable’ and ‘shadow’ worlds of arms trafficking**

Any study of the arms trade reveals the flexibility of the concept of a ‘threshold of legality’: The decision as to what is right or what is wrong in trade will always depend on its surrounding circumstances, and will thus involve the “discretionary stretching of values” (Ruggiero, 1996, p. 5). In 2015, the British government sold bombs, missiles and rockets worth £1 billion to Saudi Arabia, arguably facilitating “a surge of airstrikes by a Saudi-led coalition on Houthi rebels in Yemen” (Bowcott, 2016). In December 2015 Amnesty International reported that “the UK Government is

breaking national, EU and international law and policy by supplying weapons to Saudi Arabia in the context of its military intervention and bombing campaign in Yemen” (Amnesty International, 2015). Nevertheless, in July 2017 Campaigners Against Arms Trade lost their case “calling for UK arms sales to Saudi Arabia to be stopped over humanitarian concerns” when the High Court ruled that such exports could continue (Ross, 2017). The issue of such arms sales is popularly considered as being morally wrong, even though it is profitable for the UK and otherwise legal. Lynch (quoted by Ross, 2017) maintains that “irrespective of this ruling, the UK and other governments should end their shameless arms supplies to Saudi Arabia. They may amount to lucrative trade deals, but the UK risks aiding and abetting these terrible crimes”. The issue of a “discretionary stretching of values” is important where the responsibility for war is ascribed to corporations and governments with differently stretched values.

Feinstein and Holden (2015) identify two ‘worlds’ of arms trade: a ‘respectable’ world of legal state operations and a ‘shadow world’. The respectable world consists of “state sanctioned government-to-government contracts”; a “formal and legitimate” world (p. 445). The ‘shadow world’ is categorised by grey and black markets (*Ibid.*, p. 445). The grey markets are those dominated by legal traders operating on behalf of those with a secret political agenda, while the black markets are represented by deals that are *per se* illegal. However, both traders and clients can operate in respectable and shadow worlds simultaneously.

As already stated, Ruggiero (2010) categorises war as being corporate and state crime, arguing that “powerful actors . . . are able to impose their own definitions within the social sphere, and, while making them widely acceptable, are then capable of translating them into political concepts and sensibilities” (p.106). However, this is not necessarily an exclusive definition of for the state of war. Lijn (2018) reminds us that the labelling of what is legal or illegal is arguably the privilege of the state, even though, in some situations, and especially in times of conflict, “the binary choices of good versus bad are arbitrary, and often do not reflect the views of the population” (p. 1-2). With regard to the arm trade, the state seems to have such a latitude to influence moral perception according to its interests. This also applies to the clients with whom they are trading. Lijn (2018) writes that in Kosovo “some criminals may have continued their criminal activities

within government . . . where addressing them is difficult as they are considered war heroes” (p. 2). Hence, depending on the contingency it is evident that trading partners could be labelled “freedom fighters”, “terrorists” or “organised criminals”.

At one stage or another in the evolution of a crisis they may be represented by the state of being its violent opposition. The recent history of Ulster and the break-up of Yugoslavia (1992-1996) provide near contemporary examples in which such labelling can be discerned (Lijn, 2018). In consequence, we see that though formal, rational explanations of the arms trade may be useful, they have limited depth and explanatory power. It is for this reason that we contend that Arsovska and Zabyelina’s (2014) argument is essential, namely that, specifically on the demand side, “the impact of culturally-enriched and socially-embedded factors” should be taken into consideration. These authors show that patriotism, conflict mentality and gun culture play as important a role in the “demand for weapons in the Balkans and in the North Caucasus” as does any other factor (Zabyelina, 2014, p. 417).

## **The situation in Post-Soviet Ukraine: power without accountability**

### **Lack of strategic vision**

Ukraine is a ‘successor state’ with an extensive Soviet Union heritage; an ineffective public administration, and economically, an important arms production sector which once was ‘the backbone’ of the Soviet Union’s armament industry (Kiss, 2014). Johansson (2011) notes that after the collapse of the USSR, Ukraine was left with the third largest army in the world. Consisting of: “five ground armies, one army corps, four air armies, one air defence army, one rocket army, the Black Sea fleet, 21 divisions (infantry, tank and artillery), three airborne brigades and many support units including over 780.000 troops)” (p. 206). Ukraine also had around two thousand nuclear warheads on its territory (*Ibid.*). According to some experts, this was enough to indicate a positive economic development for the country.

Because of the geographical situation of Ukraine, ever since the First World War, “large quantities of military equipment and armaments were dumped in Ukraine” (Johansson, 2011, p. 206). In 2011, there were about 184 munitions storage sites, and “approximately seven million small arms and light weapons” recorded as being situated in Ukraine (*Ibid.*). The irony of the situation was that despite these large quantities of weapons, the military power of Ukraine was negligible.

Johansson (2011) discusses the difficult situation in the early 1990s when the public administration of Ukraine had no experience in governing, and specifically of managing the military sector. Only by the late 1990s did Ukrainian officials start to show any interest in the arms industry (*ibid.*). Kiss (2014) stated that in the early 1990s, Ukrainian officials failed to realign the military sector towards civil industrial production, leaving arms exportation as the only option available to the government. In the 1990s, the impact of the European Union and NATO’s attempts at ‘disciplining’ the Ukraine were slight. Ukraine’s entry into the shadow arms market was therefore relatively easy (*ibid.*). This entailed that “the arms industry was used for revenue generation, but it was hardly restructured and very little of the income was reinvested in the sector” (Kiss, 2014).

In 1999 the Ukrainian government attempted to legitimise their conduct by employing “easy-to-forge documents to prove that its state-owned companies had stayed within the law”, as for example “in selling to Burkina Faso weapons that ended up in the hands of the Revolutionary United Front (RUF) in violation of not one but two UN arms embargoes” (Hiltermann, 2001). It was very convenient for the Ukrainian government to create a political and economic context for the deal (designed paperwork), and thus to avoid responding to the concerns of the UN concerns of the UN. In a case study of Ukrainian arm sales to Sierra Leone, Hiltermann (2001) states that

“in March 1999, a Ukrainian-registered cargo plane delivered 68 tons of weapons and ammunition to Ouagadougou, the capital of Burkina Faso, for on-shipment to the Revolutionary United Front (RUF) via Liberia. In Ouagadougou, the plane landed in the airport’s VIP terminal. There the cargo was transferred for shipment by smaller aircraft to Liberia and, once in Liberia, the weapons were transported by land to the RUF inside Sierra Leone” (*Ibid.*).

In response to the allegation of arming the RUF in Sierra Leone in contradiction of the embargoes, the Ukrainian government insisted that its “state-owned arms export companies had sold the weapons legally to the Burkina Ministry of Defence, which had duly issued an end-user certificate showing the weapons were to stay in Burkina Faso” (*Ibid.*). As Ruggiero notes it seems that, when governments are involved in cross-border transactions the issues of legality can be adjusted according the needs of a particular group.

In early 2014 when the violent conflict in the East of Ukraine unfolded, the country was to pay a very heavy price for the absence of a strategic vision on and the lax regulation of its military sector.

## **Regulation and (mis)management**

It is important to note the legal provisions regarding the status of weapon ownership in Ukraine. There are three main legal directives regarding their ownership, use, and their transfer of ownership:

- Instruction of the Ministry of Internal Affairs that regulates the legal purchase and use of weapons;
- the Decree of the Verkhovna Rada (Parliament) that defines the right to own weapons;
- the Decree of the Cabinet of Ministers concerning circulation of weapons.

Legally, any citizen of Ukraine, who is deemed psychologically fit to do so by a doctor, and on provision of a letter confirming this from the doctor, can purchase a specified firearm for hunting. However, the absence of any legal provision to control the permitted use of such weapons is clearly evident. For example, Article 263 of the Criminal Code of Ukraine describes cases of the ownership, keeping, purchase and the sale of weapons, ammunition and explosives without identifying any permit to do so: in fact there is no relevant law! The Verkhovna Rada registered a draft for such law at the end of 2104, but failed to consider and enact it.

The mismanagement of military resources in the independent Ukraine occurred at all levels: from that of relevant Ministries to that of underpaid local officials. In the 1990s anecdotal evidence emerged suggesting that soldiers were routinely engaged in selling weapons (or anything suitable

military hardware for sale) to augment their minimal incomes and feed their families. This situation was repeated in other industries that lacked sufficient regulation and accountability, thus offering opportunities for the abuse of unprotected state assets. Such included: corrupt tenders to state drug purchases (Markovska and Isaeva, 2007), a lack of transparency in bankruptcy procedures and the stealing of natural resources from the state for example, in the gas industry (Markovska and Van Duyne, 2018). In Ukraine “the public administration, particularly the civil service, judiciary, the prosecution and the police, are especially vulnerable to corruption. Reports issued by the Group of States against Corruption (GRECO) and other bodies of the Council of Europe also highlight the extent of corruption in Ukraine and the lack of independence in the judiciary and police (customs service included)” (MONEYVAL, 2017 p.16; Kuzio, 2007).

### **Post-Soviet Ukraine as an “ill-conceived exporter”<sup>2</sup>**

Alongside the normal ‘respectable world’ arms trade, systemic corruption within government and the abundance of old and cheap weaponry that are not properly registered have created a shadowy arms trading scenario in Ukraine. The recklessness of the government is illustrated in the earlier cited example of the trafficking of weapons to Sierra Leone. A further example of this upper level corruption is the case of Leonid Minin (Feinstein and Holden, 2015; Johansson, 2011). Mr Minin was believed to be “a central part in the trade in East European small arms in sub-Saharan Africa” (Traynor, 2001). Traynor describes Minin as “one of a new breed of east European racketeers, some of whom are well-connected KGB veterans, who thrive on keeping Africans killing one another” (*Ibid.*). Minin was arrested in Italy in 2000. Italian magistrates reported that “Minin had chartered an Antonov-124 transport aircraft in Moscow, had it flown to Kiev in Ukraine where it was loaded with 113 tons of Kalashnikovs, RPGs, and ammunition, and then directed it to Abidjan, the capital of Ivory Coast in west Africa” (*Ibid.*). The UN Conference on Small Arms Trafficking in 2001 used this and similar examples to identify governmental irresponsibility with regard to arms sales (Hiltermann, 2001).

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<sup>2</sup> Johansson, 2011.

Traynor (2001) argues that Ukraine's government is not the only one doing so. One intercepted cargo in the early 2000s contained machine guns that were Czech-made, and of which the logistics used the port in Bulgaria (*Ibid.*). The difference in the Ukrainian case is the origin of the weapons sold and the activity of the authorities there. As a result of budgetary cuts to the military sector, arms and military goods were sold "through the shadow economy which controlled a significant part of Ukrainian arms supplies abroad" (*Ibid.*). Ustinov (2017) calculates that only 20% of all arms deals were conducted officially, while "80% of arms export deals were in the hands of the 'shadow structures'" (Ustinov, 2017).

A parliamentary inquiry ordered by the Ukrainian President Kuchma to investigate the shadow arms trade, reported that between 1992 and 1998 Ukraine lost \$32 billion of revenue to the 'lost' weapons trade, the result of an inadequate pricing regime and an absence of governmental control. Traynor (2001) states that "Ukraine's military stocks were worth \$89bn in 1992 and that in the course of the following six years \$32bn worth of arms, equipment, and military property were stolen, much of it resold" (*Ibid.*).

The ease with which falsified documents, can be obtained from Ukraine, may be considered as an indirect indication of government corruption and the involvement of state officials in the shadow arms trade. Nevertheless, no Ukrainian politician has ever been prosecuted for facilitating illegal deals in arms trafficking and this despite anonymous sources alleging the involvement of politicians at highest level (Johansson, 2001, p.210). More importantly, the parliamentary inquiry cited earlier has been the only effort of the government to ascertain the extent of the arms trade. Unfortunately, the inquiry was ended abruptly, and all its associated documents have disappeared (Pravda, 2002). Another instance of the ability of powerful actors to manipulate the political situation to create an environment suitable for their misconduct (Ruggiero, 2010).

There are various ways in which to contextualise the criminality of state officials in Ukraine. Van de Bunt (2010) employs Simmel's notion of the 'secret society' in order to understand how members of criminal networks are able to maintain secrecy in relation to their actions. "Secrets do not remain hidden because the people involved isolate themselves from the world, but rather because the actors, and their illicit activities, are socially embedded" (*ibid.*, p. 441). In the case of Ukraine, the perpetrators of crime (from state officials to soldiers at military bases) are well embedded and

able to switch secretly from criminal to legal activity in the course of their daily practices with a very limited chance of being caught. Not surprisingly, therefore, the National Risk Assessment (NRA) confirms that in Ukraine, “white collar crime has exceeded other more conventional proceeds-generating offences, such as drug trafficking” (MONEYVAL, 2017, p.16). In this set of white-collar crimes, the top five predicate offences that pose significant risks for Ukrainian society are: fictitious entrepreneurship, tax evasion, fraud, embezzlement, and the abuse of power (MONEYVAL, 2017). In such an environment, a politically patronised judiciary makes it extremely difficult to successfully prosecute any identified offences. Indeed, MONEYVAL (2017, p. 64-65) highlights the difficulty of analysing statistics on corruption and money laundering in Ukraine, stating that as of 2016 no current or former state official or oligarch has been prosecuted on money laundering charges. A lack of successful prosecutions reinforces the notion of a secret, politico-judicial interdependency where an intertwining of interests often leads to lawlessness amongst business and political elites.

### **Three levels of arms trading in post 2014 Ukraine: a state in conflict.**

In any country, discussions of issues of legality and criminality in relation to the arms trade will be challenging. Introducing these qualifications in the context of an armed conflict is bound to be even more difficult. This section presents an overview of the situation in Ukraine based on an analysis of the limited data available. Each level discussed requires a more in-depth analysis than is possible within the scope of this chapter.

## The Upper level of arms trading

The upper level of shadow world arms trafficking in pre-conflict Ukraine can be characterised by the existence of front companies and forged documents to facilitate sales, as well as a lack of prosecution for law breaking at governmental level. The conflict in the east of the country has since changed the clientele of the shadow world arms trade but not its way of operating.

In 2017, Amnesty International highlighted the case of the supply of weapons worth \$169 million to the Government of South Sudan by a Ukrainian company. The four parties identified in the deal were: Ukrinmash (Ukraine) as an exporter, S-Profit (UK) as a supplier; International Golden Group (UAE) as an importer and the Ministry of Defence & Veteran Affairs (South Sudan) as customer (Amnesty International, 2017). In terms of legality, “the prospective exports to South Sudan . . . should have rung alarm bells for any licensing or governmental export officials assessing the transfer” (*Ibid.*). In addition, there are a number of human rights violation issues that are associated with arms transfers to South Sudan. The deal’s facilitation involved the crossing of a number of borders and involved a “London-based intermediary company; as well as a buyer (International Golden Group) and exporter (Ukrinmash) all of whom had been previously cited by a UN Panel of Experts’ report on Libya as violating a UN arms embargo in 2011” (*Ibid.*).

Clearly, this was not solely a Ukrainian act. Amnesty International noted the “regulatory vacuum that makes the UK an appealing jurisdiction, and UK companies attractive legal vehicles, through which to route illicit arms deals and other illicit activity” (*Ibid.*). The potential for the Ukrainian government to engage in shadowy arms dealings is significantly enabled by administrative tools provided from abroad, such as the opportunities created by UK-registered ‘shell’ companies.

In 2016, Ukraine significantly improved its ranking on the Global Militarisation Index, moving from 23<sup>rd</sup> place in 2014 to 16<sup>th</sup> place in 2016 (BICC, 2016). In 2016 the state-run military-industrial concern Ukroboronprom ranked 77<sup>th</sup> on the list of the *Stockholm International Peace Research Institute* (SIPRI) top 100 arms-producing military services companies with “the sales index at the level of \$1,06 billion” (SIPRI, 2017). From a purely economic point of view, such an unprecedented rise within the

military sector could be considered as significant progress, however, Higgins (2018) reports that the National Anti-Corruption Bureau (NABU) has identified defence embezzlement schemes run by the high level Ukrainian state officials starting from 2014, of which only one case has ended up in court. The media in Ukraine frequently discusses the embezzlement of state funds and the systemic utilisation of fake contracts issued by the authorities to defraud the state budget and the defence sector. For example, there are reports on the use of fictitious companies to service military vehicles on state contracts.

In 2014-2015 the Ministry of Defence purchased services worth 5,3 m HRV<sup>3</sup> from the Kiev Armoured plant. The plant has allegedly bought the required parts paying 5,3 m HRV to the account of a company that has nothing to do with military services. The Kiev military prosecutor investigated the case in 2015, followed by a further investigation carried out in 2016 by the Chief Military Prosecutor. Investigators questioned the main suspects thought to be involved in the fictitious companies, however to date no one has been prosecuted (Antikor, 2017). Similarly, in March 2018, the national Anti-Corruption Bureau of Ukraine (NABU) investigated a case of the Lviv armour factory where the managing director allegedly used invoices of fictitious companies to embezzle state property (NABU, 2018).

There are also reports that the military factory 'Kuznica na Rubalskom' (85% of its shares belonging to a fund that is owned by the president of Ukraine), has been involved in the overcharging and embezzlement of state funds (Godzenko, 2018). In November 2017 NABU investigated the purchase of military equipment that initially was priced at 4,75 m HRV, however the completion documents on the purchase revealed that 14,876 m HRV had been spent to purchase equipment units from the factory (Liga, 2017).

Ruggiero (2010, p. 117) described such criminality of the powerful and their ability to revise the scope of legality to suit the situation as "establishing new norms and legislations". In Ukraine, the above examples suggest that in addition the practice of the embezzlement of state funds has been widespread amongst business and political elites.

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<sup>3</sup> Ukrainian Hryvnia. €1 ≈ 30 Hryvnia (June 2018 conversion).

## **The middle level of arms trading**

This level of arms trafficking is directly related to the events of the winter 2013-2014 in Ukraine, when a number of private armies and battalions were established. Peaceful anti-government protest started in Kiev in November 2013, but on 20<sup>th</sup> February 2014 a number of protestors were killed. Katchanovski (2015) called this day “a tipping point in the conflict between the West and Russia over Ukraine. This mass killing of the protesters and the mass shooting of the police that preceded it led to the overthrow of the pro-Russian government of Viktor Yanukovich and gave a start to a civil war in Donbas in Eastern Ukraine, Russian military intervention in Crimea and Donbas, and an international conflict between the West and Russia over Ukraine” (p. 3).

In the spring of 2014 between 30 and 40 volunteer battalions were formed to assist the new Ukrainian government to reclaim its territory in the east from Russian backed separatists and to defend its major cities (Amnesty International, 2014). At the beginning of this conflict, after years of governmental neglect, the Ukrainian national army was unable to fight against the Russian-armed separatists on its own.

Most of the Ukrainian volunteer battalions were formed in the Spring of 2014 as a response to the conflict in the east and the Russian invasion in Crimea (Gladka, 2016). Popularly known as Dobrobatu- Dobrovolchi Battalionu in Ukrainian (shortened to “Dobrobatu”) (Gladka, 2016), volunteering battalions were established as independent military groups in the Spring of 2014. At the beginning of the conflict these were not accountable to the authorities in Kiev. Naturally, no state can accept a challenge to its ‘monopoly’ of military autonomy. Accordingly, in the spring of 2014 the Ukrainian parliament voted to disarm the paramilitaries, and then introduced legislation to bring the battalions under control of the Ministry of Defence, Ministry of Internal Affairs, or the National Guard (the National Guard was formed in the Spring of 2014 by the government). Since then, only two military organisations, the “Right Sector” and the “Volunteer Army of Ukraine” remain to a degree independent, but coordinate their activities with those directed by the Ministry of Defence and the Ministry of Internal Affairs.

SIPRI (2015) reported that this conflict situation affected the Ukrainian arms trade in many different ways. “The parties to the armed conflict – the

Ukrainian Government and the separatist rebels in eastern Ukraine – fought a large-scale conventional war with large numbers of weapons, including heavy weapons. Most of the weapons used by both sides were in the Ukrainian inventory before the crisis started” (Ibid.). A question arises as to how the independent formations acquired their weapons in the initial stage of their development. While there are many speculations concerning this in the media, majority opinions suggests that either they were stolen from the ex-Soviet warehouses or were purchased on the grey market.

Many of these battalions were funded by Ukraine’s richest oligarchs, raising questions as to the legitimacy of their actions and the ideologies driving those actions. The private battalion of the Ukrainian oligarch Mr Kolomoisky provides an interesting example. The Ukrainian media reported that Kolomoisky established a special military unit “Dnipro-1”, consisting of about 2.000 soldiers, to take part in the fighting in the region of Mariupol and Ilovaisk. Wier (2015) states that an army of volunteers was assembled by Kolomoisky amounting to between 10.000 and 20.000 soldiers. Hirst (2015) holds that these troops were successful in maintaining security in the city of Dnipropetrovsk when it was under attack by separatists.

More generally, Coynash (2014) notes that: “These battalions were formed when Ukraine’s army was still floundering against militants trained and heavily armed by Russia to fight the latter’s dirty war. The volunteers were risking their lives and many have been killed defending their country. What are you supposed to say? We hate your views, go home? Where, incidentally, do we draw the line as to ‘acceptable views’?” In the first stages of the conflict these armed private battalions operated as informal links to assist the government forces with the supplies, including food and weapons.

There are a number of issues that the presence of these battalions raises:

1. *Ideology:*

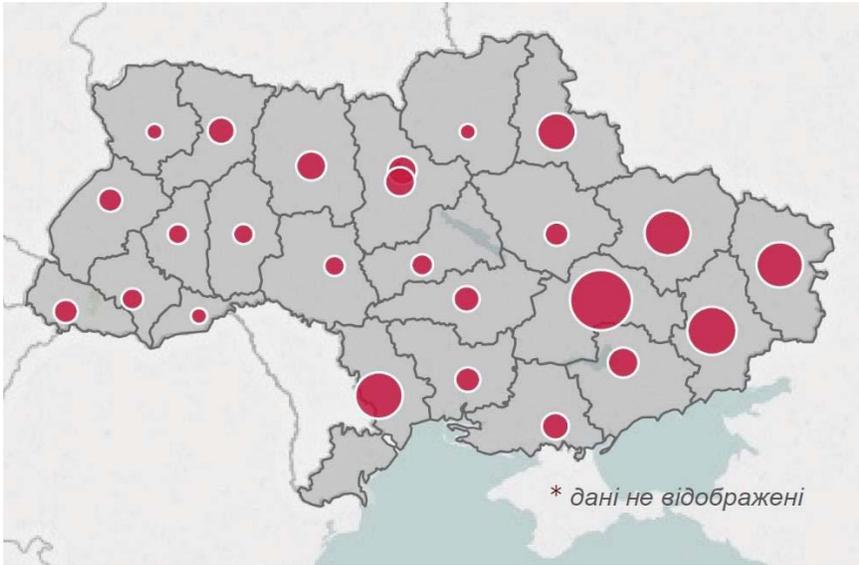
About a year after Kolomoisky’s volunteer army was established it was allegedly employed to storm government buildings in protest at new regulations that were damaging to Kolomoisky’s financial interests (Weir, 2015).

2. *Criminality:*

Certain factions within the battalions were suspected of being organised and armed criminal formations taking advantage of the situation. Map 1

below shows how the proximity of conflict zones increases the availability of weapons and the use of weapons in criminal activities. The size of the red circle corresponds to the prevalence of recorded criminal offences involving the use of firearms. Data from the Crimea are not available.

**Map 1: Criminal offences recorded with the use of firearms, 2016**



(Source: Office of the Prosecutor General of Ukraine, 2016)

### 3. *Gun culture*

In order to understand the activities of the private battalions and their demand for weaponry we might make sense of a business model based on rational choice. However, it is also important to consider the socio-cultural context of the formation of these battalions. Arsovska and Zabyelina's (2014) identification of socially embedded factors that drive the illicit demand for weapons seem directly applicable here, namely: *patriotism* and *conflict mentality*. Many of those who joined battalions did so from a sentiment of patriotic duty in a time of severe political and social instability. The prospect of Russian aggression turned their peaceful patriotism to militancy. Weapons should, therefore, be purchased to defend the country, and the nature of these purchases, legal or illegal, seemed to be irrelevant to them. A resulting increase in *gun culture*, the third cultural factor discussed

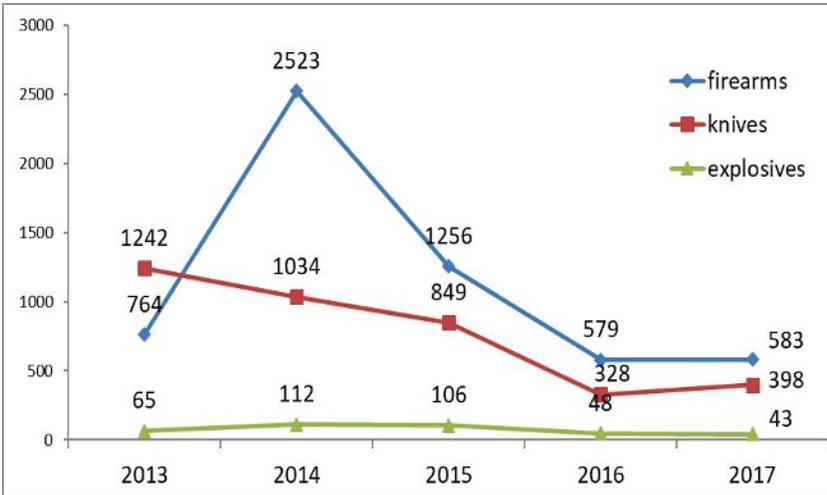
by Arsovska and Zabyelina (2014) encouraged both legal and illegal trade in guns, and to a certain degree, stimulated the third (the lower) level of arms trafficking. It also provided a rationale where the acquisition of arms are seen as being in the service of a 'good cause'.

While the above socio-cultural factors are likely to be categorised as 'individual', there are also some structural factors conducive to the increasing use of firearms in the commitment of criminal activities. The first such factor is the *worsening economic situation* in Ukraine. The Head of the Criminal Investigation Department Mr Knyazev directly linked the worsening of living standards in Ukraine with the rise of recorded criminality (Bodnya, 2017). During 2016, 3,900 robberies were recorded in Ukraine and among them 196 robberies involved the use of the firearms (Knyazev, as discussed in Bodnya, 2017). Knyazev considers armed robberies to be a sign of the conflict society, where weapons become inexpensive and widely available. According to Knyazev, before the 2014 conflict, criminals used weapons to intimidate their victims, whereas now they use weapons to kill.

The second socio-cultural factor is a *growing market for illegal weapons*. Knyazev (2017) notes that from 1 April 2014 13,361 weapons were recorded as being stolen; there were 6,807 cases of the illegal sale of weapons; and 1,352 weapons and 1,825 grenades were confiscated by the authorities. When asked for a comparison with previous years, Knyazev (2017) noted that before 2014 grenades and explosives were not in circulation and any comparison would therefore be irrelevant. Knyazev argued that because of the conflict the Ukrainian black market for weapons had become amongst the cheapest in Europe. Stupak (quoted in Gor, 2017) recalls that in 2010, intelligence regraded the sale 5 pistols and a Kalashnikov, as being a massive operation. In post 2014 Ukraine, "one can purchase a grenade launcher and have ammunition for change" (Stupak, quoted in Gor, 2017). The increased availability of firearms implies a higher likelihood of their being used. According to Knyazev, there is a growing tendency towards the use of firearms in murders. For example, in 2016 286 murders were committed involving firearms and 41 committed with the use of explosive devices (Bodnya, 2017). The fact that Ukraine is engaged in military conflict in the East is considered by Knyazev as one of the main reason for the increase in such criminal use of weapons.

The third socio-cultural factor is *the absence of effective policing operations* during 2014, the first year of the conflict. Figure 1 compares the use of weapons in recorded criminal activity.

**Figure 1:**  
**Recorded criminal offences with weapons used, 2013-2017**  
**(Office of the Prosecutors General of Ukraine, 2017)**



The year 2014 can be singled out for a dramatic increase in the criminal use of firearms and explosives in Ukraine. Statistics reveal an increase from 761 crimes committed in 2013 to 2.523 crimes in 2014. In 2015, this diminished to 1.526, and to 579 and 583, respectively, in the following years. The country was awash with weaponry (Bodnya, 2017). Anecdotal evidence suggests that virtually every local market had a trader in illegal weapons. Stolbovoi (2017) argues that the politicisation of the police and, specifically, the liquidation of the Organised Crime Bureau in 2015 led to significant problems in identifying criminal groups prepared to use firearms. Corruption within the police may also partially explain why many ordinary, law abiding citizens began to see the trafficking of arms as being an acceptable way of making a living. In that one could always negotiate with a corrupt police officer to “turn a blind eye” to any transaction.

## The lower level

The third level is *the lower level* of the arms trade pyramid where the illegal arms trade becomes normalised during a time during a time of conflict. The Ukrainian political crisis of the 2014 brought significant economic difficulties to the country: “Ukraine’s economy contracted sharply and GDP declined in 2015” (Prosperity Index, 2017). Between 2012 and 2015, the Prosperity Index recorded the biggest fall in Ukraine’s international ranking in factors such as governance, security and democratic accountability. A sharp fall in popular confidence in the government was also recorded, “only 24% of people had confidence in the national government during the Yanukovych years – but this number has dropped to just 8% in 2016 following the political turmoil” (*Ibid.*). The Democratic Initiative Foundation (2015) reported the results of a survey conducted amongst the Ukrainian public, where only 9% of respondents said they trusted the legal system. The survey concluded that the majority of the Ukrainian population (94%) believe that legal corruption is widespread, with 80,5% of population believing that the judiciary is under political control.

The Personal Freedom Index has also registered a decline with regard to Ukraine: “*it has fallen 17 ranks from 76th to 93rd over the past decade. Civil liberties have decreased and little to no progress has been made to improve the freedom of the press*” (Prosperity Index, 2017).

An economic rationale to this increased level of arms trafficking seems obvious considering Ukraine’s rampant inflation: a rapid decrease in income levels and growing rate of unemployment. Because of the political situation, those engaged in the illegal arms trade can justify their illegal actions by adopting a “*conflict mentality*” (Arsovska and Zabyelina, 2014). Living in a state of constant fear and financial insecurity has the potential to reduce the moral threshold of what is regarded as being acceptable and legal to many. The ability to engage in “informal negotiation” with the police can provide a further encouragement to engage in the internal trade in weaponry.

A rapid scan of selected national Ukrainian newspapers in April-June 2017 produced the following items:

*April:*

A Georgian citizen is arrested in Odessa for providing a postal service for trafficked arms; a former volunteer is arrested in Kiev for engagement in the production and sale of illegal firearms; arms sales from the military camp in the city of Nikolaev are reported; two Ukrainian soldiers are arrested on suspicion of arms trading from the military base in Kherson;

*May:*

In Odessa 5 people were arrested on suspicion of trafficking arms originating from the Ukrainian side of the conflict zone; a hidden warehouse of arms is discovered at a meat factory in Lugansk; a man is arrested in Kharkiv for involvement in arms trafficking (providing storage facilities for arms in the city of Kharkiv); in Poltava a man is arrested for involvement in the sale of arms trafficked from the conflict zone;

*June:*

In Kharkiv customs officials are implicated in in arms trafficking.

Such “normalised” illegal arms trafficking can be divided into two categories: civilian or military, both can operate individually or as a part of an organised group. On the individual level we identified cases in which for example, in May 2017, uniformed patrol officers in the city of Kharkiv stopped and searched a Ukrainian national. During the search, they found that the man was carrying two explosive devices in his bag. When asked why, the man said that he was going fishing (illegally) (Korespondent, 2017).

On aggregate level, the following statistics are instructive. During the first 9 months of 2017 police seized 7.110 weapons from illegal circulation. This is 39% more than in the same period in 2016 (Avakov, 2017). 1.604 explosive devises were also seized. This level is less ideological, and criminality is generally more visible to the authorities than is the “militarised” version and is, thus, easier for the police to deal with.

## **Conclusion**

This chapter elucidates the different levels of arms trafficking in Ukraine in order to raise the old, but here very relevant, concern of traditional criminology: how do we label what is legal or illegal and with what implications? As Ruggiero (2010) argued, the attitudes to arms trade presents a

convincing indication of how the powerful in a society determines what is moral and what is immoral, what is legal and what is illegal. This chapter supports Ruggiero's (2010) contention that the powerful can reshape legal and political conditions to suit their business of arms production and trading during times of conflict. When officials engage in what might be regarded as illegal or immoral conduct, they can often provide documentation that will offer them the legal framework within which to operate and thereby the protection against criminalisation. Indeed, without such a protection, when for example an old man is caught moving weapons in the boot of his car, he is at the mercy of officials who can apply different labels to him such as 'arms trafficker' or 'terrorist'.

The conflict in eastern Ukraine has created a significant national demand for weaponry. To meet this demand, the Ukrainian authorities have increased their weapon production capacity. However, it was not the country's income position that benefited. With the endemic culture of corruption this increased production of weaponry enabled a political elite to use military factories as a means to embezzle state funds and launder money. A comparative situation had been experienced within the gas industry (Markovska and Van Duyne, 2018). As indicated, this upper or political level of criminality in arms trafficking has existed and flourished in Ukraine ever since the collapse of the USSR as evidenced in Amnesty International's reports and targeted investigations conducted by the British House of Commons. This was intensified by the war of secession in the east.

On a lower criminal level, it also had effect. Official statistics point to an increase in the number of firearms related offences committed by criminal groups in Ukraine. The associated use of firearms by para-military groups is the subject for further studies that will depend on the developing political situation in the region. The level of arms trafficking amongst the Ukrainian population reveals situational response of ordinary citizens, who participate in the illegal arms trade to supplement their meagre incomes. It is this level of criminality that is mostly reported in the media and recorded in the official police statistics.

Understanding the different levels of and underlying factors determining the arms trade is of particular importance when proposing future peace-

keeping initiatives for Ukraine. Each level would require a different approach to minimise the threat posed by the easy availability of lethal weapons.

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# **Panama papers, Paradise documents and the Slovene state in the global competitiveness race**

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## **Introduction**

In this chapter, I present a brief overview of the Slovenia's stance on tax evasion through tax havens in particular after the Panama papers and Paradise documents leaks. After pointing out the manifold harm of tax havens, I show some of the counter efforts of the Slovenian tax administration and assess their effectiveness. Following that, I debate possible options a state has in defending itself against the off-shore tax evasion. Finally, I speculate on Slovenia's future position on the matter. How active will it be in both its unilateral and multilateral efforts against tax havens? Is the political will present and what kind of policy may we expect?

## **A preliminary question: the manifold harm of tax havens**

According to Richard Murphy in his recent account of the tax havens world – *Dirty Secrets: How Tax Havens Destroy the Economy* – the term 'tax haven' has always been problematic. In his brief technical definition, Murphy states that it "generally describes a place whose tax system provides an advantage to a person who is not resident in that place" (Murphy, 2017:

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54).<sup>2</sup> Or, one could describe it, again, loosely, in a following way: “A tax haven provides facilities that enable people or entities to escape (and frequently undermine) the laws, rules and regulations of jurisdictions elsewhere, using secrecy as a prime tool. Those rules include tax, but also criminal laws, disclosure rules (transparency), financial regulation, inheritance rules, and more” (Tax Justice Network, 2017). Such loose definitions create serious problems for empirically estimating almost all aspects of the tax haven finances and consequently, the scale of the problem cannot be systematically assessed. In addition, the monetary flows are dynamic easily switching accounts between off and on shore countries. As pointed out recently by van Duyn and Koningsveld (2017): “While it cannot be denied that the volume of offshore wealth is large, the present databases lack the precision to determine the total size, let alone to identify within that hypothetical total the subset attributable to identifiable types of law breaking, whether of criminal offences or tax crime.” Even though nebulous from an empirical point of view offshore financial centres offer concrete services: they record as their own transactions that have in fact real economic substance or impact elsewhere. Second, they provide as much secrecy as possible to those who make use of these provisions in order to pay zero or very little taxes with no questions asked (Cf. Murphy, 2017: p. 58)). These services are marketed openly by its providers and “enablers” (Middleton and Levi, 2015) as “tax, risk and wealth planning” and the like.<sup>3</sup>

As is now almost universally agreed, the direct and indirect costs of tax havens are huge and manifold (e.g. Murphy, 2017; Shaxson, 2016; Zucman, 2015; Palan *et al.*, 2010). The loss of tax revenue is an obvious but

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<sup>2</sup> For a short recent historical development of tax havens see, e.g., Murphy 54-57; for the case of Cayman Islands in particular e.g., Young (2013: p. 98-102).

<sup>3</sup> A typical online ad would look like this one advertising Belize: “Offshore companies are the key elements for successful tax planning, risk planning and wealth planning. Certain jurisdictions like, for example, Belize incorporate so called International Business Companies. These companies are either subject to greatly reduced tax rates or are even fully tax exempt. Most of these countries also have reduced accounting and auditing requirements, which results in far less paperwork to be dealt with. An ideal structure means you have absolutely no administrative tasks to take care of during the year, no reporting at the end of the year and no taxes due at any time. All that applies is a low flat fee to remain in good standing with the registrar.” (Offshore Company Quick Corp., 2017)

by far not the only harm; tax havens have other equally or even more harmful effects. Murphy, for example, describes in great detail how tax havens purposely:

1. undermine the rule of law and the general level of trust in a society;
2. *de facto* ignore or even enable crime by supplying (corporate) secrecy as their major product;
3. undermine the democratic process;
4. widen the rising gap between the rich and the poor and strengthen the perception of the ‘unaccountable elite’;
5. fuel the so called ‘tax competition’, or ‘tax wars.’

Stripped of all sophistry, these tax wars are simply a “deliberate attempt by one state to deprive another state the resources that are its rightful property” (Murphy, 2017: 43).

Despite the clear and simple general aim of tax havens, the procedural details of tax dodging techniques via tax havens can appear complicated to most of us. The wider audience and many politicians consider it a technical matter reserved for the experts. This in turn creates an open space for potential opinion manipulations and spins about the true nature of tax havens. One of the effects is that vested interests many times succeed in keeping the tax haven issue as far as possible from the public and academic eye.

However, recently experts have spoken openly about the true nature of tax havens. In May 2016, in light of the Panama papers, more than three hundred prominent economists wrote an open letter and described it in a straight forward way:

“... The existence of tax havens does not add to overall global wealth or well-being; they serve no useful economic purpose . . . . As the Panama Papers and other recent exposés have revealed, the secrecy provided by tax havens fuels corruption and undermines countries’ ability to collect their fair share of taxes. While all countries are hit by tax dodging, poor countries are proportionately the biggest losers, missing out on at least \$170bn of taxes annually as a result. As economists, we have very different views on the desirable levels of taxation, be they direct or indirect, personal or corporate. But we agreed that territories allowing assets to be hidden in shell companies or which encourage profits to be booked by companies that do no business there, are distorting the working of the global economy. By hiding illicit activities

and allowing rich individuals and multinational corporations to operate by different rules, they also threaten the rule of law that is a vital ingredient for economic success . . .” (Oxfam, 2016).<sup>4</sup>

If tax havens – or ‘secrecy jurisdictions’ – are now rightfully diagnosed as socially and economically harmful and need to be addressed politically as a global regulatory problem, the question remains whether they are at this point against the law? Many defenders of tax havens stress the legality of these arrangements within the tax haven jurisdictions.

However, there is more than one legal issue here; that is why slogans defending tax havens as ‘perfectly legal’ (“They are perhaps not moral but perfectly legal”) are misleading. From the perspective of states that lose their taxes the question of legality or illegality looks completely different.

Clearly not all business transactions with tax havens are illegal from the source country point of view. But because of the high level of secrecy and opacity they provide, tax havens attract illegal businesses interested in hiding and laundering money. Side by side with this group, we will find legitimate businesses that use tax havens as their “booking location” primarily for tax purposes. Normally, the transaction is taxed where its real economic substance or impact took place. But the tax evading transactions never have any real economic impact offshore, because the real economic impact takes place onshore. Because of that, it is clearly “. . . very hard for anyone using tax haven to be tax compliant.” (Murphy, 2017: p. 59); the main legal problem of the source country is the non-reporting by the beneficial owner in the jurisdiction where he has legal obligations. And of course, there are many concrete cases where the division between being formally on the right or wrong side of the law is not at all clear and is ultimately decided retroactively either by the court, or, as the well-publicised cases like *Apple v. EU* show, by an out of court settlement.

Apart from “booking location services”, guaranteeing secrecy and refusing to cooperate with other states is at the heart of tax haven services. It makes them an ideal partner in crime. Crimes that offshore centres facilitate are: money laundering with or without private and public sector corruption including financing political parties and bribing politicians with

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<sup>4</sup> Among the signatories are Angus Deaton, the 2016 Nobel Prize-winner for Economics, Thomas Piketty, Jeffrey Sachs, director of Columbia University’s Earth Institute and Olivier Blanchard, former IMF chief economist, *etc.* (*Ibid.*).

deposits in off-shore bank accounts, illegal arms trafficking, terrorism financing and in general illegal trade of all kinds of commodities, humans included.

Indeed tax havens are a *refugium* for the tax dodging legitimate businesses, the hard core criminal organisations and those in between; we could call them organised crime businesses. A good example would be Enron, who just before its bankruptcy had 881 (*sic*) subsidiaries in tax havens: 692 in Cayman Islands, 119 in the Turks and Caicos, 43 in Mauritius and 8 in Bermuda (Cf. Shaxson, 2016). Corporate tax departments became important profit centres, in case of Enron with revenue targets, employing hundreds of individuals (Cf. Zucman 2015: p. 110; Braithwaite 2005: p.197). Roberto Saviano observes: “Tax havens are where criminal capitalism and legal capitalism meet side by side.” They both “seek the same services and enjoy the same benefits” (2017). The criminal underworld uses the very same mechanisms and legal vehicles as the upperworld: shell companies and banks, numerous subsidiaries, trusts and foundations (Shaxson, 2016: p. 27).

It is thus necessary to address the problem of tax havens while discussing the varieties of cross border crime (Cf. Van Duyne and Van Koningsveld, 2017). The impunity that tax havens offer cannot but fuel and facilitate all sorts of crime (cf. Deneault, 2007: p. 260) apart from tax dodging which itself contains a criminal dimension of its own.

## **Tax dodging (via tax havens) as a criminal offence**

Tax law as well as definitions of what is or is not an administrative or criminal tax offence vary substantially between states. The situation gets even more complicated in cases when two or more different tax jurisdictions are involved. Corporate activities and ownership structures may be spread over many (secrecy) jurisdictions as a result of an attempt to create the so called ‘secrecy space’ in which to hide (Cf. Murphy, 2017: p. 24). Consequently, it is difficult to distinguish in advance between acts remaining within the letter and spirit of the law and illegally cheating on taxes.

An established traditional distinction is between tax avoidance and tax evasion. Tax avoidance, with or without the use of tax havens is in principle legal. On the other hand, tax evasion is illegal and a kind of fraud as it: “involves acts intended to misrepresent or to conceal facts in an effort to escape lawful tax liability” (Cf. Workman, 1982: p. 677).

In Slovenia, for example, illegal tax evasion can amount to an administrative offence in cases of less serious evasion. More serious tax evasion is a separate criminal offence (art. 249 of Criminal Code – KZ-1C “Tax Evasion”) punishable with imprisonment of not less than three months and not more than three years. However, it qualifies as a criminal offence only if the sum of liabilities evaded exceeds 50.000 euros. Both natural and legal persons are liable. In defining the elements of crime of tax evasion the incrimination refers back to the provisions of the relevant tax law.

In theory, we therefore have two clear demarcation lines. The first one is between legal tax avoidance and illegal tax evasion. Once the illegality is established the second demarcation line is the one between an administrative tax offence and a criminal offence. In cases of illegal tax evasion, a criminal offence may contain the very same elements as the administrative tax offence; the only difference is that the sum of liabilities is above the 50.000 Euros threshold (so called objective condition of punishment).

The problem in real life however, is not so much the latter but the former demarcation line between avoidance and evasion (Koprivec and Bajec, 2017). The perpetually innovative and creative “tax, risk and wealth planners” are most of the time ahead of tax authorities. In disputed concrete cases, the legality or illegality is determined retrospectively by the tax administration and/or by the final decision of the court, and sometimes less clearly in respect to the legal/illegal divide, by out of court settlement.

## **Tax havens and Slovenian efforts**

How does Slovenia stand on taxes and providing secrecy and how does it tackle tax evasion via tax havens? First, as things look now, Slovenia is not a tax haven; it does not offer a tax-free (corporate) environment nor is it a very secretive jurisdiction. On the *Tax Justice Network Financial Secrecy*

*Index* that appeared in 2015 it occupies a position number 88, with a secrecy score of 34. This is the second best position within the EU just after Finland as far as the extent of secrecy is concerned (Tax Justice Network, 2015).<sup>5</sup> On the other hand, the *corporate* income tax rate in Slovenia is among the lowest in the euro zone – in 2016 it was 17% (declining from the high of 25% in 1995), while the *personal* income tax is comparatively high and rises to 50% percent for the highest bracket; the rate ranges from 16% to 50%.

In contrast to all other western countries, Slovenia has just raised the corporate tax in 2017 by two percent points to 19 percent, while at the same time making some reductions in individual income tax rates. According to the Ministry of Finance, increasing corporate income tax will not hurt Slovenia's competitiveness, as it still remains among the lowest in Europe even after the increase to 19%. (Cf. Reuters, 2016).

Therefore, Slovenia currently maintains its corporate income tax at comparatively low levels and in turn relies more on the personal income tax and the value-added tax (VAT). However, this in fact means that Slovenian government levies higher taxes on its population; VAT in particular disproportionately affects poorer citizens.

Despite the comparatively low corporate tax some wealthier Slovenian tax payers find the idea of tax dodging in tax havens attractive. The problem is not at all a novelty for the Slovenian tax administration (Finančna uprava Republike Slovenije – FURS).<sup>6</sup> According to its own report it continuously deals with this issue and has been successful to some degree in identifying and recovering taxes evaded through tax havens. From 2011, a special *Project Tax Havens* is underway and FURS publishes regular reports on its results. The report shows the number of “focused controls” of natural and legal persons that FURS launched in each year together with the amount of tax in million euros that they established to be missing. These data are presented in Table 1 below:

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<sup>5</sup> The index ranks jurisdictions from exceptionally secretive (91-100) to moderately secretive (31-40).

<sup>6</sup> A recent discovery in the archives of the former ‘one party’ controlled secret service (SDV – UDBA) made clear that even in the time of socialist Yugoslavia many big Slovene firms and banks owned subsidiaries in tax havens, many of them allegedly controlled by SDV (Pezdir, 2017).

**Table 1.**  
**Project Tax havens - official data of the Slovene tax administration**  
**(Source: FURS, 2017: 4)**

<b>Project tax havens</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
Number of focused controls	-	22	185	341	168	142	106	43
Taxes evaded in million €	-	6,1	3	3,5	12,3	2,4	2,8	6

The table shows that the number of focused controls was rising through the years 2010 to 2012 followed by what looks like a steady decline from 2013 to 2016, which in itself may or may not reflect any underlying shifts in the amount of tax evasion through tax havens. We also see that the officially established total amount of evaded tax is ranging from 2,4 to 12,3 million euros per year and totals 36,1 million euros in six years from 2010 to 2016.

In addition, in 2016, FURS published online anonymised details of its decisions in order to increase the visibility and transparency of its efforts against tax evasion using tax havens (Cf. Boštlic, 2017b). In March 2017, FURS also published typical examples: a kind of typology of the ways tax avoidance using tax havens typically takes place (FURS, 2017: 5-7).<sup>7</sup>

The activities of FURS reflect only the cases of which they somehow get the information. The real extent of illegal tax evasion through tax havens remains an open question. In these circumstances, whistle-blowers are good news to FURS. Without their help, the secret untaxed wealth remains “an unknown unknown”; without their help FURS is left searching for a needle in a haystack which is extremely costly with a uncertain final result.

We see that FURS started its focused activities already in 2011, before the recent political impetus provided by the Panama papers and Paradise documents. Despite the presented figures, the success of these activities is

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<sup>7</sup> Apart from tax evasion, secrecy jurisdictions may also play a role in bankruptcy fraud. Officially, bankrupted debtors avoid effectively paying taxes and debts by hiding wealth in tax havens. Secrecy jurisdictions do not respond to the official demands to disclose the beneficial owners and therefore such ‘virtually’ bankrupt debtors effectively get away with it (Cf., Boštlic, 2017a, see also, e.g. Zgaga, 2015).

impossible to assess due to the unknown untaxed wealth. However, in comparison to the total amount of taxes collected for the state budget by FURS, for example 8,7 billion euros in 2017, the average 5,1 million euros per year so far identified by this kind of focused controls represents a very tiny share of the whole taxable wealth.

## Slovenians in Panama and Paradise papers

As we know, the Panama papers consist of more than 10 million leaked financial documents created by a Panama law firm Mossack Fonseca. The documents leaked to the German newspaper *Süddeutsche Zeitung* by an anonymous whistle-blower deal with more than two hundred thousand off-shore entities. According to the media many of them were employed exclusively as shell corporations used to facilitate tax evasion and eventual other illegal or criminal activities (ICIJ, 2016).

Worldwide the discoveries led to many official and internal<sup>8</sup> investigations and accompanying intense media coverage primarily of cases that involved politicians and other public figures. Among them was a small number of Slovenian beneficial owners. It turned out that a Ljubljana based consulting firm owned by a Slovene citizen acted as a main intermediary to Mossack Fonseca. Through this channel, it has registered companies for 74 Slovenian natural persons – beneficial owners. As reported by Anuška Delić from *Delo*, the consulting firm opened 17 companies through Mossack Fonseca: one at the British Virgin Islands and 16 in Anguilla, where there are virtually no taxes, and no agreements with other countries on double taxation exist (Delić, 2016a). Apart from this number, the daily *Delo* decided not to reveal all beneficial owners that surfaced, but only those cases that in their view fit the criterion of being in the ‘public interest’.

Among the most notable publicly disclosed beneficial owners were: the so called ‘king of steroids’ (a person on the US Drug enforcement fugitives list (Cf. Delić, 2016b)); a couple of sportsmen; one drug administration

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<sup>8</sup> For problematic aspects of internal investigation of suspected white collar crimes triggered by Panama papers in the largest Scandinavian bank Nordea and in particular its Luxembourg branch, see Gottschalk (2016).

inspector; a public notary; an honorary consul, but no Slovenian nor foreign politicians. The content in most cases corresponded with a common tax haven rationale: off-shore registered companies of these beneficial owners were not doing business themselves – they owned shares in other companies. In case of selling these shares, no capital gain tax would ever be declared in Slovenia as the beneficial owners and the whole scheme would remain secret to Slovene tax authorities.

The government responded to the media provoked public indignation and promised action. The Prime Minister Cerar appointed a strategic working group to prepare additional measures for tackling the abuse through tax havens more effectively. Further, the Police produced two criminal charges so far, while the Specialised State Prosecutor's office was conducting one ongoing criminal investigations (Delić, 2017).

Interestingly, the Slovene Chamber of tax advisers welcomed the discoveries and stressed the need to strengthen the regulation and licensing requirements for tax advisers, among other to prevent such aggressive tax consultancy. They pointed out that the consulting firm that acted as an intermediary to Mossack Fonseca was not a member of the Chamber (Delo, 2017) implying as it appears that their members would do no such things.

The more recent Paradise papers leak put light on the “top end of the world of offshore finance” (BBC News, 2017). This leak is composed of documents from two firms that provide offshore legal services: Appleby law firm based in Bermuda and Asiaciti Trust based in Singapore and covers nineteen secrecy jurisdictions. So far the leak has brought up only six additional Slovenes as beneficial owners of tax haven based corporations. Thus Paradise papers, coming after Panama papers discovery, did not bring about a substantial change in the assessment of the scope of the problem, nor in the Slovene government's position on the matter.

Do the 74 beneficial owners in the Panama papers and the 6 in the Paradise documents look like a modest catch? Yes, indeed. Very probably, the numbers will be even lower after cases are scrutinized by FURS. The media suggested a partial explanation; based on their other research and sources the Slovenes prefer European jurisdictions, mostly Lichtenstein, Luxembourg, Cyprus<sup>9</sup> and Malta. In a separate research conducted by Delo

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<sup>9</sup> For example, media reported of a successful Slovene IT firm that developed first in Slovenia but then at some point moved its seat to Cyprus. In 2017, it

76 Slovenian beneficial owners (70 natural and 6 legal persons) surfaced out of the Maltese business register (Cf., Gole, 2017; Delić, 2017). In addition, the media recently also pointed out the nearby Bosnia and Herzegovina (and its Republika Srbska in particular) as good hiding places (Mihajlović, 2018).

On the level of political parties, the reactions to these discoveries were mixed. Even though all of them denounced illegal tax evasion, only one of them in opposition demanded of the government to be more pro-active in the fight against tax havens. It also demanded a more ambitious reaction of the state and suggested and prepared an extensive action plan by itself. The government refused these demands as “not needed”. It only agreed to regularly report on its anti-tax havens activities to the Parliament and to compose a list of state owned firms dealing with tax havens, presumably as a message to them that they are being watched (Cf., Zdužena levica 2016, 2017).

Before we address the possible future stance of Slovenia on tax dodging via tax havens let us briefly point out options that states have at their disposal.

## **What can a harmed state do?**

Sovereign states caught up in a ring with free riding tax havens/secretary jurisdictions have four options: they can decide to become a tax haven themselves and compete on the other side; they can enact more aggressive defence measures; they can actively join multilateral efforts against tax havens and finally, and they can do a combination of all or some of these things.

### **Switching sides: becoming a tax haven**

In theory a state can switch sides. Although the supply of secrecy jurisdictions is already abundant, some states may consider this option seriously,

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was sold for almost a billion euros, while the Slovene tax administration remained apparently empty handed. (Cf. Derčar, 2017; Dnevnik, 2016; cf. also Koprivec and Bajec, 2017: p. 25-30).

even though the best time to do this is probably over. This option needs to solve the riddle of how to raise sufficient revenues and eventually flourish and at the same time manage all international and other problems that the new status will bring about. The transition to a tax haven may not come overnight and in a pompous way, indeed many long established and younger tax havens never openly admit that they are what they are. However, the market for tax haven's services is competitive and some would-be *paradis fiscaux* have failed to succeed for this or that reason (Cf. Palan *et al.*, 2010: 29-30). A smart and even less transparent version of this option is to create an 'inner' tax haven(s). These are states, autonomous regions or jurisdictions within a (federal) state that function as tax havens or 'offshore jurisdictions' within a "normal state". Many times cited examples of such 'inner tax havens' are Delaware, Nevada and some other states in the USA (Ibid.). One can also become a *de facto* tax haven by leaving the law on the books intact and start granting numerous secrete favourable advance tax rulings to individual corporations or individuals functioning as tax avoidance scheme as was revealed by, for example the Luxembourg leaks in 2014 (Cf. ICIJ, 2014).

Therefore, in theory deciding to become a tax haven is an analytically interesting policy option with various sub-options and would demand a much broader analysis that we can undertake here. The second, much more prevalent option is to fight back.

## **States acting in a proactive self-defence**

The prime problem of tax administrations of the world is information asymmetry. The simplest but optimistic solution to tax the hidden wealth would be to get the tax haven assist you in obtaining the information needed. Most of the time tax havens will refuse to cooperate even if a blatant violation of another jurisdiction's laws is involved (Cf., Workman, 1982: 686, 679). The essence of tax havens is defending its secrecy for which they have very good economic reasons.

Strong states such as, for example, USA, France and Germany, may sometimes unilaterally press tax havens by threatening with sanctions or by rewarding leaks. Sometimes they succeed.

Germany in particular provides a recent example of how this is done. It has a long history of trying to resolve tax 'problems' with the neighbouring

tax havens like Switzerland and Liechtenstein and tries to exert pressure unilaterally and share its successes with other states. For example in a recent well reported case German officials paid whistle-blowers millions of Euro for 11 CDs with data on the beneficial owners of secret Swiss bank accounts since 2010. This led some 120.000 German citizens to self-report their Swiss accounts and to an alleged 18 million recovery of unpaid taxes (Reuters 2012). In 2016 the media reported that the German state involved in this case – North Rhine-Westphalia – has passed stolen CDs to twenty seven other countries (SWIswissinfo.ch, 2016).

However, Switzerland, from its point of view considers buying data stolen from Swiss banks a violation of Swiss banking laws and a crime of economic espionage. Thus it launched a counter attack by trying to secure evidence against the German tax investigators with the help of the Swiss intelligence service. The operation ended when a Swiss spy was arrested on criminal charges in a Frankfurt hotel in April 2017. He was suspected of having spied inside North Rhine-Westphalia Finance Ministry since 2012. His targets were the German tax investigators that carried out the operation of buying stolen data. The Swiss spy was sentenced to a suspended sentence of one year and ten months together with € 25.000 fine. (Cf., *BBC Europe*, 2017).

### **Joining multilateral efforts**

Apart from acting on their own as we have seen in the example of Germany, the victimized states may close ranks. Indeed one of the leading researchers of tax havens, Gabriel Zucman, suggests that the only way to reach a decisive global breakthrough is by means of extreme political pressure. He suggests the coalition of states should impose harsh enough penalties – customs duties, financial embargo, excluding tax havens from international organisations and even excluding the tax havens members of the EU from the EU! (Zucman, 2015, 2016).

At the moment the multilateral efforts against tax havens are led by the IMF and the OECD with its BEPS (Base Erosion and Profit Shifting) initiative and in particular by the EU with, among other, its External Strategy for Effective Taxation (EU Commission, 2016).

Indeed, in light of the Panama papers affair the EU Commission became more active. In January 2016, it presented its Anti-Tax Avoidance Package

focused on corporate taxation and in particular on aggressive tax planning within the EU (EU Commission, 2016). Among other, the obligatory exchange of information on ‘tax rulings’ is in place since January 2017. The Commission also promised to prepare a whistle-blower protection directive, to launch again its Common Consolidated Corporate Tax Base initiative and to produce the official list of tax havens – the announcement that triggered a wider media attention – by the end of 2017. The speculations as to who might appear on the first ever EU list of ‘non-cooperative tax jurisdictions’ were widespread. Once the list was published in December 2017 it turned out that it does not cover EU member states, which did surprise many observers. (Cf. Damijan, 2017b). The Commission explained that it uses different tools against unfair and non-transparent taxation within the EU and that is why the EU member states do not appear on the list that is supposed to be the instrument of the ‘external strategy’ only. To many that looked like an excuse.

Without going into the many details of the present initiatives the question remains whether the EU is a big enough global player that it can substantially reduce the ‘threat’ of tax havens? The other question is whether the member states can truly unite in light of the divergent political interests that they have on the matter. Some of the member states may have a vested interest in *status quo*. This has implications for the effectiveness of the new measures, which can be continually undermined, if not directly, by built-in deliberate loopholes. Is thus the concern and indignation on the EU level genuine or mostly rhetorical? The ongoing challenge to build a common political will is far from resolved.

## **Is the global solution rapidly underway? What is Slovenia’s stance?**

Obviously, states defending themselves alone or in small groups will not succeed in tackling the fast moving off-shore targets. In particular as the main strings are allegedly pulled by the main political and financial centres *onshore*. In the aftermath of Panama papers a former Harvard professor of economics Jeffrey Sachs pointed out the systemic *onshore* embeddedness of the problem:

“Tax havens do not just happen. The British Virgin Islands did not become a tax and secrecy haven through its own efforts. These havens are the deliberate choice of major governments, especially the United Kingdom and the United States, in partnership with major financial, accounting, and legal institutions that move the money.

The abuses are not only shocking, but staring us directly in the face. We didn’t need the Panama Papers to know that global tax corruption through the havens is rampant, but we can say that this abusive global system needs to be brought to a rapid end.” (Sachs cited in Oxfam, 2016).

Two years after the Panama papers the tax havens have not been brought to a rapid end. Obviously, we are still at the beginning of some kind of effective global reaction. In addition, as we saw, many aspects of the phenomenon are not known and many questions remain unanswered. Apart from the lacking political will the main obstacles appear to be bank secrecy, no economic or other incentive on the side of tax havens to start to cooperate in good faith and the unwillingness on the side of the banks to tackle money laundering very seriously because of the fear of losing clients (Cf., Zucman, 2016: viii-ix).

But the Panama papers and the Paradise documents did move public opinion and created the rare momentum. This situation in turn built pressure that in some places resulted in a political will to address the problem. But how long will that last?

If the political will is essential, the history of regulating international finance and indeed, tax havens so far, does not leave us very optimistic. Until very recently the dominant paradigms in this area were well known contrary slogans: deregulation and further reduction of the role of the state. Today, at least in theory, the voices against this paradigm are stronger, but the practice has not witnessed the decisive shift. Previous attempts to enact more effective worldwide regulation of finance do not fuel optimism. The reforms introduced after the Savings and Loans scandal in the late eighties and early nineties in the USA and the regulatory reforms in the aftermath of the 2008 financial crises were modest, to say the least (Cf. Dorn, 2010, 2015; Jager, 2015, Štiblar, 2016).

Is, bearing in mind such a track record, an effective global solution of the tax haven problem realistic? Slavoj Žižek, for example, thinks it is not

and describes Piketty (2014, 2015) and other tax haven fighters as “utopians”:

“I think he’s utopian because he simply says that the mode of production has to remain the same; . . . my claim is that if you imagine a world organisation where the measure proposed by Piketty can effectively be enacted, then the problems are already solved. Then already you have a total political reorganisation, you have a global power which effectively can control capital, we already won.” (Žižek, 2014)

On the other side, Picketty, Zucman, Murphy, the NGO Oxfam and others (the ‘utopians’ in Žižek’s view), while acknowledging that we are still at the beginning, remain optimistic about achieving global, multilateral solution. They believe tax paradises can be fought to the final victory. The rest of us are in no better position than to wait and see.

The Slovenian government is of course not particularly interested in such theoretical frame of discussion. States, in particular smaller ones, navigate their self-interest pragmatically and will continue to do that in the future.

To begin with, we predict that Slovenia will not consider becoming a tax haven as an option. On the contrary, it will continue its unilateral defensive efforts (FURS) and may even start acting more aggressively in a proactive self-defence. At present, it is impossible to assess the success of these efforts as the size of wrongly untaxed wealth is simply not known. As remarked before, in comparison to the total tax collected in Slovenia per year the size of FURS’s catch (Project Tax havens) is tiny. It looks like neither Panama nor Paradise leaks will contribute in any substantial way to change this impression. It remains to be seen how the situation will evolve in the future.

In the end we predict that Slovenia will continue to participate actively in various multilateral defensive initiatives, in particular within the EU where so far it has been among the more proactive members.

Bearing in mind the position of the majority of political parties and based on what we have seen so far, it can be said that Slovenia will, like most other countries, continue to ride two horses at the same time. On the one hand, it will be among those member states that actively support the EU and other multilateral defensive mechanisms against tax haven generated erosion of its tax bases. On the other hand, while waiting for the global

systemic solution of the tax haven problem to happen (either by the way suggested by Žižek or by the way suggested by the ‘utopians’), it will very probably actively take part in the global competitiveness race where providing a tax friendly (corporate) environment continues to be one of the main issues.

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# **The crusade for purity**

## **Corruption and laundering**

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### **Introduction: corruption and integrity offences**

Corruption emerges and re-emerges over time in multiple variations as it touches many sides of society. Therefore, how corruption is addressed within a country usually depends on perception, the emotion it evokes, its scale, politics and the affluence of its population. These determinants are interconnected. It is commonly believed that corruption occurs in impoverished regions and that corruption makes poor nations poorer. However, corruption in affluent regions may be overlooked as it is felt less acutely. Perception can cause bias and value judgements. For instance, if a politician in a society seen as democratic and affluent, passes plum jobs to kinfolk. This would not necessarily be described as corruption despite the apparent nepotism. If this occurs in an emerging market or a developing country, then it will most certainly be viewed as a manifestation of engrained corruption and invoke condemnation.

Likewise, prejudice can lead to a distorted perception of corruption prevalence. For example, geographically there is a north-south and an east-west prejudice. Northern countries (protestant) would typically be seen as less corrupt than southern ones (catholic). Or, 'the east' would be more corrupt than 'the west' (in view of the roundness of the globe a strange

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saying). Then we have the dichotomy of developed and developing countries with accompanying prejudices.

All this illustrates that we are dealing with a ‘hot subject’: the reproach of being biased or condescending to a group of countries is easily made. A researcher’s task is to steer clear of such value judgments and treat corruption as a similar form of ‘rational law breaking’: profit-seeking abuse of office or position.

Is that the essence of corruption? No, the formulation seems too broad. Selling sexual services where such are prohibited is not considered corruption (despite ideological objections). However, paying a brothel’s bouncer for access in breach of entry restrictions may be corruption: you buy a *decision* against the rules. This case contains all elements of corruption which can be defined as:

*An improbity in decision-making or decay in the decision-making process in which a decision-maker (in private or public service) consents to deviate from the criterion which should rule his decision making, in exchange for a reward, the promise or expectation of it (Van Duyne, 2001, p. 75).*

This formal definition centres on decision making: the decision maker has power to provide or withhold something which, in a criminal interaction, becomes a tradable asset. Surprisingly, the OECD, the Council of Europe and the UN Conventions do not formally define ‘corruption’, although it is generally loosely described as misuse of public office for private profit or gain). Instead, a set of corruption offences is listed.<sup>2</sup>

In most literature the conceptual circle is even wider. The definition of Transparency International (TI) is “misuse of public power for private benefit”. This definition is elegant in its simplicity, but it does not delineate sharply enough: it encompasses (grand) embezzlement and other forms of illegal or unethical enrichment.<sup>3</sup> While embezzlement is seen as a form of

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<sup>2</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; United Nations Convention against Corruption (2005); Council of Europe Convention on Corruption. These are discussed later in the chapter.

<sup>3</sup> Although we recognise that complex embezzlement typically involves more than one individual.

corruption, it is different from corruption as described above: it does not necessarily involve the illegal exchange of interests in a decision making process with other parties. In addition, abuse of office can also occur in the private sector and for purposes other than ‘private benefit’. For example, nepotistic appointments of relatives or allowing inappropriate advantages to a friend (cronyism). Within the whole circle of integrity breaches we have the *abuse of office*, which by its nature requires a formal relationship to an employing entity. Not all abuse involves corrupt conduct. Neither should abuse of office always result in direct financial profits. For example, office space may be misused after office hours for secret parties or as a personal studio. Within that circle of abuse of office we find the ‘hard core’ corruption as a sub-set in decision making situations.

One often finds the terms abuse, corruption, fraud and deceit used in changing conjunctions or as a word string in a sentence or text. This may be handy but remains imprecise. For ease of reference we will cluster these criminal manifestations under the concept of ‘*integrity offences*’.

## **Integrity offences and laundering**

As follows from the previous section, including integrity broadens the scope substantially. Therefore we will focus on acquisitive manifestations of integrity breaches with a major impact on society. This is also an ambiguous demarcation: what is major impact? In the literature this is often referred to as ‘grand corruption’, though that is often technically grand *embezzlement*. That does not help us: the term ‘grand’ is also an open concept determined by the economic context of a country. Against the background of (international) scandals (*e.g.* Brazil, Peru, South Africa, Spain) that profoundly affected the countries involved, we will focus on income of a volume that needs management and *laundering*,<sup>4</sup> although we recognise that, cumulatively, petty corruption offences can also be of significant impact on the economy and public trust of a country: *e.g.* parole or traffic police, health care workers (Van Duyne and Stocco, 2012). However, proceeds

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<sup>4</sup> For the purpose of this chapter we define money laundering as “*falsely claiming a legitimate source for an illegally acquired advantage*” (Van Duyne, 2003, p. 69).

from petty offences enter the financial system through ‘percolation’ (as daily expenses) and remain typically ‘under the radar’. Our interest concerns proceeds from corrupt conduct exceeding the average household expenses and are in need of separate laundering (Van Duyne, 2003).

Large-scale integrity offences are likely to attract law enforcement attention. Confidential data leaks can provide leads of inquiry. But more importantly, criminal assets management (CAM/laundrying) is expected to draw the attention of the ‘gatekeepers’ of the financial system’s integrity. These are entities required by the law to report financial transactions they consider unusual or suspicious. Within the international anti-money laundering regime such suspicious transaction reports (STRs)<sup>5</sup> are submitted to national Financial Intelligence Units (FIUs). These ‘gatekeepers’ range from relationship managers and compliance officers in banks, to notaries and art and antique dealers. Through their reporting criminal revenues from integrity offences come onto the radar of regulators and law enforcement agencies.

Within the framework of the global anti-laundering regime, this CAM also comes in an aggregated form onto the radar of the Financial Action Task Force on money laundering (FATF), the international anti-laundering standards setter through ‘recommendations’ for the global financial system and designated professions and businesses. The FATF issues ‘typologies’ and evaluates how countries comply with its 40 Recommendations.<sup>6</sup>

Tackling the management of the proceeds of integrity offences is also within the remit of the FATF. Given the significance of the FATF, it is important to know its position regarding the proceeds of integrity offences. Therefore, in this chapter we will investigate how the FATF deals with integrity offences, their prevalence and impact.

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<sup>5</sup> In the US and the UK these are called ‘suspicious activity reports’ (SARs), whereas STRs refer to reports of transactions above \$10,000 (in the US) or market abuse (in the UK). However, the FATF and most other countries use the denotation STR, which we adopt in this chapter.

<sup>6</sup> The first list of Recommendations was issued in 1990, followed by revisions in 1996, 2001, 2003 and most recently in 2012. The 2001 revision (in response to the terrorist 11th September attacks in the US) extended the FATF mandate to include Counter Terrorism. As a consequence, Special Recommendations directed at financing of terrorism were added to the list of 40 Recommendations (first eight, a year later the ninth). The 2012 version of the Recommendations reincorporates the additional special Recommendations to revert to a list of 40.

# Methodology

## Sources

For our enquiry we made a search through documents the FATF published on its website:

- Annual reports from the inception of the FATF to date;
- Mutual Evaluation Reports of countries which had undergone a fourth round evaluation;
- President's summary of the outcomes from the experts' meeting on corruption: 2011-2016;
- Conference comment by Davis Lewis, May 2016;
- Typologies on the laundering of the proceeds of corruption, 2011;
- Plenary reports;
- Support papers such as 'Reference guide and information note on the use of Recommendations in the fight against corruption' (October 2012); best practices papers and practical hand-outs on 'specific risk factors in the laundering of the proceeds of corruption, both issued in 2012.

In addition, we will make use of open sources where cases of integrity offences are discussed or revealed, as well as publications of relevant NGOs and professional journals.

## Content analysis: the mutual evaluation reports

One of the most commonly used techniques for evaluating reports is that of content analysis as it provides a way in which (a) the perceived importance of an issue can be determined and (b) changes in that perception can more readily be identified (Krippendorff, 1980). The method can be applied *quantitatively* (for example counting words, sentences paragraphs) or *qualitatively* (isolation of key themes and analysis of the sentence structure and meaning). Irrespective of approach, the value in content analysis is not what is counted but how the researcher sets out the conditions, under which the search took place (Riffe *et al.*, 2014; Lacey, *et al.*, 2015) in a

way that is systematic and replicable (Riffe *et al.*, 2014; Lacey, *et al.*, 2015; Powell, 1997; Krippendorff, 1980). Quantitative approaches employed include simple word counting (see for example: Campbell, 2003, 2004); sentence counting (see for example: Deegan *et al.*, 2000); and, page proportioning (see for example: Unerman, 2000).

Examples of both quantitative and qualitative methods have been followed within the field of corruption. Andersson (2010) carried out a qualitative content analysis through ‘claims-making’ of three anti-corruption reports authored by the World Bank<sup>7</sup> More recently, Czibik *et al.* (2016) employed word-based quantitative analysis (employing corruption or pre-selected related terms such as bribery, backhanders or kickbacks) to analyse coverage of corruption within news media in Hungary.

## Approach followed

The aim of this part of the study was to consider the degree of attention paid to ‘corruption’ within a sample of Mutual Evaluation Reports (MERs) conducted by teams of assessors (deemed to be experts) of the FATF. The MERs are important as they describe a country from the perspective of its compliance with the Recommendations. However, that is a specific filter, not intended to describe the world ‘as it is’ but the state of compliance with FATF’s recommendations. The result is a judgment by six to eight assessors of a varying degree of objectivity, with corruption not necessarily mentioned as an item. Thus, while MERs are important sources, we must interpret them cautiously.

As remarked, we analysed a selection of the outcomes of two evaluation rounds: the *third* and the *fourth*. The reason for this choice is that in this way we have two measurements and can control for the difference in assignment and FATF methodology. In a developed approach from the third round, the fourth round is carried out from the angle of *risk* and threat assessment, which is broader than corruption: corruption is considered as a money laundering risk in the first place.<sup>8</sup>

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<sup>7</sup> ‘Claims-making’ originates in the sociology of social problems and relates to normative conditions that ought not to exist and about which something needs to be done (Nichols, 1997; Harvey and Ashton, 2015).

<sup>8</sup> In undertaking this analysis, we acknowledge that the underlying methods employed in the two rounds are different. However, although corruption had come

We applied a quantitative content analysis as an approximation of how serious and important corruption was judged: as a risk to society and as a predicate to laundering. This resulted in a count of ‘corruption mentions’. Such a count has a *caveat* as it is not a fully external yardstick: it also reflects the opinion of the assessors. Therefore, we also compared it with an ‘independent’ measure of corruption: the Transparency International Corruptions Perception Index for the years of the MERs.

The analysis was restricted solely to consideration of occurrence of the words ‘corruption’ and ‘bribery’. Consistent with the recommendation of Krippendorff (1980), we have identified *sentences* as our preferred unit. This was to account for the fact that the word ‘corruption’ appears multiple times in non-contextualised places such as headings *etc.*, within the MERs.

Each report was searched using the ‘advanced find’ functionality within PDF documents. This enabled the context of the word to be assessed to ensure its relevance in terms of content so that sum-up sentences, word strings *etc.* could be identified. The documents of the other sources were also ‘combed’ for the occurrence of ‘corruption’, ‘bribery’, ‘abuse of office’ and ‘integrity’. This stock taking served as a reconnaissance of the spread of attention for integrity subjects related to laundering.

## Findings

### a. From first notice to enhanced awareness

It would be counterfactual to say that awareness of corruption ‘emerged’ at some point of time after which it developed and unfolded into a global policy. We rather assume that some level of awareness of corruption has always been present. The corrupt rule of the president Mobutu (president of Zaire, 1965-1997) and Marcos (president of the Philippines, 1965-1986) needed no special awareness raising for their abuse of office, grand corruption and embezzlement.<sup>9</sup> Their misconduct was condoned to ensure an

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more to the fore within the risk-based approach of the fourth round, we maintain that it ought properly to have featured within the third round as a contributor to money laundering activity.

<sup>9</sup> Cite reference: Howard W. French, Mobutu Sese Seko, 66, Long time Dictator of Zaire, 8 September 1997, The New York Times.

anti-Soviet stance in the Cold War.<sup>10</sup> However, in recent years, donor countries providing aid have become increasingly concerned about misappropriation of funds.<sup>11</sup>

Apart from a growing state of awareness, there were earlier clear signs that corruption in international trading relations had to be addressed. As a result of the U.S. Securities and Exchange Commission investigations in the mid-1970s it appeared that more than 400 US companies admitted having furthered their business by paying bribes or providing favours of about \$ 300 million to foreign governments and relationships. A famous case was the Lockheed scandal involving the Prince of the Netherlands. This was one of the cases that led to the passing of the US Foreign Corrupt Practices Act, 1977 (Gelemerova *et al.*, 2018). It took more than ten years for a series of international events to unfold: in 1989, the year of birth of the FATF, the Organisation of Economic Cooperation and Development (OECD) established a working group to survey how national legislations address international corruption. An EU Convention against corruption was drawn up in 1991.<sup>12</sup> In 1994 the OECD Ministerial Council adopted the OECD Anti-Bribery Convention.<sup>13</sup> The Committee of Ministers of the Council of Europe adopted in 1996 the Programme of Action against Corruption, which was followed in 1999 by the Criminal Law Convention.<sup>14</sup> The UN Convention against Corruption (UNCAC) came later: adopted in 2003 and by October 2017 it was signed by 183 parties. Chapter V of UNCAC also

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<https://partners.nytimes.com/library/world/090897obit-mobutu.html>

<sup>10</sup> Howard W. French, Mobutu Sese Seko, 66, Longtime Dictator of Zaire, 8 September 1997, *The New York Times*, <https://partners.nytimes.com/library/world/090897obit-mobutu.html>

<sup>11</sup> See for example 'UK suspends aid to Uganda as concern grows over misuse of funds'. *The Guardian* 16 November 2012, available at [www.theguardian.com/global-development/2012/nov/16/uk-suspends-aid-uganda-misuse](http://www.theguardian.com/global-development/2012/nov/16/uk-suspends-aid-uganda-misuse) Accessed 7 February 2018.

<sup>12</sup> Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union. *Official Journal C 195*, 25/06/1997 P. 0002 – 0011.

<sup>13</sup> Officially: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention came into force in 1999. Revised in 2009.

<sup>14</sup> Gelemerova (2010) discusses FCPA's history and international anti-corruption legislation.

introduced international asset recovery and was considered a major breakthrough.

Where there is so much confluence of political tributaries against corruption and given that the proceeds of (grand) corruption have to be laundered, it is obvious that it should come within the remit of the FATF. The FATF is dependent on the G-7 (later G-20) which has an overlap with the OECD. Given this dependence, unsurprisingly, in general the FATF stayed also on this item in line with the dominant political community: the OECD, the UN, the World Bank, the IMF, the EU and the USA.

The first mention of corruption as a laundering issue occurred in 1994/95, a year after the OECD Anti-Bribery Convention was signed: “*In addition, there remains a significant threat of corruption, by criminals, of banks and their staff*” (FATF-Annual Report (AR) 1994/95, p. 16). The mention stands alone and is not connected to corruption as a predicate offence but as an operational threat to the integrity of banks.

In the following year corruption was mentioned four times, of which two concerned the threat of corrupt Eastern European banks (Russian in particular). Two mentions occurred as an aside in a summing-up sentence together with other categories of crime. One mention was contained within a statement about a specific Member State: “[and] *other crimes as predicate offences within the ambit of its money laundering statute*” (FATF-AR, 1995-96, p. 43). Another aside was for the future, in particular concerning the extension of the predicate offences beyond drug trafficking.

In similar fashion, we find in the FATF-AR 1996-97 that of the eight references to corruption, seven occurred in the usual summing-up sentences of serious predicate offences. The eighth mention concerned the attendance of the FATF at the 21st *Conference of the European Ministers of Justice on corruption and organised crime*. Clearly, the FATF kept pace with the political developments within the corruption portfolio.

In the subsequent annual reports, the references to corruption lacked depth and were few and far between. We find them in the FATF-AR 1997-98: in the copied speech of IMF President Camdessus and in the summarised Mutual Evaluations and description of the situation in Southeast Asia, Mexico, and the Black Sea region. Frequently, ‘corruption’ within MERs occurs in the summary statements pointing at the risk of drug trafficking, organised crime, fraud, tax evasion, corruption, human trafficking *etc.* Of

course, the order in this summing-up varied, but they were all serious offences generating proceeds for laundering. Separate mentions concerned the UN Crime Prevention and Criminal Justice Commission Expert Group meeting in March 1999 and an International Anti-Corruption Conference in October 1999 in Durban (South Africa) during which the FATF President gave a presentation.

In 2003 the FATF issued its first mandatory requirements covering Politically Exposed Person(s) (PEPs), their family members and close associates. Given this significant event, it is perhaps surprising that in the 2002-2003 AR, corruption was mentioned only two times and in the two following years not at all. How big a problem is corruption when it can be neglected or mainly mentioned by default? Can it sink into oblivion after its first surfacing?

Eventually the FATF and its President rescued this issue from oblivion. In the FATF-AR 2005-06, we read in the foreword of the President that “*the devastating effects of money laundering linked with corruption*” have to be examined. Thus, in 2005-06, the FATF initiated a cooperation with the *Asia-Pacific Group on Money Laundering (APG)* to shed light on the symbiotic relationship between laundering and corruption. The report observed “*a critical need to (i) develop a greater understanding of how corruption damages the effectiveness of AML/CFT systems, and (ii) develop appropriate strategies to deal with the issue.*” (p.7). At the joint FATF-APG Plenary meeting in Singapore in June 2005, the two organisations decided to explore the issue and, among others, the ways in which corruption can undermine AML policy.

The Project Group expanded its membership soon in order to obtain broad international support. There were few who did not participate. We find, of course, the UN, IMF, World Bank, OECD, GRECO<sup>15</sup> and the FATF Style Regional Bodies (FSRBs).<sup>16</sup> After the “successful” Plenary another followed in February 2006, with ESAAMLG, and a joint Typologies meeting with GAFISUD<sup>17</sup> hosted by South Africa. More than 400 delegates from 44 jurisdictions discussed how to build an AML infrastructure.

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<sup>15</sup> The Council of Europe’s Group of States against Corruption.

<sup>16</sup> FATF Style Regional Bodies are regional stand-alone organisations which adopted the principles, standards and organisational structure of the FATF.

<sup>17</sup> ESAAMLG stands for Eastern and Southern Africa Anti-Money Laundering Group; GAFISUD if the South-American FATF Style Regional Body.

Corruption related money laundering was discussed, but to the extent it may undermine the AML-regime: laundering the proceeds of corruption was not the subject of any meaningful discussion.

After all these efforts, conferences and Plenaries, nothing happened. We find no mention of corruption in 2006-7; one mention in passing in 2007-8; 2008-9 again none; but three in 2009-10 of which the most important was:

*“Also in response to the call by G20 leaders, the FATF has committed to publishing information to raise awareness on how AML/CFT measures may be leveraged to combat corruption and the FATF’s ongoing work to strengthen standards in this area”* (FATF AR – 2009-2010, p. 14).

Corruption was also mentioned as one of the issues of the Working Group on Terrorist Financing and Money Laundering, but no context was provided.

What happened next after this serious call for awareness raising? The FATF started to move. In its following FATF-AR 2010-2011 the FATF President Luis Urrutia Corral repeated the call of the G20 leaders that urged for higher priority to be given to the fight against corruption. The FATF had responded to this call with what one may consider as an ‘enhanced awareness’ which resulted in a significant output. The FATF produced six documents between 2011 and 2014:

- Laundering the Proceeds of Corruption (July 2011);
- Specific Risk Factors in Laundering the Proceeds of Corruption. Assistance to Reporting Institutions (June 2012);
- Reference Guide and Information Note on the use of the FATF Recommendations to support the fight against Corruption (October 2012);
- FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22) (June 2013);
- Best Practices Paper: the use of the FATF Recommendations to combat Corruption (October 2013);
- FATF Guidance: Transparency and Beneficial Ownership (October 2014).

In addition to this output, the FATF held five expert meetings from October 2012 onwards, which were followed by an elaborate summary by the President of the FATF (or the Chairman of the meeting). Surveying this output

one may say that the FATF devoted much energy to the laundering aspects of proceeds of corruption.

The report *Laundering of the proceeds of corruption* is the most comprehensive and thorough. It is based on a study of 32 cases from 1965 to 2008 involving 15 Presidents, three Prime Ministers (and/or wives or children), ministers, governors and high-level civil servants. As is usual in such cases, the amount of money involved could only be roughly estimated. According to Annex I of the report, the estimated damage or illegal earnings ranged from \$ 1,8 million to \$ 10.000 million. With this figure one must take into account that the abuse of office lasted throughout the rule of a President (or PM): that implies for decades. Philippines' former president, Ferdinand Marcos, remained 21 years in office (1965-1986) and is estimated to have embezzled \$10 billion; Pinochet remained in office for 31 years (1973-2004) and allegedly embezzled 'only' \$ 27 million. Sani Abacha (and sons) was in office from 1993 to 1998 and is suspected to have embezzled \$3-5 billion.<sup>18</sup> Although these cases were presented under the umbrella concept 'corruption', most references concern embezzlement: mentioned 18 times, while 12 cases refer to bribery. In eight cases a combination of abuse of office was mentioned: embezzlement combined with bribery, extortion or 'self-dealing'.<sup>19</sup>

"Lessons learned" from this study is that the AML-regime did not work, at least not in these cases of "grand corruption". Many banks did not recognise the PEP, or if they did, they "*failed to understand the source of the wealth*" (p. 29), or they "*fully understood that the money that was passing through PEP's account was money from the national treasury*" (p. 31). And for the FIUs, LEAs or supervising institutions? The project team concluded that it "*did not find any instance discovering corruption and proactively alerting the affected country*" (p. 32).

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<sup>18</sup> Of which in 2017 Switzerland returned \$ 432 million. [www.straitstimes.com/world/africa/switzerland-to-return-432-million-stolen-by-Nigerian-dictator](http://www.straitstimes.com/world/africa/switzerland-to-return-432-million-stolen-by-Nigerian-dictator)

<sup>19</sup> "Self-dealing occurs when a PEP has a financial interest in an entity which does business with the state. The PEP is able to use his official position to ensure that the state does business with the entity, thereby enriching the PEP." *Ibid*, p. 17.

One important question addressed five years earlier by the then FATF president, however, remained untouched. That was: “*a critical need to develop a greater understanding of how corruption damages the effectiveness of AML/CFT systems*”. Apparently this critical need was neither shared by the organisers nor by hundreds of attendants at the ‘expert meetings’.

Referring to the findings of the first report of 2011, the FATF issued guidance reports in which the PEP concept received much attention, together with the use of legal persons, geographical and industry sector special risks. The guidance report “Specific Risk Factors” pointed at the need for financial institutions “to understand risks outside the context of identifying and understanding and monitoring PEPs” (p. 4). To that end it provided a synopsis of geographic and product-, service- and transaction-risk factors. It also gave an overview of the many corruption indices that the financial institutions can consult to assess the risk attached to a customer.

By frequently referring to the applicable Recommendations, such as concerning (enhanced) Due Diligence (R.10; 22); PEP (R.12); or beneficial ownership of legal persons and legal arrangements (R.24, 25), the documents served as a proper ‘paper training session’. Naturally, they were also of use during the numerous experts meetings. As such, these publications, collecting existing knowledge, should have an awareness enhancing function to fight corruption and related laundering. Did that correlate with other output, such as the mutual evaluation reports or the corruption assessments such as gauged by perception indices?

## **b. The Mutual Evaluation Reports: TI indices and corruption references**

It is reasonable to assume that with so much training, expert meetings and awareness raising something measurable should occur in the ‘real’ world of corruption. For example, if it is becoming increasingly difficult to convert the proceeds of corruption into usable assets, something observable must have happened in the evaluated countries. Unfortunately, though this

*should* be the case, we only have indirect measurement sticks: *e.g.* the various integrity indices compiled by Transparency International (TI) and others.<sup>20</sup>

These indices have obvious shortcomings. Firstly, there is their subjectivity, due to relying on perception rather than evidence (Hough, 2016<sup>21</sup>). Second, there is cross-contamination – FATF evaluation teams reference the TI index in their assessment, whilst the MERs form part of the data used by TI in arriving at their judgement.

As the TI Corruption Perception Index is widely used, we adopt this yardstick as an approximation of corruption in the public administration. In so doing, we are aware of the *caveats* and the lack of precision and statistical chance variation: *e.g.* a few points higher or lower between two measurement years does not necessarily mean a corresponding higher or lower extent of corruption.

We will give first a short description of the TI corruption yardstick, after which we will apply it to a sample of countries that have undergone a third and fourth mutual evaluation. We will inspect the MERs for the prevalence of corruption references: how often is corruption mentioned in a full sentence? The assumption is that MERs of countries with a negative (low) TI index will have a higher frequency of references to corruption. We will then compare the fourth round compliance ratings on Recommendations linked to corruption with the TI indices of these countries.

### **b.1. The TI corruption perception index**

TI traces its formation back to 1993. They operate internationally through national chapters and are proud of their independence. The details of data

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<sup>20</sup> Transparency International provides details on other measures (all maintained by TI) on its website page ‘measuring corruption’ (<http://www.transparency.org.uk/corruption/measuring-corruption/#.WiFDLVV18qM>). Accessed 21 December 2017.

<sup>21</sup> Washington Post ‘Here’s this year’s (flawed) Corruption Perception Index. Those flaws are useful’. By Dan Hough, 27 January 2016, [https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/27/how-do-you-measure-corruption-transparency-international-does-its-best-and-thats-useful/?utm\\_term=.8f5019595df5](https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/27/how-do-you-measure-corruption-transparency-international-does-its-best-and-thats-useful/?utm_term=.8f5019595df5).

used and on how the *composite* index is constructed is set out on their website (see Corruption Perceptions Index 2016: Full Source Description<sup>22</sup> and Corruption Perceptions Index 2016: Technical Methodology Note<sup>23</sup>).

The individual country score provides an indicator of corruption perception within the public sector of a country on a standardised basis. The most recent 2016 survey scored 176 countries on a scale of 0 (highly corrupt) to 100 (very clean).<sup>24</sup> The countries are then ranked according to score from least to most corrupt. Of these countries, 121 or two thirds score below the mid-point and the overall average score of 43,2, applying a general interpretation, indicates that wide areas of the world are very risky places to conduct business!

## **b.2. Looking for correlations**

The fourth round is still in process; therefore, the findings are temporary. At the time of data collection (2016/17) 26 countries had been evaluated: See Table 1. Of these countries, we tallied the references to corruption in the third and last round to search for changes between these MERs. The distance in time between evaluations ranged from six to twelve years.

The differences between the TI-Indices of the two evaluation years ranged between one and nine points. Some countries ‘lost’ whilst others gained a few points. Of the 26 countries: 13 countries received lower ratings, ten a better rating and for three, no data were available. The biggest changes concerned the ratings of Australia, Singapore and Spain: 8-9 points *negative*. These are countries with a generally high TI score, well above the overall average score of 43,2. In contrast, most countries with a lower score than this general average ‘improved’ with a better rating in the year of the fourth evaluation round. The countries with an improved score were Serbia (from 35 to 42) and Sri Lanka (from 31 to 37). Two countries scored lower: Guatemala (from 32 to 28) and Uganda (from 28 to 25).

It is difficult to attribute these differences to potential causes, as these will be mixed with normal statistical variations. There are no background data to allow attributing these outcomes to the FATF-connected activities

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<sup>22</sup> Available at: [CPI\\_2016\\_SourceDescriptionDocument\\_EN%20\(2\).pdf](#).

<sup>23</sup> Available at: [CPI\\_2016\\_TechnicalMethodologyNote\\_EN%20\(1\).pdf](#).

<sup>24</sup> This paper was written before TI’s 2017 survey was published in February 2018.

or national ML-policies. With the time difference between six and twelve years these ratings look rather stable. One should also take into account, as remarked before, that the TI ratings concern mainly *perceptions* of corruption, which are logically a derivative of underlying reality, but still remain subjective. Therefore, we took the midpoint between the two years and rank-ordered the countries according to this weighed TI score. The average score was 43,2 with Hungary above and Tunisia just below this dividing line.

How do these perception ratings compare with the corruption references in the two MERs rounds and with the compliance ratings for those recommendations which, according to the FATF, are most relevant? We took the following Recommendations from the FATF Recommendations 2012 (updated 2017):

- R. 10: Customer Due Diligence of financial institutions;
- R. 12: PEP;
- R. 22: DNFBPs (designated businesses and professions) Customer Due Diligence;
- R. 24: Transparency and beneficial ownership of legal persons;
- R. 25: Transparency and beneficial ownership of legal arrangements.

The rating for the level of compliance were full compliance (C), Largely Compliance (LP); Partial Compliance (PC) and No Compliance, which we converted into:

- C = 4
- LP = 3
- PC = 2
- NC = 1.

We added these compliance ratings to a total as an ordinal scale index of the level of compliance to these five corruption relevant Recommendations. The results of this data collection, (a) the TI ratings, (b) corruption mentions and (c) the ratings on the five recommendations, are presented in Table 1.

**Table 1.**  
**Country TI scores and corruption mentions in two**  
**Mutual Evaluation Rounds & 5 corruption linked Recommendations**

<b>Country</b>	<b>Mid-point TI</b>	<b>3rd Round mentions corr.</b>	<b>4th round mentions corr.</b>	<b>R10 Due Diligence</b>	<b>R12 PEP</b>	<b>R22 Due Dil. DNFB P</b>	<b>R24 Ben. Own. Legal Pers.</b>	<b>R25 Ben. Own. Legal arr.</b>	<b>Sum Compliance</b>
Sweden	90	2	9	3	3	3	2	2	13
Switzerland	88,5	34	33	2	3	2	3	3	13
Singapore	88	46	80	4	4	2	2	2	14
Norway	87,5	5	21	2	2	2	2	2	10
Canada	84,5	11	37	3	1	1	2	1	8
Australia	83,5	4	37	2	3	1	2	1	9
Austria	77	4	15	3	2	2	2	2	11
Belgium	75,5	24	7	3	2	3	3	3	15
Spain	64	22	32	3	4	3	3	3	16
Malaysia	50,5	70	90	4	3	3	2	2	14
Italy	48	2	96	3	3	3	3	3	15
Hungary	47,5	7	40	2	2	2	2	2	10
<b>Tunisia</b>	<b>41,5</b>	<b>5</b>	<b>93</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>1</b>	<b>11</b>
Serbia	38,5	37	73	2	2	2	3	2	12
Jamaica	37,5	28	55	2	2	2	2	2	10
Trinidad-Tob.	34,5	33	41	3	4	3	2	2	14
Sri Lanka	34	11	62	1	1	1	1	1	5
Guatemala	30	47	34	3	3	2	3	3	14
Armenia	28,5	19	36	3	2	3	3	3	14
Honduras	27,5	12	52	3	3	3	1	3	14
Uganda	26,5	44	43	2	1	2	1	1	7
Bangladesh	25	14	130	3	3	3	2	2	13
Zimbabwe	21,5	59	41	2	2	2	1	1	8
Fiji	0	31	56	2	2	1	2	2	9
Samoa	45	17	15	2	2	2	2	2	10
Vanuatu	31	5	23	2	3	2	1	1	9
	<b>53,3</b>	<b>593</b>	<b>1251</b>						

We observe that the corruption mentions in the MERs have more than doubled from the third to the fourth round. The group of countries with TI ratings above the average show an increase in corruption mentions, with

two exceptions: Belgium, which went from 24 to 7 mentions, and Switzerland, which remained practically the same. The group of countries below the TI average also had more corruption mentions, but with more exceptions: Guatemala, Uganda, Zimbabwe and Samoa containing fewer references in the fourth round.

The most plausible explanation for this increase is the intensified attention to corruption due to the publications and FATF's annual expert meetings. However, its effects are whimsical with large jumps, as is the case with Italy and Bangladesh, and the substantial lower number of references to corruption in the MERs of Guatemala and Zimbabwe, both nevertheless perceived as very corrupt.

As a matter of fact: nothing correlates with anything. If we take the TI as the best available external measure of the level of corruption, we have an interpretation problem concerning the corruption references as well as the compliance ratings. Both corrupt and non-corrupt countries can have a reasonable or even good compliance with the FATF recommendations.

Thus, if these recommendations are intended to contribute to the fight against corruption, it cannot be concluded that their compliance has an external effect. The only effect that can be observed is a certain level of 'FATF satisfaction'. But that is an 'internal effect'.

### **b.3. Above the midpoint: the non-corrupt and less corrupt countries**

Not only the TI score and compliance, but also the word count (see Table 1) should be interpreted cautiously. It is an indication, on an ordinal scale, of what assessors think worth mentioning than a precise scoring of the prevalence of corruption in the assessed country. Many 'instances' just occur in a summing-up sentence in which routinely three or four predicate crimes are mentioned as 'serious problems'. Often corruption is one of them. Many instances are repetitions in conclusions and summaries.

Bribery was hardly mentioned as a problem in the third round. In line with the higher number of corruption references in the fourth round, bribery was mentioned somewhat more, though it never reached double figures. In twelve MERs it was not even mentioned. This may be due to an 'absorption' of bribery into the broader concept of corruption. Bribery may also be associated with 'petty corruption' with less need of laundering.

Corruption as a social and economic problem usually does not manifest itself as a short-term phenomenon which emerges and disappears again. It is rather characterised by its long-term persistence. So one would expect that manifestations of corruption, for example, in real estate, would be mentioned in the MERs in both rounds: not only as a generally ongoing law enforcement issue, but mentioned by its specific form or economic sector. However, this did not appear to be the case in a systematic way.

When we first look at the countries above the midpoint 41,5 TI in our table, we observe only a few common denominators, between the two rounds and between the countries. Shared observations or concerns were expressed in the MERs of countries which saw corruption coming from *abroad*: the proceeds of corruption *entering* the country. In this manner, Australia, Austria, Singapore and Switzerland were identified as having received the proceeds of corruption from other countries. Either the proceeds were just transiting the country or were deposited requiring efforts to determine whether there was a PEP involved. For example, in its MER, Switzerland was mentioned in both rounds as the final destination of the proceeds of mega bribes or embezzlement by foreign heads of state or of the streams of slush money from the Brazilian Petrobras corruption affair. The same applies to Singapore, which in both rounds was mentioned as a kind of financial reception point of capital flight (not necessarily criminal) and grand corruption. There was no indication that this inflow of dirty money implied corruption at the receiving side or what this ‘receiving’ implies: a simple transfer from a foreign bank account or cash deposit.

When we look at the countries with a lower TI ranking in this group – Belgium, Spain, Malaysia, Italy and Hungary – we also observe much diversity, across years and between countries.

Belgium had the lowest number of mentions of corruption in the fourth round (7), all referring to compliance procedures, but nothing about actual corruption, despite on-going corruption scandals.<sup>25</sup> In the preceding third round it contained 24 references, but also here nothing factual about corrupt acts and related laundering itself. There were mainly complaints about the lack of resources for the implementation of counter measures.

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<sup>25</sup> *Volkskrant* 24 July 2017. In particular, the Parti Socialiste in the Walloon provinces has a history of corruption, cronyism and clientelism.

The way in which corruption was presented differed for the MER of Italy. In the third round we see only two mentions, in the fourth round we find 96 mentions. It seems this is mainly caused by the adoption of corruption within a kind of crime ‘trinity’ of the three most important forms of predicate offences with money laundering relevance. These are: (1) tax and excise evasion (75% of total proceeds of crime); (2) drug trafficking and loansharking (15%) and (3) as remaining an ‘impure’ composite category of: corruption and bribery, fraud, theft and other profitable crimes (10%). There is no mentioning of the proportion of laundering within each offence type. This does not look like a very exact or serious approach: the important category of corruption is just submerged into an undifferentiated ‘left-over bag’. Nevertheless, this composite crimes category emerges in most tables (Italy is one of the countries with more statistics) increasing the mention frequency of corruption. That does not help our understanding. Furthermore, the tables are difficult to compare and we have reasons to suspect that the underlying data is not the same. Also, the assessors were obviously mainly (but not systematically, see table 11 within the report) interested in laundering and narrowed the database(s) to cases (suspects) with corruption-plus-laundering charges. Of course, laundering is inherent to receiving bribes, but does this approach lead to a responsible assessment of the seriousness of corruption?

We attempted to get some clarity on this matter and compared the Italian assessment with that of Hungary as their weighed TI score differed only by 0,5 points. As measure of comparison, we took the number of convictions for corruption in both countries. Unfortunately we were handicapped by the fact that in the Hungarian MER-fourth round, in contrast to the previous round, there is no breakdown of predicate offences. Telling for the FATF, no explanation why such important information has been dropped. So we are forced to compare the Italian fourth round time series of corruption convictions with the Hungarian third round.

**Table 2.**  
**Frequencies of corruption related convictions:**  
**Italy (2011-2014) and Hungary (2006-2009)**

Hungary		Italy	
Year	Convictions	Year	Convictions
2006	431	2011	597
2007	369	2012	619
2008	302	2014	558
2009	230		

How can these findings be interpreted? In Italy (60 million inhabitants) corruption is presented as one of the three major proceeds-generating crimes (as we have seen: figures not separated). Nevertheless, the corruption conviction rates are modest, possibly even going down. Hungary is a much smaller country (10 million inhabitants), has almost the same TI index but a lower conviction prevalence. Maybe the Hungarian figures should be corrected for relative population size. In rounded figures, the Hungarian figures would then be multiplied by six, if such a linear extrapolation were allowed. It should be noted that in the fourth round MER in its National Risk Assessment Hungary rated its problem of corruption as a ‘medium risk’. After a possible correction for population size such mitigating qualification might sound odd. At any rate, the number of convictions have gone down in the time span 2006-2009, after which the series ends. Whether the trend continues towards an even lower prevalence cannot be determined, but with a linear extrapolation it should have reached a zero level by now. With a TI of 47,5 that sounds only credible in an ‘illiberal democracy’.<sup>26</sup> And Italy? If we accept this extrapolation, its corruption problem should at most be rated as ‘medium risk’, an assessment unlikely to be taken for granted outside the FATF.

There are two more countries of interest: Spain and Malaysia. Spain is of interest because of omissions in both MERs. Irrespective of its reasonable good TI status (64), Spain has known various protracted corruption scandals in the real estate and banking sectors, which occurred during the

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<sup>26</sup> The ‘usual’ small bribe taker seems to have been replaced by the ‘usual’ grand oligarch. See “Victor Orbán’s oligarchs: a new elite emerges in Hungary. Prime minister has cultivated a group of friendly businessmen in what critics call crony capitalism” by N. Buckley and A. Byrne. *The Financial Times*, 21 December 2017. Accessed 24 December 2017.

third as well as the fourth evaluation round but remained mostly unmentioned. Thus corruption, nepotism and clientelism was a known local phenomenon in both sectors. Illegal real estate development along the Mediterranean coast (particularly Marbella and Alicante) with 102 reported cases of corruption and more than 60 arrests was known internationally but went unnoticed in the third MER.<sup>27</sup> Only in the fourth round MER there was a euphemistic mention of “*some corruption cases, often involving town planning and real estate development*” (p. 30). This led, among others, to extend the PEP requirement to mayors and councillors of towns of more than 50.000 inhabitants (p. 169). Neither mention was made of the numerous cases of top-level political corruption, the involvement of banks or the many Spaniards facing trial for corruption: 1500 suspects between July 2015 and end 2016.<sup>28</sup>

The Malaysian MERs are also of interest when it comes to shedding light on corruption in the country. The MER-third round mentions the politically expressed aim of the National Vision Policy (2001-2010) to attain “developed nation status” by 2020 (p. 16). That would imply fighting corruption as a national priority, good governance and business ethics. The government established a Malaysian Anti-Corruption Academy and an Anti-Corruption Agency with over 1.000 (!) staff (p. 40). This army handled 62 investigations: period and outcome not clear from the reports. From 2002 to 2006 ACA received 123 STRs from the FIU. More figures on corruption are not available, although quantitative transparency is one of the priorities one would expect of a National Vision Policy. In the fourth round MER the 90 corruption references concern a lot of repeat sentences and organisation structures, intentions and summing-up sentences, but few facts. The few statistics mentioned concerned corruption cases combined with laundering: 139 investigations, 6 prosecutions and 2 convictions from 2009-2013. Statistics of *single* corruption cases (without a laundering charge) are not provided even though the Malaysian ACC has a page on its website with monthly corruption arrests, trials and case description, with photos and names of the suspects for the sake of deterrence. By way of

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<sup>27</sup> Greenpeace España, 4 July 2006.

[www.greenpeace.org/espana/es/news/2010/November/greenpeace-presenta-su-nuevo/](http://www.greenpeace.org/espana/es/news/2010/November/greenpeace-presenta-su-nuevo/) [www.telegraph.co.uk](http://www.telegraph.co.uk), Accessed 27 October 2017.

<sup>28</sup> [www.politico.eu/.../spain-corruption-pp-rajoy-never-endin](http://www.politico.eu/.../spain-corruption-pp-rajoy-never-endin) Accessed 27 October 2017.

example, five high value cases and one big case with a former senior political leader involved, also in illegal logging, were mentioned. In September 2015, at the time the MER was published, the grand corruption and abuse of office allegations concerning the ruling UMNO and Prime Minister Najib Razak came to the open.<sup>29</sup> This sheds doubt on the reliability and validity of this aspect of the MER.

#### **b.4. Below the midpoint: countries of concern**

How are the countries with a TI score lower than the midpoint described in their third and fourth MER? Looking at Table 1, the differences are considerable. Tunisia refers to corruption only five times in its third round MER but this jumped to 93 in the fourth round MER. A country with the highest number of corruption references is Bangladesh: 14 and 130 in respectively 2009 and 2016, while its TI index hardly improved: from 24 to 26.

What happened to these countries? As we cannot discuss them all; we have to make a selection, beginning with the case of Tunisia with the highest TI score in this group. According to the third round MER, Tunisia is a country with mainly petty corruption. But, “*Officials, broadly speaking, and in particular police officers, judges, and district attorneys, are subject to clear ethical obligations*”. Members of the judiciary are threatened with “harsher penalties” for law breaking. Furthermore, “*Tunisia has established a system of clear principles and regulations in the area of transparency and good governance, based on international good practices and the European models.*” With such a highly appraised ethical and transparent system, it is not surprising that the number of corruption cases is low: 143 cases in 2003-2004 and 111 in 2004-2005.

What made the fourth round MER Tunisia so different? That was the ‘Arab spring’ revolt of 2011, which took the lid from an apparently closed authoritarian society of kleptocrats. In contrast to the previous nice words

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<sup>29</sup> Prime Minister Najib Razak was accused of misappropriation of nearly \$700 million from the state owned investment firm (1MDB) to his private account. The case is still pending (also in the US), with wife and son (also mentioned in the Panama Papers) as lavish spenders. Jenkins, Nash. “Malaysian PM Najib ‘Spent Millions’ on Luxury Goods: Report”. Accessed 9 September 2016.

about moral standards, the rule of the dethroned president, Ben Ali, together with his extended family and clan of followers, now stood accused of grand corruption. Interestingly that state of corruption did not penetrate the previous MER, reviewed and accepted by the FATF-in-Plenary.

For the new government this caused a hunt for the stolen or laundered assets: by 2013 \$ 825 million was recovered. Therefore, the adulation in the third MER with the “clear ethical obligations”, “transparency and good governance” disappeared to be replaced by references to the required anti-laundering actions against Ben Ali’s allegedly corrupt legacy. According to the fourth MER, one facet of that legacy is the cash-based parallel economy and bureaucracy. The MER also points at a shortage of trained judges (p.14) and insufficient freezing and confiscation orders (p.17). How effective the cleansing sweep is cannot be deduced from the text: the fourth MER provides only crude statistics of predicate offences, among them corruption cases (and suspects): 566 cases from 2011 to 2014, with most cases in the last two years (159 and 266) (Table 7, p.47). In addition, since 2011, 1.368 cases concerning corruption have been opened, of which 669 involved the former president and his family.

The fourth MER of Tunisia remains silent about the difference with the earlier (2006) MER. We can only speculate about the cause of this difference. What have the assessors missed or omitted in the third MER?

The second country with a large ‘jump’ of corruption mentions is Sri Lanka: from 11 to 62 mentions in respectively the third (2006) and the fourth round (2015). During that time span the TI index went up from 31 to 37. Consequently one would expect more corruption references in the third round MER while the reverse was the case: the third round contained hardly any relevant references. It referred 10 times to the “Commission to Investigate Allegations of Bribery or Corruption” and the UN Anti-Corruption convention. It only noted in passing that this Commission investigated 30 cases of corruption annually with a conviction rate of 50%. There were no statistics. We do not even find the usual ritual formulation that ‘corruption is endemic’. Indeed, a poor report, despite the seriousness of the corruption situation, according to TI.

The fourth MER of Sri Lanka appears to correspond to the improved state of integrity in Sri Lanka. However, the assessors view the authorities’ corruption approach almost exclusively from an anti-laundering angle: corruption is primarily seen as a laundering risk with hardly attention paid to

broader aspects.<sup>30</sup> Sri Lanka is not reproached for its state of corruption but because of “*a lack of corruption-related ML investigations, prosecutions and convictions*” (p.3). A plain ‘ML risk-first’ standpoint. This manifests itself in the way the efforts of the Law Enforcement Agencies are presented: “*there were 7.706 reported cases of bribery and corruption between 2008 and 2013. Of those, 336 were prosecuted, with only **one** leading to an ML investigation*” (p. 26). No reference was made to the outcome of the investigations and prosecutions of corruption. Another matter of concern was that the Anti-Corruption Commission pursued mainly cases of petty corruption (p. 29): the ‘easy pickings’.

As a whole, the country did not have an overarching strategy with a focus on corruption and related laundering, complemented with a corresponding confiscation policy. Despite the increase of corruption references, the MER of Sri Lanka has a low information value: it appears that placing a focus on money laundering alone has resulted in other relevant information being ignored. This narrowing of focus affects the reliability and validity of the report.

Bangladesh has in both years the highest corruption references, more than Zimbabwe, which appears on the TI scale three points lower than Bangladesh. Corruption is deemed endemic in all state-owned enterprises. The banks are mentioned in particular for their role in corruption-related money laundering. In both MERs it was emphasised that corruption impeded the effectiveness of the AML-regime (§ 60 and § 73). In both MERs corruption is a national priority but still, corrupt business goes on unabated and without proper (statistical) monitoring. Very euphemistically, the third MER judged the compliance of the statistics Recommendation as “partial”, but added that “*Statistics provided by Bangladesh authorities on investigations, prosecutions and convictions were not consolidated and could not always be reconciled against specific statutes or timeframes*”. In other words, they were neither reliable nor valid: in fact useless. The fourth MER observed little improvement (except for the statistics of the Bangladesh

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<sup>30</sup> As noted previously, in 2006 the FATF Plenary jointly with the ESAAMLG and GAFISUD, at a meeting in South Africa, discussed how corruption can undermine AML. It seems, the subject was not consistently considered across all MERs.

FIU) and rated it with a kindly “partial-compliant”. That means that there are no statistic instruments to determine whether corruption related STRs/SARS, investigations, prosecutions and convictions increase or decrease.

New in the Bangladesh fourth MER is the “unexplained wealth” investigation, which proved to be of little help, however. Between 2011 and 2015, the Anti-Corruption Commission seized about \$ 13 million but, in the end, only one million was confiscated (p. 48). The MER speaks of an “overreliance on unexplained wealth actions” which has the drawback of alerting those potentially accused. It seems that culprits have little to worry about: we find that of the 214 ML charges between 2009 and 2015, *four* led to a conviction. Whether these are corruption-related is unknown. The wording in both MERs does not allow an optimistic expectation about corruption convictions, certainly not against the background of the chronically understaffed and under-resourced judiciary.

The same applies roughly to the other countries, below the average TI mark. It is true that the mentioning of corruption has increased substantially which may have contributed to more awareness of corruption as a predicate offence. Otherwise, little seems to have changed structurally. Most jurisdictions established an Anti-Corruption Commission or Agency, which was no guarantee of more intensified action against corruption as well as laundering of its proceeds. The general observation is that the anti-corruption bodies are under-resourced or that no or little activity can be observed (Armenia, Uganda). Though not stated explicitly, we might be justified in suspecting a lack of enthusiasm: Zimbabwe did not appoint a Commissioner to the ACC for three years; the Guatemala Commission “could have been more rigorous”; the prosecution of two ministers in Honduras was mentioned, but without additional insight into the corruption prosecutions; Fiji has a 35-member Commission with wide powers, but limited resources and little output. One may wonder how their days are spent.

## **Conclusion: corruption and the FATF**

We have seen that corruption entered public consciousness with the Lockheed scandal but it has taken time to gain prominence. After the confluence of various tributaries from the US, the UN, the IMF and after the OECD Anti-Bribery Convention was signed, the FATF was bound to take over the theme, as mentioned in its 1994-95 annual report. This was not the money from corruption as such but the potential corruptive influence on banking staff. The idea that the bribes themselves are proceeds covered by the laundering concept still had to sink in. Otherwise, for the following years the ‘mentioning’ babbled on from aside to aside. One could always say: “It has the attention”, but without sense of urgency.

In 2005 this situation changed: the President of the FATF put the corruption issue firmly on the agenda with two specific subjects: the undermining of the AML regime by corruption and counter strategies. This resulted in an outburst of activities in terms of a project group, broad international participation in meetings of up to 400 attendants: the Monty Python’s Flying Circus set in motion (Van Duyne *et al.*, 2016). But there was limited attention to bribery as a source of proceeds and no answer to the question whether corruption was undermining the AML-regime.

After these ‘exhausting’ events the FATF became silent for a couple of years, until 2010, when the tocsin was sounded anew, again by the FATF President. This was followed by an intensified awareness campaign and a number of published studies and guides (2010-2013). Did this awareness raising had any effect? Though strict causal relationships are difficult to determine, it is plausible that the increased frequency of corruption mentions can be attributed to this awareness raising.

Otherwise the MERs data of 26 countries, both above and below the average corruption score, do not show a coherent picture, which is best summarised by “nothing correlates with anything”. Thus we have the finding that on the five corruption relevant Recommendations four countries with perceived little corruption, according to the TI index, have a lower compliance rate than five perceived ‘corrupt’ states. From the perspective of fighting corruption by (among others) a strict compliance regime, this is an awkward finding: it points at the ineffectiveness of the AML-regime as

far as corruption is concerned. To use a qualification the FATF reserves for non-compliant states, this can be termed a ‘strategic deficiency’.

One aspect of the MERs is of serious concern: its reliability. As demonstrated in the section on our findings, we had to conclude repeatedly that various statements in the MERs could not be substantiated. In the first place there are the statistics which are almost invariably below proper professional standards, if available at all. While reliable statistics are the backbone of any evaluation, mal-performance can be observed from one MER-round to the following one. Despite reproaches and encouragements we observe little progress in this matter. We also observed omissions of important corruption cases reported broadly in the open sources, but not mentioned in the MERs.

The difference between the third round and fourth round of Tunisia raises the question how these MERs could have been accepted in the first place. The first MER, because it proved to be blind to reality, and the second one, because it omitted a proper comparison with the preceding one. This leads to the worrying question: how reliable are the MERs? The point is not only the observed omissions and mistakes but the fact that these can go unnoticed for years.<sup>31</sup> How reliable is the ‘FATF brand’?

Meanwhile, amidst all this focus on corruption one question, posed five years earlier, remained virtually untouched: “*develop a greater understanding of how corruption damages the effectiveness of AML/CFT systems*”. While we observed that compared to the third round the mentions of corruption has increased significantly in the fourth round MERs, notwithstanding we found only two examples that the assessors addressed this question: in the MERs of Bangladesh and Armenia. In the Bangladesh MERs concern was expressed that corruption lowered the effectiveness of the AM-regime. For Armenia “*no indication was found by the evaluation team that corruption had any impact on the effective functioning of the AML/CFT system*” (MER-Armenia 2015, p. 22). No explanation is given how the perceived pervasive corruption in the country leaves the AML system unaffected. Naturally, given the limited sample of mutual evaluation, our observation is temporary: the fourth round is not over yet.

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<sup>31</sup> Both mutual evaluations were carried out by the World Bank and adopted by the Plenary of the Plenary of the MENAFATF (Middle East and North Africa Financial Action Task Force).

Returning to our questions regarding the way corruption was treated as a political issue and an acquisitive offence, we conclude that it has a clear place in the fourth mutual evaluation round. However, we also conclude that the way it is otherwise dealt with is little coherent and mostly shallow. Some on-going or recent high-level corruption scandals and their importance for the AML-regime were not reported. Laundering of suspected proceeds from grand corruption in the real estate sector of New York and London widely covered in the media,<sup>32</sup> were barely mentioned. Politically too sensitive, even for the FATF?

There is also little attention for the broader abuse of office of which corruption is an element. This may be due to the circumstance that corruption is mainly addressed from the perspective of laundering and the emphasis laid on the ‘laundering-first’ requirement which narrows the vision. Despite the claim that fighting laundering is also fighting corruption, which is not substantiated, a broader approach outside the narrow confines of the FATF is required.

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<sup>32</sup> “The dark side of Britain’s gold rush: how corruption crept into our suburbs”, *The Guardian*:  
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# Opacity of business ownership and the risk of money laundering

*Michele Riccardi and Riccardo Milani*<sup>1</sup>

## Risk based approach and risk assessment

In the past twenty years, the *risk based approach* has become a central concept of the global money laundering (ML) discourse. The basic principle is simple: anti-money laundering (AML) measures should be weighted according to the risk of a given transaction, product or individual: higher risks require enhanced measures, lower risks allow simplified interventions. In other words, AML resources (*e.g.* the budget of a bank's AML department, or the officers of a FIU) should be allocated according to the identified risk: more resources where the risk of money laundering is higher. Consequently, the activity of measuring ML risk – which in the literature is referred to as *risk assessment* (see for example FATF, 2013) – is of pivotal importance because it influences how and where the State and the private sector move their money and human resources committed to the fight against money laundering.

The risk based approach is so central that the Financial Action Task Force (FATF) (in the last 2012 update) draped around it the first of its Recommendations. In line with the FATF, this approach has also been endorsed through the EU AML regulatory regime. In particular, the 4th AML Directive (EU Directive 2015/849), and the forthcoming 5<sup>th</sup> AML Directive, require money laundering risks to be assessed at three levels: (a) at the supranational level (Directive 2015/849, art. 6); (b) at the national level (art. 7); and, (c) by each *obliged entity*, *i.e.* each business sector which, by

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<sup>1</sup> Both authors are researchers at the Università Cattolica del Sacro Cuore – Transcrime, Milan.

law, should conduct AML due diligence on the customers (Articles 8 and 10-24).

The result of the exercise at supranational level is the EU Money Laundering Supra-National Risk Assessment (SNRA), published by the European Commission in 2017, aimed at identifying the areas of ML (and terrorist financing – TF) risks affecting the whole EU internal market by criminal cross-border activities (European Commission, 2015).

Following the FATF and EU requirements, in recent years, a large number of countries carried out risk assessments at the national level (usually referred to as national risk assessments – NRA): for example, the United States, Japan, Switzerland (all in 2015), Canada (in 2016), and, in Europe, Germany, United Kingdom, Italy and, still on-going, the Netherlands (for a review of NRAs see Veen and Ferwerda, 2016; Savona and Riccardi, 2017). Even more numerous are the risk assessment models adopted by banks, financial institutions and other obliged entities, although they are often concealed in ‘black boxes’ which are harder to access than banking safe-deposit boxes.

## **What is the risk of money laundering? And how it can be measured?**

Despite the increasing number of money laundering risk assessment exercises, there are still concerns about the effectiveness of this approach. Are governments and private businesses (such as banks or real estate agencies) *able* to identify and target ML risk? And if so, are they *willing* to do so? More generally, how can *risk* be defined? And measured?.

First, the FATF (in line with the broad literature on risk management) defines ML risk as the combination of two elements: 1) the *likelihood* that a ML event occurs (to be intended as statistical probability, although the FATF omits to provide a precise definition); 2) the impact (*consequences*, in the FATF taxonomy) that the occurrence of the ML event will exert. In turn, the likelihood that an event occurs is determined, according to FATF, by two main factors: *threats* and *vulnerabilities* (FATF, 2013, p. 7). A threat (T) may be defined as any “person or group of people, object or activity with the potential to cause harm to, for example, the state, society,

the economy, *etc.*” (FATF, 2013, p. 7). Threats are all the people or activities that produce illicit proceeds and/or that may need to launder money. For example, drug trafficking groups that have accumulated dirty proceeds to be laundered. A vulnerability (V) is any circumstance or factor which attracts, facilitates or allows threats to happen (Dawe, 2013). For example, making high-value purchases in cash which could facilitate the injection of dirty proceeds into the legitimate economy. Eventually, the risk of money laundering (in the FATF conceptualisation) is a function of *threats*, *vulnerabilities* and *consequences*. Therefore, assessing ML risk means identifying and ‘measuring’ each of these three factors, and then of joining them together.

However, in the first place, most risk assessments carried out to date focus on threats and vulnerabilities only, and discard consequences. Even the EU supranational evaluation does not take into account the impact of ML: “it is regarded as constantly significant and will therefore not be assessed” (European Commission, 2015, p. 7). In other words: we call them *risk* assessments but in fact they are assessments of the *likelihood* of money laundering.

Second, despite being under the same FATF umbrella, there is no harmonisation among all the risk assessments produced to date (Savona and Riccardi, 2017, p. 24). Each country or entity seems to follow its own methodology. Most of them adopt a qualitative approach based more often on experts’ opinions rather than hard data. It has already been pointed out that expert based methodologies are questionable (Veen and Ferwerda, 2016). To achieve their personal purpose, interviewees may overestimate ML risk (*e.g.* to gain more resources) or underestimate it (*e.g.* to get a medal from the prime minister for the good job done) and in any case it is hard to believe that their knowledge is *objective*, being influenced by their background, experience and field of work. On top of that, it should be noted that the ‘methodologies’ adopted by most existing reports are not transparent (Ferwerda and Reuter, 2017), in the sense that they are not sufficiently described in the reports or in any annex. The best example in this sense seems to be the UK ML NRA 2015, which comes up with some risk scores for different business sectors but there is detail on how they have been derived (see Hopkins and Shelton, 2017 for a critical review).

The lack of transparency, of harmonisation and the qualitative nature of most risk assessments makes it difficult to compare, aggregate, or replicate

them over time nor to review them critically. At the end, their whole validity can be questioned: are they really useful and to whom? The impression is that, often, these exercises are performed only to respond to local or global AML compliance requirements. In particular, countries may conduct ML risk assessment only for satisfying the FATF (and gain some extra points at MERs – Mutual Evaluation Rounds). Similarly, banks and other obliged entities perform them for satisfying national AML regulatory authorities. Is this a further confirmation that the AML regime has produced only a mountain of *compliance* with weak effectiveness (Harvey, 2011; Levi, 2014)? Are these evaluations based on a RBA – risk-based approach – or on a TBA – tick-the-box approach?

## **A composite indicator of money laundering risk**

### **The research project IARM**

In order to address these gaps, in 2015-2017 an international consortium led by Transcrime – the Joint research centre on transnational crime of the Università Cattolica of Milan – carried out the research project IARM.<sup>2</sup> The project aimed at developing a methodology to assess the risk of money laundering based on hard data that could be replicated over time and in different countries and settings. In particular, it developed a composite indicator which could provide a synthetic measure of ML risk at (i) regional level and (ii) at business sector level. The methodology was tested in three countries (Italy - (Riccardi, Milani, and Camerini, 2017) -, the Netherlands - (Ferwerda and Kleemans, 2017) - and the United Kingdom - (Hopkins

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<sup>2</sup> Project IARM - Identifying and Assessing the Risk of Money Laundering in Europe ([www.transcrime.it/iarm](http://www.transcrime.it/iarm)) was co-funded by the European Commission, DG Home Affairs. The international consortium included Transcrime – Università Cattolica del Sacro Cuore (as coordinator), the University of Leicester (UK), VU Amsterdam (the Netherlands), and, as associate partners, the Ministry of Economy and Finance (Italy), the Italian FIU, the Ministry of Finance (the Netherlands), the Ministry of Security and Justice (the Netherlands), the National Police Chiefs Council (UK) and the external support of Home Office (UK). Bureau van Dijk supported the project as data provider.

and Shelton, 2017) and eventually four composite indicators were developed: the first measured the ML risk across the Italian 110 provinces; the second across 77 business sectors of the Italian economy (NACE divisions<sup>3</sup>); the third across 83 business sectors of the Dutch economy (NACE divisions), and the last one across the 43 UK police areas.

## Methodology

The four indicators follow the same methodological approach. The idea is that the overall ML risk of a certain geographic area, or business sector, is a function of the level of the *risk factors* present in that area or sector (Savona and Riccardi, 2017, pp. 29–30). For doing so, IARM adopts the FATF conceptual framework that considers ML risk as a function of *threats*, *vulnerabilities* and *consequences*. In line with other works (see above), IARM focuses on threats and vulnerabilities only. In other words, it assesses the likelihood, rather than the actual risk of money laundering.

The IARM methodological approach can be better illustrated in 7 steps which follow the OECD guidelines for the construction of composite indicators (OECD and Joint Research Centre (JRC) of the European Commission, 2008) and previous works aimed at producing indicators of organised crime (van Dijk, 2007; Dugato, De Simoni, and Savona, 2014; Calderoni, 2011). As set out in Savona and Riccardi (2017, p. 30), the steps are:

1. *Risk factors identification*: in each country, at each level (area or business sector), ML risk factors are identified on the basis of literature review and then validated with experts' interviews;
2. *Risk factors operationalisation*: each risk factor is operationalised in one or more proxy variables so as it can be measured;

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<sup>3</sup> NACE Rev.2 is the statistical classification of economic activities in the European community, adopted in 2007. NACE uses different hierarchical levels. Level 1 (or 1-digit) identifies 21 sections by alphabetical letters (A to U); Level 2 (or 2-digits) identifies 88 divisions by two-digit numerical codes (01 to 99) [http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Statistical\\_classification\\_of\\_economic\\_activities\\_in\\_the\\_European\\_Community\\_\(NACE\)](http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Statistical_classification_of_economic_activities_in_the_European_Community_(NACE)).

3. *Data collection and normalisation*: for each variable data are collected from a variety of sources, organised in a dataset, treated with imputation of missing values and, where necessary, normalised;
4. *Data exploration and correlation analysis*: descriptive statistics and correlation analysis are produced among the identified variables;
5. *Principal component analysis*: variables are aggregated using principal component analysis (PCA) which allow identification of (and determine the relative weight of) the different dimensions (or components) of ML risk;
6. *Aggregation and composite indicator construction*: for each component extracted from the PCA, values are generated for each area or sector in each of the three countries, and then aggregated and combined in a composite indicator of ML risk after appropriate weighting and normalisation;
7. *Sensitivity analysis and validation*: the composite indicator is validated through sensitivity analysis to determine how it changes depending on parameters' variations (e.g. in weighting, normalisation techniques, PCA rotation, etc.). Also, the indicator is compared to alternative measures of ML – e.g. the number of suspicious transaction reports (STRs) issued by banks across areas or sectors.

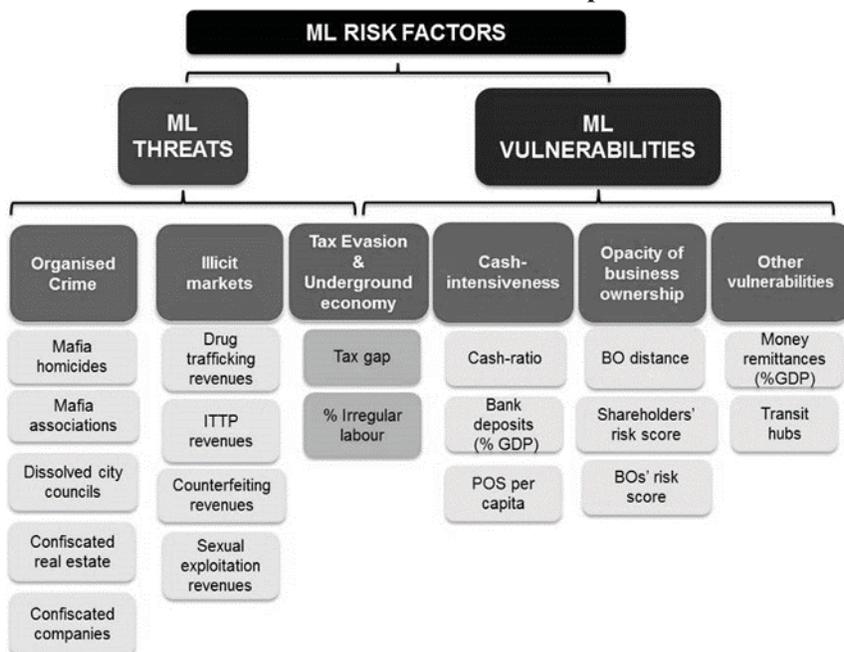
## Findings

### ML risk across Italian provinces

To better illustrate the IARM methodological approach, this section describes the development of the composite indicator of ML risk across the 110 Italian provinces. More details can be found in the IARM report (Savona and Riccardi, 2017, pp. 29-33).

First, ML risk factors are identified with respect to Italian territories. Figure 1 below shows the risk factors grouped by the *threats* and *vulnerabilities* categories and, for each of them, the proxy variables used.

**Figure 1.**  
**Risk factors of ML across Italian provinces**



Source: Riccardi, Milani and Camerini, 2017, p. 47

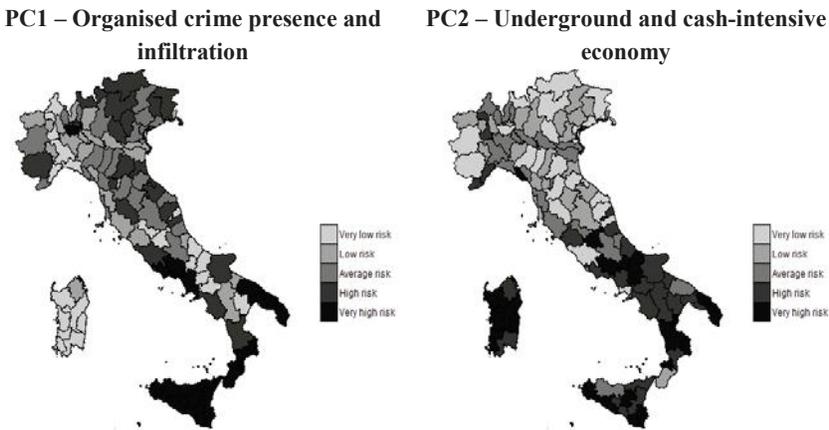
In Italy, at territory level, we identified as risk factors of money laundering: on the *threats* side, organised crime (Calderoni, 2011; Transcrime, 2013) and illicit markets (Calderoni, 2014; Calderoni, Favarin, Garofalo, and Sarno, 2014; Giommoni, 2014; Mancuso, 2014) as ML threats; on the *vulnerabilities* side, cash-intensity (Ardizzi, Petraglia, Piacenza, and Turati, 2014; Riccardi and Levi, 2018), opacity of business ownership (Cassetta, Pauselli, Rizzica, and Tonello, 2014; Riccardi and Savona, 2013), the high volume of money remittances (Clemente, 2016) and the presence of transit hubs (Soudijn and Reuter, 2016). In addition we included two proxies for underground economy (as defined in EUROSTAT, 2015):<sup>4</sup> tax gap (Argentiero, Chiarini, and Marzano, 2015) and irregular labour (ISTAT,

<sup>4</sup> Eurostat draws a clear distinction between illegal economy and underground economy. Both are part of the non-observed economy (or not registered), but the former comprises productive activities that are deliberately not registered because they involve criminal activities and markets, whereas the latter comprises activities that, although legal, are not registered to avoid taxation and

2017), which could play a role both as threat (because of the illicit proceeds produced by tax evasion) and vulnerability (because high levels of the underground economy facilitate the introduction of dirty money in legitimate markets).

Most ML risk factors show significant correlation: areas with high levels of organised crime, illicit markets and tax evasion are also those with highest cash-use. However, the principal component analysis (PCA) is able to distinguish the different dimensions of ML risk. In particular, it identifies five principal components (PC), which are labelled and represented as follows:

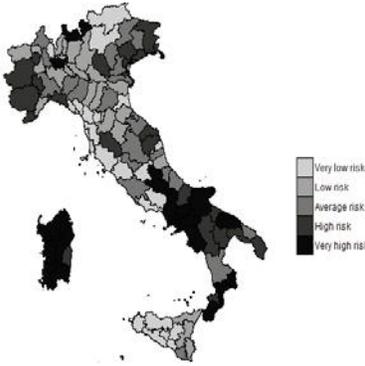
**Figure 2.**  
**Principal components of ML risk across Italian provinces**



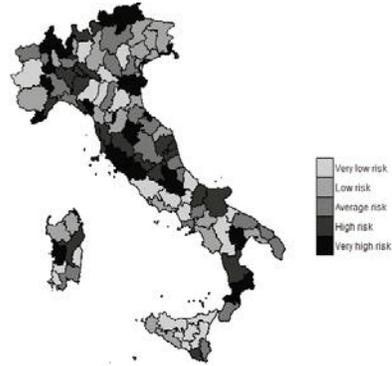
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social security obligations. For details see [http://ec.europa.eu/eurostat/statistics-explained/index.php/Building\\_the\\_System\\_of\\_National\\_Accounts\\_-\\_non-observed\\_sector](http://ec.europa.eu/eurostat/statistics-explained/index.php/Building_the_System_of_National_Accounts_-_non-observed_sector).

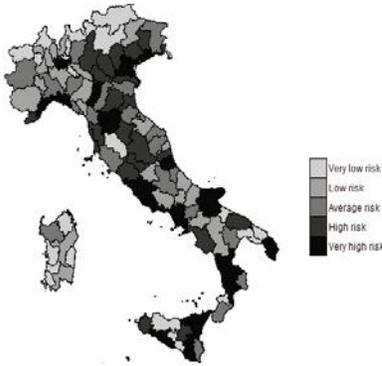
PC3 – Illicit markets



PC4 – Opacity of business ownership



PC5 – Money remittances



Source: Riccardi, Milani and Camerini, 2017

The five components – or better the scores for each component  $j$  and each province  $i$  – are then combined together in a single indicator using as weights the proportion of variance explained by each component in the PCA. In other words:

$$ML\ Risk\ Indicator_i = \sum_{j=1}^J (S_{ij} \times w_j)$$

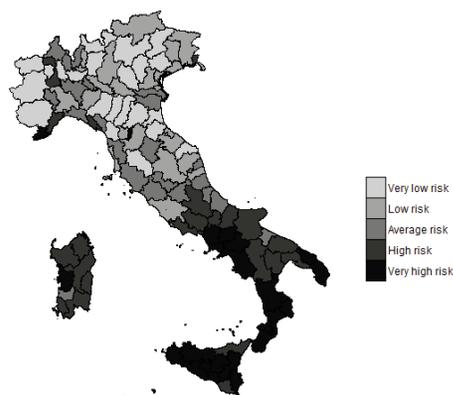
Where the subscript  $i = 1 \dots I$  indicates the province (in this case  $I = 110$ );  $j = 1 \dots J$  the principal component ( $J = 5$ ) and  $w =$  proportion of variance explained by each of the five components as emerged from the PCA (constant across provinces).  $S_{ij}$  is the relevant score extracted by the PCA for each province and for each component.

The final composite indicator of ML risk across Italian provinces is represented in the map below (Figure 3), while the first twelve provinces by

value of the ML risk indicator, *i.e.* the riskiest ones, are reported in Table 1.

As it can be noted, the majority of most vulnerable provinces are located in the south and in islands, with Calabria and Sicily on top. The reasons are related to the high levels of mafia-type organised crime and of underground economy. However, there are some exceptions: Imperia, which is located in Liguria at the border with France, ranks 6<sup>th</sup> due to the high cash-intensive economy, the high tax evasion and the highest, among Italian areas, opacity of local businesses' ownership structure. Prato, in Tuscany, ranks high due to the high underground economy and the anomalous volume of money remittances. The two activities are related to the presence of Chinese groups acting on the edge between the legitimate and the illegal economy (counterfeiting, labour and sexual exploitation and tax evasion), as also demonstrated by important investigations such as *Qian Liu/Qian Ba* operations (see Riccardi, Soriani, and Giampietri, 2016, pp. 133–134 for a summary of these police operations).

**Figure 3**  
**Composite indicator of ML risk across Italian provinces**



Source: Riccardi, Milani and Camerini, 2017

**Table 1.**  
**Top 12 Italian provinces by composite indicator of ML risk**

Province	Macro-region	ML risk indicator value
Reggio Calabria	South	100,0
Vibo Valentia	South	94,9
Catanzaro	South	85,4
Crotone	South	67,1
Napoli	South	66,3
Imperia	North-west	62,5
Caserta	South	62,0
Agrigento	Islands	59,9
Palermo	Islands	59,5
Caltanissetta	Islands	57,7
Trapani	Islands	52,3
Prato	Centre	51,1

Source: Riccardi, Milani and Camerini, 2017

It is important to note that the ML risk composite indicator is highly correlated with the ratio of STRs by bank units (Pearson's  $r = 0,7$ ), which can be seen as a first validation of the good-fit of our indicator. Moreover, the sensitivity analysis proves that, even after changing parameters of the analysis (*e.g.* weighting or normalisation criteria, PCA rotation, aggregation methods) results almost do not change (all alternative indicators show correlations higher than 0,95 with our final one presented above).

The same methodology was employed to produce indicators of ML risk in the Netherlands at business sector level (Ferwerda and Kleemans, 2017) and in UK at police area level (Hopkins and Shelton, 2017) (See the relevant IARM report chapters for details).

## **Opacity of business ownership as a money laundering risk factor**

Apart from the development of the ML composite risk indicators, the added value of project IARM is the analysis of the opacity of business ownership in Italy, the Netherlands and the UK. It was included as one of the ML risk factors in all the four models – and indicators; and as such was operationalised in proxy variables so as it could be measured. Despite the

wide political debate on the issue, empirical works on corporate structure opacity are few and weak, and limited to the analysis of case-studies (see for example de Willebois, Halter, Harrison, Park, and Sharman, 2011; Steinko, 2012; Riccardi and Savona, 2013). Project IARM represents probably the first attempt to carry out a systematic and large-scale exploration of how companies in Europe – at least in the three countries covered by the study – are controlled and owned. This last section of the chapter will focus on the findings of the analysis of business ownership opacity.

### **a. The global debate on business ownership opacity**

In recent years, pumped by important journalistic investigations such as *Panama Papers*, *Luxembourg leaks* and *Paradise Papers*, an international consensus has emerged that the increased transparency of business ownership information is of key importance for tackling money laundering, financial crime and other serious and organised crimes. The FATF, in its Recommendation 10, stimulates financial institutions and obliged entities to:

*“Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer”* (FATF, 2012, p. 16).

The issue has been supported by the G8, the G20 and was endorsed by the 3<sup>rd</sup>, the 4<sup>th</sup>, and 5<sup>th</sup> AML Directive. The latter required obliged entities to identify the beneficial owner (BO hereinafter) of their customers, and EU member states to set up a central public register of beneficial owners accessible to a range of stakeholders upon certain conditions.

Since then, *beneficial ownership identification* has become a *mantra* of the global AML debate of policy-makers, academics, researchers and international organisations. Opacity of corporate ownership represents now the first issue to be addressed – in the economic crime area – by governments and NGOs (see *e.g.* HM Treasury, 2015; US Department of State, 2013; Transparency International UK, 2015). This has happened despite

the contradictory and often only anecdotal evidence about the use by criminals of all sorts of complex corporate structures and of offshore jurisdictions.

We have to admit, in fact, that the problem of corporate secrecy does not characterise all crime areas in the same manner. There is solid evidence that the ‘Chinese boxes’ schemes and opaque jurisdictions are used in grand corruption schemes (see *e.g.* the World Bank ‘Puppet Masters’ report - de Willebois *et al.*, 2011), and even more frequently in tax evasion, tax avoidance and profit misalignment mechanisms (see *e.g.* Cobham and Jansky, 2017; Zucman, 2013 for a review). However, the evidence of use of opaque corporations by ‘traditional’ organised crime is not as widespread.

Transcrime (2013) and Riccardi, Soriani and Standridge (2015) show that Italian mafias, apart for some exceptions, prefer figureheads chosen within the family (possibly, daughters, sisters and wives) and limited companies registered locally rather than professionals based in Panama or the Cayman Islands. The reason is simple: involving external people in the criminal ring – such as lawyers or accountants’ experts of international tax management – poses more risks than benefits, also because criminals are by nature averse of relying on third persons (Van Duyne, 2003).

Similarly, Steinko (2012) shows that most OC-related money laundering in Spain heavily relies on traditional schemes rather than complex corporate structures. It confirmed earlier findings by Van Duyne (2003) and the analysis by Kruisbergen *et al.* (2015) that stress that *proximity* is, above all, the most important driver of organised crime infiltration in the legitimate economy in the Netherlands. This may imply a limited use of foreign jurisdictions and corporate vehicles to the preference of local small companies and immovable assets: what van Duyne defined “*own yard investment*” (Van Duyne, 1996).

Even considering this, company secrecy raises significant concern; nonetheless it may work differently discerning the type of predicate offences and the typologies of criminals. Are opaque jurisdictions more important for multinationals and Russian oligarchs than for ‘Ndrangheta families? Probably: anecdotal evidences on Panama or British Virgin Islands seems to endorse this assumption. However, the road is long and winding but research should pursue this path in the next future in order to really

contribute, with empirical evidence, to the political debate on business ownership opacity.

## **b. Opacity of business ownership: how it can be operationalised? How it can be measured?**

The concept of corporate ownership opacity was analysed by the project IARM by looking at two dimensions:

- i) the complexity of businesses' ownership structure as such;
- ii) the volume of ownership links with opaque jurisdictions.

For the purpose of the analysis, we could access data on owners (*i.e.* name, surname, type of individual or entity, country of birth/incorporation, % shareholding held) from Bureau van Dijk's ORBIS database.<sup>5</sup> The database used covered more than 10 million companies, 14 million shareholders and 15 million beneficial owners<sup>6</sup> registered in Italy, the Netherlands and the

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<sup>5</sup> ORBIS is developed by Bureau van Dijk (BvD hereinafter), a multinational company headquartered in Belgium and specialised in business information, which collects company data from official business registers across the globe and, after appropriate standardisation, provides the data to users in a range of databases and services available online upon annual subscription. Because of the differences in company law and company reporting standards across different jurisdictions, BvD does not cover the universe of registered businesses worldwide and it is not fully clear how this coverage varies from one country to another. However, for certain jurisdictions – and among them Italy, the Netherlands and the UK, analysed in IARM – the degree of representativeness of ORBIS data is very high. The added value of BvD databases, and ORBIS in particular, is represented by the ownership data. Because it links together company data from different registers of different countries, ORBIS is able to map cross-border ownership networks, something that traditional and official business registers and Chambers of Commerce do not provide: they usually stop at the border and cannot trace the ownership chain beyond the first layer of shareholding, especially if the control network extends abroad. This makes ORBIS a unique dataset, and the only one helpful for an in-depth analysis as the one performed here.

<sup>6</sup> Beneficial owners in BvD definition are the natural person(s) who ultimately own or control an entity. They are identified by BvD reconstructing the ownership chain until finding natural persons holding above a certain shareholding percentage. For the purpose of this study it has been decided to set the minimum threshold at 10% at the first level of company ownership chain and 10% at further levels. The adopted threshold is lower than EU Directive definition (25% threshold) but allows for a more comprehensive analysis.

UK, as illustrated in Table 2. Unfortunately, although ownership structure and names of shareholders and BOs are provided, information on their nationality was not always available. While in Italy for almost half of the population it was possible to determine the country of birth (if natural person) or of incorporation (if legal person) of the owner, in the Netherlands and in the UK it could be done only for a small sub-sample – even smaller when looking at BOs. One could argue that this lack of information could be the proof of the lack of effectiveness of the KYC (Know Your Customer) activities: if due diligence were to be carried out properly, we would not have so many missing data. However, these are data taken from business registers, which are not required to conduct any KYC.

**Table 2.**  
**Company ownership data analysed in project IARM**

	<b>Italy</b>	<b>Netherlands</b>	<b>United Kingdom</b>
N. Companies analysed	3.700.000	2.700.000	3.700.000
N. Shareholders	5.200.000	2.800.000	6.700.000
% Shareholders with info on nationality	49,5%	12,7%	16,0%
% Foreign shareholders (of those with available info on nationality)	1,7%	7,8%	6,8%
N. BOs	4.700.000	2.800.000	8.200.000
% BOs with info on nationality	42,9%	0,9%	3,1%
% Foreign BOs (of those with available info on nationality)	1,3%	90,0%	37,9%

Source: Authors' elaboration based on Savona and Riccardi, 2017

This is a weakness of the study, especially because it is not possible to determine if the sample of owners with known nationality is properly representative of the whole population. But what used in IARM is probably the best dataset of cross-border ownership nowadays available at global level.<sup>7</sup>

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<sup>7</sup> At least until promising projects such as EBOCS ([www.eboocs.eu](http://www.eboocs.eu)) will provide better data. EBOCS is a EU co-funded project which is currently developing a search engine able to crawl shareholders and directors' data across borders through direct connections of official business registers of a number of juris-

### c. The complexity of business ownership

The issue of unknown nationality does not constitute a problem for the analysis of the first sub-dimension of opacity, *i.e.* the complexity of business ownership. This was measured through a proxy, developed on the basis of BvD data, called “*beneficial owners’ (BO) distance*”. It represents the number of ‘steps’ which separate a company from its BO(s)<sup>8</sup>: if BO distance equals 1, then the BO(s) has a direct ownership in the company; when it equals 2, it owns a given company through possessing a share in another intermediate company (*i.e.* a layer), etc. The higher the BO distance, the longer the control chain, the more complex the encompassing ownership structure of a given company, the higher the risk of money laundering because of the opportunities to hide financial data.

For each of the 10 million companies for which data was available, the BO-distance for each of their BO(s) was calculated, then averaged for each company (because a single company could have multiple BOs). The BO-distance of each analysed geographic area or business sector was computed as the average of the BO-distances of the companies registered in that area or sector.

Table 3 reports the average BO distance in Italy, the Netherlands and UK. Of the three countries, Italian companies show, on average, the most direct control (and therefore the shortest BO distance). Italy has also a high number of individual enterprises, confirming the direct nature of business ownership. The higher values of the Netherlands and UK could be instead proxies for the higher number of multinational companies/holding schemes – set up either for tax optimisation or other reasons.

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dictions. Until now EBOCS is covering 8 European countries – Italy, the Netherlands, Romania, Latvia, Estonia, Ireland, Spain and the United Kingdom – but will be accessible only by law enforcement agencies for investigation purposes.

<sup>8</sup> For the definition of BOs, see footnote 6 of this chapter.

**Table 3.**  
**Average BO distance by country and region <sup>a</sup>**

Italy		The Netherlands	United Kingdom	
1,3		1,7	1,6	
Imperia	1,5		Channel Islands	3,7
Catanzaro	1,5		Isle of Man	3,4
Savona	1,4		South Yorkshire	2,5
Bolzano-Bozen	1,4		Greater Manchester	2,0
Milano	1,4		Norfolk,	1,7

<sup>a</sup> Analysis across regions was not conducted in the Netherlands because not meaningful – see Ferwerda and Kleemans, 2017.

Source: Authors' elaboration based on Milani and Riccardi, 2017

Table 3 also shows the values by region in Italy and the UK. In Italy it is important to note that higher BO-distances are registered: (i) in regions at the border (Imperia, Savona and Bolzano-Bozen, respectively bordering France/Monaco and Austria); (ii) in Milan, where most inward FDI converge; (iii) in Catanzaro, a relatively poor area in Calabria characterised by very high levels of mafia infiltration in the legitimate economy (especially in the wind-power sector, see Riccardi, Milani, and Campedelli, 2016).

In the UK, it is interesting to note that the highest BO distance is recorded by Channel Islands, *i.e.* Guernsey, Jersey and Alderney, famous offshore tax havens close to Normandy but in fact territories under the British sovereignty. Starting from a company registered in these islands, on average it is necessary to open 3 further corporate boxes before finding the natural person ultimately owning the first one – *i.e.* its BO(s). Almost the same applies to Isle of Man (BO distance of 3,4), which frequently appears in *Paradise Papers* as a preferred place where oligarchs, multinationals or sport stars can set up legal persons behind which to conceal assets or funds in order to avoid (or evade) taxes.

The analysis at business sector level shows that NACE sections B (Mining and quarrying – which includes also oil and gas extraction companies), D (Energy – which include electricity companies, wind power or gas companies) and K (Finance – including banking and insurance groups and other financial institutions) record the highest BO distance (Figure 4). It is not surprising as these are sectors characterised by a high number of large companies with a multinational structure and a holding company often registered in tax favourable countries. In the Netherlands, Mining and Finance

even reach the BO distance of 3,7 and 3,6: it means that, for example, for identifying the beneficial owner(s) of an average oil and gas company registered in Amsterdam it is necessary to open three further corporate boxes on top of it. Obviously, this does not mean that all of them have been established in such a way in order to launder money, as other incentives (e.g. tax optimisation, profit shifting, and good business environment) matter, too.

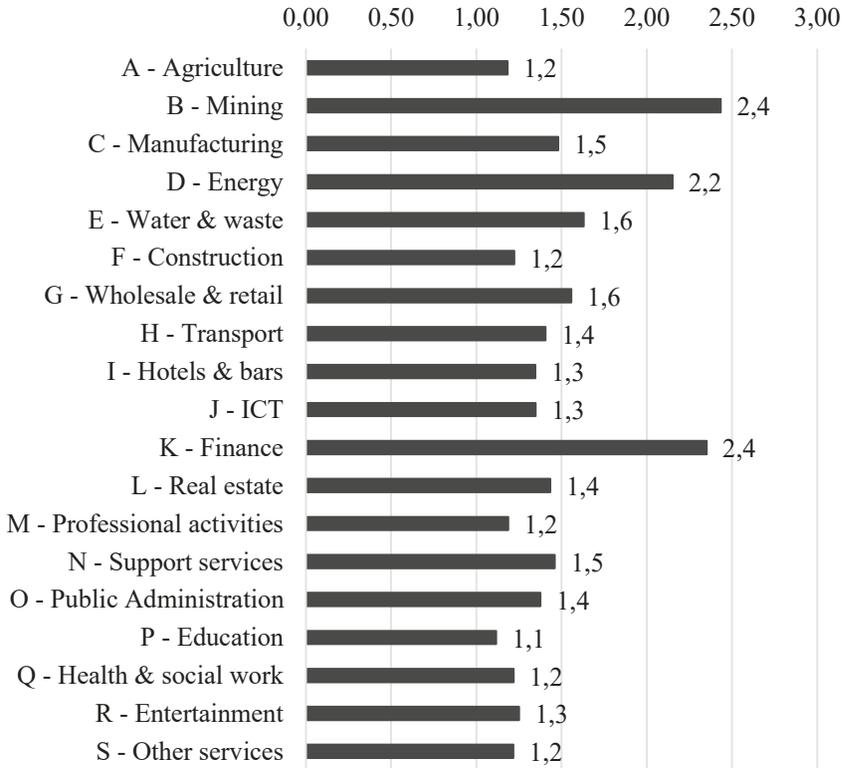
It can be argued in fact that from a ML risk prevention perspective it is more important to identify those companies which are characterised by unnecessary corporate complexity – e.g. small companies with low capitalisation but a very complex ownership structure. For this reason, we weighted the average BO-distance at sector level by the average company size (measured through the total assets value). After weighting, the NACE sectors with highest BO-distance are: S (Other services – including also security and fiduciary services) in Italy; R (Gambling, Art and Entertainment) in the Netherlands and O (Health and Social work) in United Kingdom. But also sectors such as Bars, restaurant, hotels (NACE Section I) emerge in all the three countries and L (Real estate) in the United Kingdom (Milani and Riccardi, 2017, p. 159).

#### **d. Ownership links to opaque jurisdictions: conceptual framework**

The second sub-dimension of corporate complexity analysed is the volume of links to opaque jurisdictions. It was operationalised through the number of shareholders and beneficial owners coming from *risky* countries: the more the links to opaque countries, the higher the risk that a company can be misused for ML purposes.

The issue of course is to determine which jurisdiction can be defined *opaque* and what makes them *risky*. The two easiest options would be (i) to take the countries included by international organisations such as FATF and European Union in AML blacklists; (ii) to consider what are usually labelled as *off-shore financial centres*.

**Figure 4**  
**BO-distance at business sector level (NACE sections)**  
**Average between Italy, the Netherlands and United Kingdom.**  
**Not weighted by company size**



Source: Authors' elaboration based on Milani and Riccardi, 2017

As for the first option, if we looked at the FATF we would end up with an awkward list of *rogue countries* (in the US-driven cosmogony) such as North Korea and Iran and other examples like Ethiopia, Bosnia Herzegovina or Syria.<sup>9</sup> Obviously nobody would not be satisfied by such lists, as it is hard to believe that drug lords or corrupt officers in Western Europe or South America wishing to launder money would incorporate holding companies in North Korea or Ethiopia. No doubt these are opaque jurisdictions, but they are probably not the safest places where to deposit

<sup>9</sup> Full list of FATF non-cooperative countries could be find here: [www.fatf-gafi.org/countries/#high-risk](http://www.fatf-gafi.org/countries/#high-risk).

money, either legal or not. And if we used the brand new blacklist of “non-cooperative tax jurisdictions” issued by the European Union in early December 2017,<sup>10</sup> we would not find better solutions. In this list, there is no mention of notorious Caribbean territories such as BVI nor, on-shore centres such as Cyprus, Malta, Luxembourg or the United Kingdom (which by the way is leaving EU)<sup>11</sup>. Then we can agree that official blacklists are more often expression of geo-political interests rather than real AML prevention commitment (Van Duyne and Van Koningsveld, 2017, p. 141).

So, we do look at *off-shore financial centers* (OFC). As noted by various authors, there is no one single and universal definition of offshore centre (Gara and De Franceschis, 2015, p. 5). In summary, off-shore jurisdictions could be defined as locations which aim at attracting capital from non-residents (either individuals or companies) offering lower tax regimes and company confidentiality and anonymity (for a conceptual review see Van Duyne and Van Koningsveld, 2017). It must be noted that taxation regimes are so complex, country-specific and constantly changing that it is almost impossible to find a one-size-fits all definition, also because in some countries there is huge gap between *statutory* (or declared) and *actual* corporate taxes (Cobham and Jansky, 2017).

Therefore, for the purpose of the this analysis it was then decided to rely on what – at least in our opinion – represents nowadays the best indicator of corporate opacity at country level: the Financial Secrecy Score (FSS) developed by the Tax Justice Network (Tax Justice Network, 2015).<sup>12</sup> This is an indicator, usually issued every two years, which evaluates different dimensions of secrecy/opacity, for example:

- the level of banking secrecy;
- the access to BO information;
- the transparency of corporate information;
- the compliance with international standards (*e.g.* FATF Recommendations).

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<sup>10</sup> See here: [http://europa.eu/rapid/press-release\\_IP-17-5121\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5121_en.htm)

<sup>11</sup> This 2-years exercise only covered extra EU countries.

<sup>12</sup> The Secrecy Score, of Financial Secrecy Score (FSS), is combined by Tax Justice Network with a measure of economic magnitude to produce the so-called Financial Secrecy Index (FSI). The difference between the FSS and FSI is that countries ranking on top of the first are very opaque, but often tiny, jurisdictions such as Vanuatu; while the countries ranking on top of the FSI are more important international financial hubs such as Switzerland or Hong Kong.

The indicator has the advantage of including various facets which are all relevant to the AML discourse: not only compliance with FATF ‘soft-law’, but also the accessibility to company ownership and financial information and the cooperation with foreign authorities. These are issues which are important when talking either about tax evasion, grand corruption or serious and organised crime. In this sense, the FSS was preferred to other available measures because of its completeness and the methodological transparency. The 2015 version of the FSS/FSI covers about 100 countries.<sup>13</sup>

### e. Ownership links to opaque jurisdictions: analysis

Under the IARM framework, the FSS was used as follows: the share of each nationality among shareholders and BOs of companies registered in Italy, the Netherlands and UK (covered by BvD ORBIS database) was multiplied by the relevant FSS value. In other words:

$$RISK\ SCORE_j = \frac{x_{ij}}{\sum_i x_{ij}} \times FSS_i$$

Where x = number of shareholders or BOs; i = nationality of shareholders or BOs; j = country or region or business sector of registration of companies; FSS = Secrecy Score 2015 issued by Tax Justice Network.

For example, if the shareholders of the companies registered in the sector I56 in Italy were 60% Italians and 40% Swiss, then the resulting opacity risk score of that sector would equal (60% x FSS<sub>Italy</sub>) + (40% x FSS<sub>Switzerland</sub>)

Obviously, in order to do so, it was necessary to determine first the number of shareholders and BOs broken down by nationality in all the three countries. This was an interesting finding itself (although, as mentioned above, the result may be biased by the low percentage of owners with known nationality). Figure 5 below shows the ratio of foreign shareholders and BOs in Italy, the Netherlands and UK: the latter two confirm

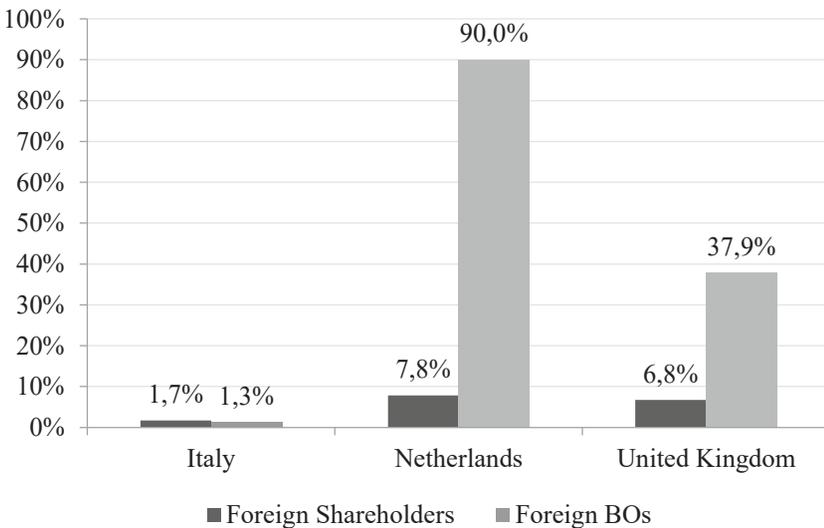
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<sup>13</sup> It is expected that in January 2018 the Tax Justice Network will issue a new version of the Financial Secrecy Index, with a wider coverage, an updated methodology and scores.

their role as preferred locations by foreign individuals or legal persons to set up firms – perhaps holding companies on their territories.

Among the top foreign nationalities of shareholders in Italy, Switzerland ranks first (11,4% of total foreign shareholders), while in both the Netherlands and UK the most common foreign shareholders are from the United States (respectively 20,7% and 24,3%) (see Milani and Riccardi, p.161, for full details). Moreover, Germany, Luxembourg, Switzerland and Cyprus are present in the top 10 of all the three countries. Interestingly, when looking at the beneficial owners, the most common foreign nationality is, in all the three cases, *Spanish* (respectively 21,7% in Italy, 28,7% in both the Netherlands and UK). A more in-depth study shows that Spanish shareholders are frequent in finance, energy but also in the gambling industry. We may hypothesize (especially for Italy) links of OC groups – in particular Camorra and ‘Ndrangheta – in Spain. But these findings would deserve further investigation and qualitative analysis.

**Figure 5.**  
**Ratio of foreign shareholders and BOs of companies registered in Italy, the Netherlands and the UK**



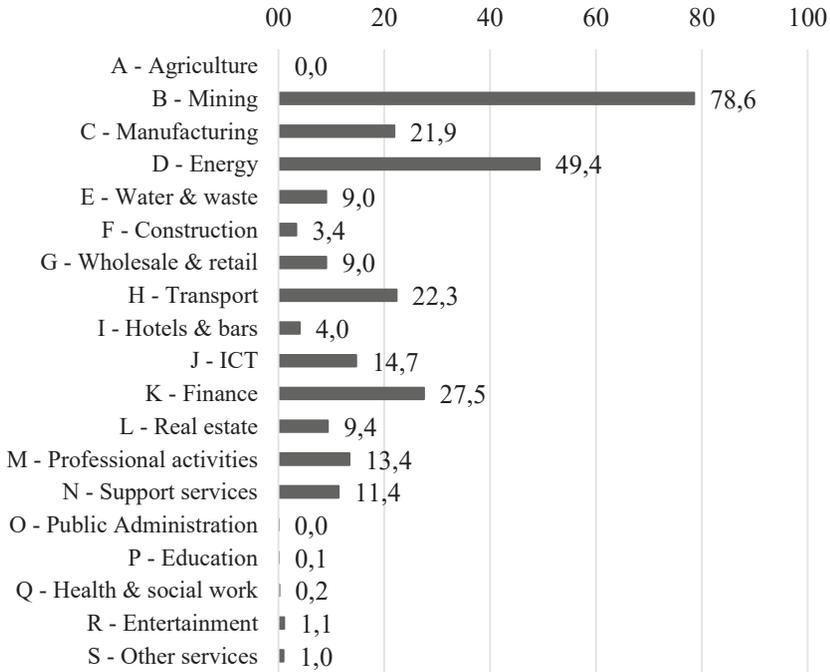
Source: Milani and Riccardi, 2017, p. 160

However, as said, foreign owner does not mean necessarily *risky* and *opaque*. And here the FSS is introduced and applied as described above. When multiplying the nationalities of shareholders and BOs by their relevant Secrecy Score, and aggregating them, the country which emerges with the highest ownership connections with opaque jurisdictions is the UK, followed by the Netherlands and then – almost at a half of UK – Italy (Milani and Riccardi, 2017, p. 163). This is not surprising if we consider the role of Britain – and London in particular – in attracting foreign capital with doubtful origin, especially in some sectors (Hopkins and Shelton, 2017). In the UK, the City of London is the more vulnerable to secrecy jurisdictions, while in Italy the province of Imperia ranks first, due to its proximity with France, Montecarlo and the high level of ‘Ndrangheta OC.

At the business sector level, again Mining, Energy and Finance are the sectors most attracting owners coming from opaque jurisdictions (Figure 6). The same can be applied to BOs. But again this may only indicate the presence of big multinational firms using tax havens to try to minimise their tax burden – in the present discussion declared unethical but not necessarily criminal behaviour from a strict legislative perspective.

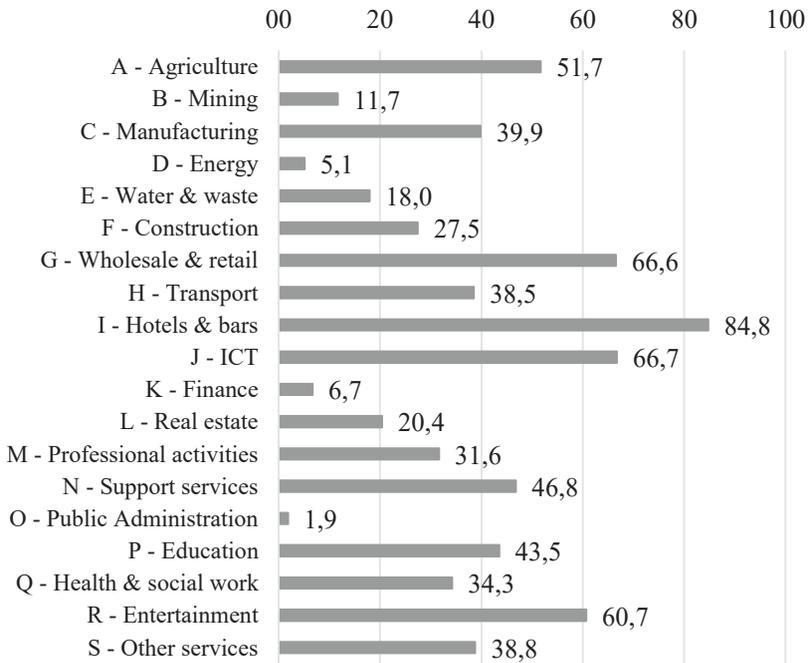
If, again, we weight the risk score by the average company size (Figure 7) what emerges as most related to owners from ‘risky’ countries are sectors such as Bars and Restaurants (NACE section I), Wholesale and Retail trade (G) and the Entertainment and Gambling sectors (R): economic activities which appear more frequently in money laundering and organised crime investigations.

**Figure 6.**  
**Shareholders' links with opaque jurisdictions**  
**(100 = max links).**  
**Average of Italy, the Netherlands and the UK.**  
**Not weighted by company size**



Source: Authors' elaboration on Milani and Riccardi, 2017, p. 164

**Figure 7**  
**Shareholders' links with opaque jurisdictions (100 = max exposure).**  
**Average of Italy, the Netherlands and the UK.**  
**Weighted by company size**



Source: Authors' elaboration on Milani and Riccardi, 2017, p. 165

Looking at BOs, instead, another sector which prompts up if controlled by company size is the real estate, but only in the United Kingdom (Milani and Riccardi, 2017, p. 165). Here concerns have been already expressed by many authorities and NGOs, such as Transparency International or Global Witness (see e.g. (Transparency International UK, 2015).

Interestingly, the real estate industry does not seem to be *owned* by corporates based in off-shore jurisdictions, neither in Italy nor in the Netherlands. This finding seems to confirm the results of previous research on the Dutch real estate market (Unger, Ferwerda, Nelen, and Ritzen, 2010; Van Duyne and Soudijn, 2009) which showed that only a minority of the local properties' value is held through off-shore companies (see Van Duyne and Van Koningsveld, 2017, p. 168). In overall terms, not much for panicky

policy making, but in any case a significant value for AML and tax investigators.

## Conclusion

In this chapter, we contributed to the debate on ML risk assessment by proposing a methodology, developed within the research project IARM, which eventually produced a composite indicator of ML risk at geographic area and business sector level. We tested it in Italy, the Netherlands and in the United Kingdom. We discussed what can be defined as ML *risk* and how it can be operationalised and measured; and we focused in particular on one ML risk factor: the opacity of business ownership. The latter was further explored to examine how complex are ownership structures of the companies registered in the three countries and to analyse to which extent owners of Italian, Dutch and British companies come from opaque jurisdictions.

Our approach has some strengths and weaknesses which are discussed below, and which suggest some future directions of research.

## Strengths

First, our methodology relies (mostly) on public data and it is designed so it can be replicated in other countries and contexts. In this way, it addresses one of the main gaps of existing national risk assessments (NRA) – the fact that they lack harmonisation and they basically cannot be compared nor easily reproduced.

With respect to previous studies and NRAs, our analysis stresses the quantitative approach, producing a composite indicator as a result of a transparent empirical analysis validated through sensitivity analysis. The methodology is clear and transparent, and can be easily criticised – while many previous studies do not disclose details about their methodology.

The composite indicator condenses in a synthetic score a complex issue such as money laundering risk, facilitating the assessment (required by law) by public authorities and private entities. And the higher level of disaggregation – regional and sectorial – provides an added value with respect

to existing NRAs, which usually adopt only a national perspective or focus only on obliged sectors.

As regards the analysis of business ownership opacity, it must be stressed that this is one of the first large-scale and systematic empirical studies of how companies are owned and controlled in Europe – at least in Italy, the Netherlands and the UK. The access to the BvD database ORBIS allowed to trace the ownership chain of more than 10 million companies, and the nationality of several thousands of shareholders and beneficial owners. The analysis confirms the findings of some previous research, *e.g.* that the percentage of foreign owners is not that high, and those coming from off-shore countries and *opaque* jurisdictions is even smaller and concentrated in some sectors and areas (*e.g.* financial hubs such as London and Milan, on-shore tax havens, such as Channel Islands or the Isle of Man, or border areas, such as Imperia and Bolzano). Somehow, good news for AML, anti-corruption and tax authorities: corporate opacity is not everywhere, and the number of companies which really deserve further investigation is reasonable.

It is interesting to note that the results changes radically if scores of complexity and opacity are weighted by the average company size. If not weighted, what emerge as most exposed to complex and opaque ownership schemes are those sectors – such as mining, finance or energy – characterised by numerous multinational companies. This points out more likely to tax avoidance and profit misalignment schemes rather than criminal behaviours in a ‘traditional’ fashion. But when weighted by company size, the sectors which register the highest risk scores are activities – such as bars, restaurants, hotels or the entertainment and gambling industry – which appear more frequently in organised crime investigations, despite the implementation of stricter controls in the three countries (like anti-mafia laws in Italy or BIBOB in the Netherlands) has made it harder for criminals to launder their money in these sectors (Van Duyne and Van der Vorm, 2016). Further research is needed.

## Weaknesses

Given the exploratory nature of this study, the results presented in this chapter should be in any case taken with caution. This approach has weaknesses, too. First of all, it is heavily reliant on data. Which is good on the one side, but weak on another. For example, the composite indicator does not take into account risk factors which are characterised by data scarcity such as, by definition, new and emerging phenomena: *e.g.* virtual currencies or predicate offences characterised by high dark figures such as corruption, extortion, environmental crime (illegal logging, emission rights swindle, wildlife crime).

Second, although it contributes to risk assessment exercises, what we performed here is an evaluation of the *likelihood* of money laundering, rather than of the risk: the impact (or consequences, in the FATF taxonomy) are not taken into account. Future research cannot avoid facing the challenging, but necessary, task of measuring consequences, too.

And focusing on the business ownership opacity side, it must be stressed, as already noted, that the used data, especially in the Netherlands and the UK, are yet not very solid. The number of owners with known nationality is a very small percentage with respect to the whole population of firms; making conclusions on the basis of these figures could be hazardous. But this is the best data available on corporate ownership – at least until official business registers and Chambers of Commerce will offer better statistics usable for research purposes.

As in any empirical work, future research would therefore benefit from an improvement – in quantity and quality – of data. Just to mention three areas which are crucial when talking about ML risk: statistics on *cash use* (the Banca d'Italia is the only central bank, in Europe, possessing data on withdrawals and POS payments at the regional level! – see (Riccardi and Levi, 2018)); of data on *tax crimes*; and of data on *corporate ownership*, especially at cross-border level.

There is the need of further empirical studies on money laundering, in order not to leave the final word to presumed experts and qualitative assessments, which are the ones which could be more easily influenced by (geo)political and commercial interests. There is the need to understand who and how owns European companies. The answer would not only help

AML officers, but also anti-corruption authorities, tax agencies and European policy makers for planning more effective and sustainable economic policies.

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# VAT fraud committed in the Slovak Republic in the context of the European Union

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## Introduction

Economic crimes, especially tax crimes, have a significant impact on states' budgets and consequently on the wealth of the citizens. Therefore, it is most important to set an effective system for the prevention of tax crimes, mainly within the European Union, but also beyond. In particular the Value Added Tax has historically been targeted by criminal entrepreneurs as well as ordinary citizens, who prefer to pay for their house repairs without requiring paperwork and without VAT (Pashev, 2007; 2008; Van Duynes, 1991; 1993; 1996; Aronowitz *et al.*, 1996).

Its importance also comes to the fore when we look at the significance of VAT revenues in the EU context. In 2008, the income from value added taxes (VAT) constituted 21,4 % of the tax revenues of all European Union Member States according to the OECD Consumption Tax Trends, 2008. In many Member States the VAT collection constitutes on average 7,8 % of the GDP according to the Green Paper on the future of VAT, published by the European Commission.

While VAT evasion and abuse is a widespread daily practice, mainly small scale but accumulatively large, serious concern has been raised by

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the professional organisation of VAT fraud (Pashev, 2008). It is remarkable to observe that whilst having been researched by scholars for some 25 years there has been only moderate commensurate official concern. Indeed, attention to tax crimes is not at the same level as other forms of profit oriented crime, *e.g.* drugs or human trafficking.

As a matter of fact, the attention for financial crimes waxes and wanes. The Panama Papers scandal is a good example to represent the statistics, as the leaked documents contain information on almost 3.500 individuals, who are suspected of hiding money from their national authorities. The documents cover a time span of more than ten years. Europol looked closely at the Panama papers and compared data of the Panama papers published by the International Consortium of Investigative Journalists with the Europol's database of persons and companies suspected of involvement in criminal offences and found around 3.500 probable matches. The data set comprises a varied group of potential offenders. A substantial part concerned VAT-offenders: according to *The Guardian* (UK) “[. . .] 388 matches were connected to VAT fraud operations [. . .].”

Of all the types of tax evasion in the European Union the Value Added Tax (VAT) fraud schemes are estimated to cause the most financial damage. According to Stieranka *et al.*, (2016) Bulgaria estimates its VAT frauds to have inflicted losses to the amount of about € 400 million yearly. Naturally Member States fight this form of tax crime. The best policies concerning fighting VAT frauds in the European Union can be observed in Luxembourg where the leakage is only 1 % loss of the theoretical VAT tax obligation. Therefore in this chapter the tax crimes in the Slovak Penal Code Act will be reviewed, particularly VAT Carousel frauds. The aim of this chapter is to explain in detail the nature and organisation of VAT frauds, identify all the types and variations of tax fraud committed and to explain them in the context of the Slovak and EU legislation.

## **The nature and structure of organised VAT fraud**

The European Union VAT (EU VAT) is a value added tax on goods and services sold within the European Union (EU). EU VAT on selling or output (known as “output VAT”) is charged by a business and paid by its

buyer. VAT paid by a business to other businesses on the supplies that it buys is known as EU VAT on input (known as “input VAT”). A business is generally able to recover input VAT by offsetting it against the output VAT for which the business is required to account to the government, or if there is an excess, by claiming a repayment from the government. The final consumer bears the burden of VAT paid: he cannot claim it back. The net effect of this is that each supplier in the chain remits tax on the value added, and ultimately the tax is paid by the end consumer, who cannot claim the paid VAT back. Hence, the enterprises have a tax collection function, a role with many temptations, as we will see.

Value added tax frauds may be committed by a variety of methods, ranging from simple to most sophisticated. The simplest and common example is that of lowering output VAT by hiding turnover (no invoice, no VAT). A more complicated approach is to tamper with the paper work: by altering data on invoices and other documents concerning the sale of goods or services which result in lowering tax liability. Consequently less tax is paid. Another form consists of fictitiously increasing input VAT followed by claiming excess paid VAT from the tax authorities. For example, by including fictitious invoices into the accountancy or inflating input invoices.

Tax liability may also be lowered by tampering with the export of goods and services. Within the EU, VAT is a *domestic* tax, which implies that the export must be free of tax, also called ‘zero tariff’. Prior paid VAT is reclaimed by the exporting company (or settled with outstanding liabilities). The vulnerability (or temptation) consists of exporting fictional goods or services to another EU Member State in order to claim fictitious VAT deductions.

A variation is that only the data on the export papers are fictitious, while the real goods are actually sold at the domestic (black) market: at a competitive price while the VAT (if charged) is put in their own pocket. A frequent form of a VAT tax fraud is the so-called Missing Trader Intra Community Fraud. Europol defines this type of VAT fraud as one where the first company in a domestic trading chain charges the VAT to the customer, but does not pay it to the tax authorities and ‘disappears’. This is

known as the “missing trader”.<sup>2</sup> When such fraud takes place between Member States there is an Intra Community fraud.

The Missing Trader fraud is the organised theft of VAT from the treasury, usually by an organised crime group.<sup>3</sup> A number of basic conditions have to be fulfilled such as: the supplied goods have to be taxable; the transport of goods has to be completed at the country of the destination; the supply and purchase of goods have to be performed as part of an economic activity and the buyer and the seller have to be registered as taxable persons. When these conditions are fulfilled, one can enter the ‘playing ground’.

The Missing Trader scheme can be illustrated by the following hypothetical case.

A Conduit company **A**, being the VAT payer in Member State **A**, is selling goods to the buyer, registered as VAT payer in another Member State, **B**. The exporting Conduit company is entitled to the deduction of the VAT paid earlier for the exported goods, by virtue of intra-Community transactions. So the goods cross the border with a ‘zero tax’ tariff. The buyer in importing Member State **B** being the country of destination has the obligation to pay VAT to his tax administration. However, the VAT, which must be paid, is not paid immediately at the importation of the goods but at the time when the goods are sold and the tax return is submitted. The buyer in Member State **B** meanwhile sells the goods to another company **B2** in his Member State **B**: VAT included. But company **B** does not pay the VAT he received and disappears. Therefore, this trader in the chain of transactions is called the *Missing Trader*. Company **B2** consequently sells the goods to another Member State - Member State **C**, therefore company **B2** is entitled to VAT return paid to the missing trader because of the ‘intra-Community’ transaction.

The described scheme can be re-used: finally, the goods may be sold back to the original Member State **A**, whereupon the circle is closed. Many subjects take part in this type of fraud and as a consequence the chain, also

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<sup>2</sup> MTIC (Missing trader intra community) Fraud  
<https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/economic-crime/mtic-missing-trader-intra-community-fraud>

<sup>3</sup> Ibid

called ‘carousel fraud’, remains unclear. It may take months or even years to uncover these transactions.

This is not only large-scale tax fraud, but also organised crime targeting VAT proceeds. It has been observed that organised crime groups often infiltrate legitimate businesses in such a way that the manager of a company may not even be aware that his company forms a part of this chain of fraudulent transactions. Indeed, this was a reason of the initiation of proceedings at the Court of Justice of the European Union in *Optigen Ltd., Fulcrum Electronics Ltd., Bond House Systems Ltd. case* from 12 January 2006<sup>4</sup>. The case will be elaborated in the text below. .

In the region the first carousel frauds took place with small amounts of goods but those goods were of a high value. However, now the structure of fraud has changed. Sato (2014) in his article on carousel frauds with sugar, claims:

“In recent years carousel frauds are more often committed in the Czech republic, but also in Poland, Hungary and in Slovakia concerning goods which are bigger and heavier, with which perpetrators trade in huge amounts and these goods are subject to quick usage and after they are consumed it is difficult to trace them (for example building materials, furnace iron, some types of groceries . . .).”

As mentioned above, the trade can be ‘enriched’ by the fact that there are no actual goods crossing the internal border. The seller uses fraudulent invoices and transport papers to demonstrate that the goods were supplied to another Member State, whilst the goods remain in the country of origin of the goods. Because of this, the seller has a comparative advantage on the market, as he can sell the goods for a lowered price, which does not include VAT (or only partly). This scheme has been used in a ‘sugar’ case where according to Sato (2014) “*in [ . . . ] Slovakia, this fraud resulted in hundreds of empty trucks traveling from the Slovak Republic to neighbouring countries where the VAT evasion is estimated to 25 million Euros per year.*” The reason why perpetrators of carousel frauds chose the sugar is clear: sugar is a commodity which is quickly consumed in large amounts and it

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<sup>4</sup> See rulings No. C-354/03, C-355/03, C-484/03 Court of Justice of the European Union.

is difficult or impossible to trace and identify the cargo if the trucks are empty or forged transportation documents are used.

Carousel frauds may be committed by submission of invoices, referring to non-existing goods, to items of zero value such as offal, or goods which are quickly consumed. Vegetables or other perishables are not suitable to this type of fraud. In addition to sugar another commodity is alcohol. Alcohol has the additional advantage of being taxed with excise, which can be pocketed in the same operation (Van Duyne, 1993).<sup>5</sup>

## VAT frauds scenarios and *modus operandi*

In this section, we shall explain the basic characteristics explained above by applying them in different theoretical scenarios.

Carousel frauds have been committed all over the European Union because of the cross-border requirement (See IMF working paper 2007). However, in order to make frauds more complicated to detect, usually more EU Member States are involved.

Basically, company **A** sells goods to company **B** in another Member State and reclaims earlier paid VAT (“zero tariff”). **B** sells to company **C** in the same country and disappears. Now two scenarios available, either company **C** deducts input VAT it had paid to the company **B** after selling the goods to customers within the domestic market VAT included. Or company **C** seller exports the goods to another Member State **D** or back to the Member State **A**, all also VAT exempted and company **C** is entitled to VAT deduction concerning this transaction. When the goods are again located in Member State **A**, the same carousel may take place, now using company **X** as a replacement missing trader **B**. The carousel fraud is then finished or may be continued in a circular manner but with other players.

As remarked, the transactions may be fictitious, but usually business is conducted with increased or lowered VAT figures, depending on whether

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<sup>5</sup> Bleeding Central Europe through VAT scams  
<http://visegradrevue.eu/bleeding-central-europe-through-vat-scams/>

or not reclaiming VAT to the amount of goods that it is stated in the invoices. The aim is not to conduct business activity but to show that the goods are ‘really’ moving between Member States. That may require many firms: Carousel frauds are often associated with creation of new companies to cover the transactions for example by issuing documents such as invoices to make transactions more difficult to trace.

Abuses of VAT systems may be conducted concerning existing goods sold for reasonable prices. For example, businessman A has at his disposal goods which he acquired by illegal means (the goods come from previous criminal conduct, and this scheme may be used to launder money). Apart from profit from selling the goods, the business plan consists of an intention of obtaining a tax deduction from the State. Manipulation with invoices is one possible option, however, we would like to emphasise another scenario. A businessman registers a new company B headed by a straw man: a homeless person while the trade may be fictional. The dummy firm B sells the businessman A’s goods to company C with VAT included, *i.e.* company C actually pays the price, but company B, as a Missing Trader, disappears without paying VAT or alternatively submits a tax return claim but of a lesser amount. Finally, the illegitimate profit is handed over to businessman A. This case is qualified as *Tax and Insurance Evasion* according to Section 276 of the Slovak Penal Code Act.

Another example concerns the selling of goods for a small loss (on paper) such that other companies are not even aware of their involvement in a VAT fraud scheme. Let us illustrate this on an example.

Company A has goods at its disposal, which it distributes using companies B, C, D and E. The goods circulate among these firms and will finally be sold to the end trader in another Member State, company F. The last company in the Member State of origin, E, exports the goods under ‘zero tariff’ to company F. Company A avoids attracting the attention of the tax authorities by inserting company B as the Missing Trader which basically emits only invoices while not paying VAT. In more sophisticated fraud schemes part of the goods are stored in a storage in case of tax inspection to look legitimate. Companies B, C, D and E sell the goods including VAT but the mutual payments are usually simulated. Company E fictionally exports goods to the company F and asks for excessive VAT deduction.

Another scenario is that the Missing Trader sells the goods further in the Member State B with VAT included, for regular, non-competitive prices to ‘acquire’ and keeps the whole amount of VAT.

There are more varieties of the MTIC fraud: one of the schemes is when the Broker (customer of the Missing trader) resells the goods to another Member State from where the goods may be resold to the Member State of the origin (Member State A): whether or not fictitious. The Broker then claims the VAT it has paid to the Missing Trader, because the Broker exports to a Member State VAT-exempted. Consequently, Member State B returned the earlier paid VAT to the Broker while firm B is missing. This carousel fraud is a repeated circular flow of invoices to make the fraud more complicated and less detectable.

As stated in the Special report of the European Court of Auditors:

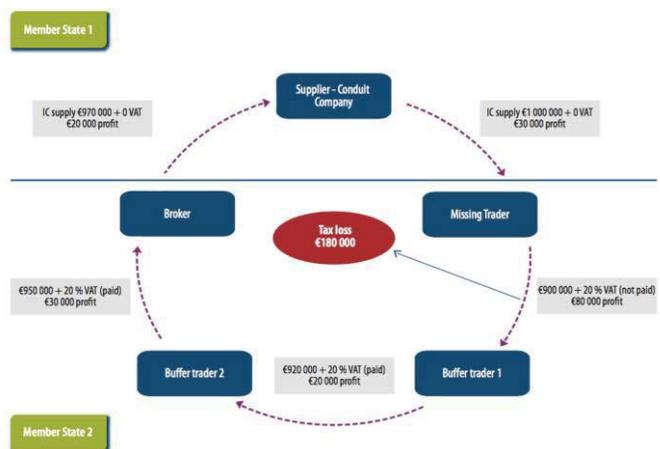
“The fraud can be further complicated when the Missing trader sells the goods to buffer traders, some of whom could be honest, to make it more difficult for tax authorities to trace the fraudulent scheme. When the circular flow includes a third country, customs procedure 42 can also be used to hamper the traceability of transactions.”

The Missing Trader Intra-Community fraud has two basic schemes: acquisition fraud and carousel fraud. In the acquisition fraud the goods that are purchased from another Member State A without VAT being paid in that Member State, are sold in the domestic market of the buyer (Member State B) for domestic consumption. The buyer – the Missing Trader – fails to pay VAT and disappears, but sells the goods to its customers VAT included. However, in the carousel fraud as a type of Missing Trader fraud the abuse of VAT system is based on fraudulently reclaiming VAT or deduction from tax authorities of Member States. The main difference between the acquisition fraud and the carousel fraud is that in the carousel fraud the goods are sold to number of companies within the domestic market of the acquirer but finally are sold outside the domestic market, to another Member State. This process may be repeated numerous times with the same goods creating the so-called carousel.

A numerical example may illustrate the functioning of a carousel scheme. Assuming that the VAT rate is 20 %, the following chart (no. 2) shows how the basic Carousel fraud works. In particular scheme the Conduit company sells the goods to the Missing trader for the amount of

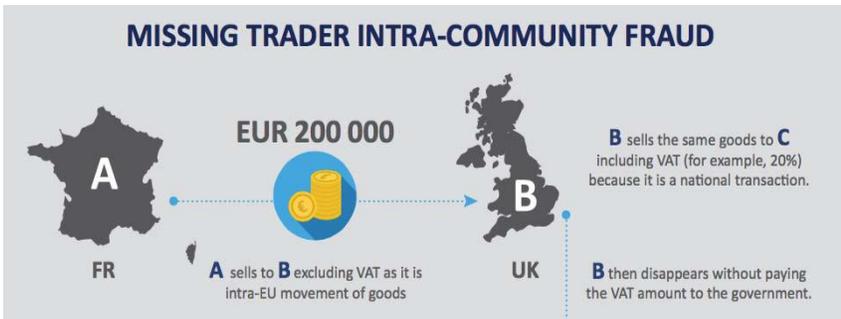
€900.000. This sum does not include VAT because intra-Community supply of goods is exempt from VAT payment. Subsequently the Missing trader sells the goods further to the Buffer trader no. 1 for €1.080.000: €900.000 plus €180.000 VAT. The Missing trader is supposed to pay the €180 000 in VAT to its tax authority but does not do so and disappears. The Buffer trader no. 1 sells the goods to the Buffer trader no. 2 with a €20.000 (€1.100.000) profit and pays 20 per-cent of the profit to the tax authority as the value added tax in amount of €4.000. The Buffer trader no. 1 may or may not be aware of the MTIC fraud taking place. As a consequence, Buffer trader no. 2 sells the goods to the Broker making profit of € 30.000 and pays taxes from this profit in amount of €6.000 (20 %). The fraudulent chain is completed when the Broker sells the goods back to the Conduit company in Member State A with profit of €20.000. The broker does not charge the VAT when the goods are sold to the Conduit company, because the intra-Community supplies are VAT exempt, but it claims back the VAT which the Broker paid to the Buffer trader no. 2 in value of €190.000. The above-mentioned transaction resulted in Member State's B tax loss of €180.000, because Member State collected €10.000 from the Buffer traders no. 1 and no. 2, but refunded €190.000 to the Broker. €180.000 represent the profit gained by the carousel fraud, which will be divided among different parties taking part in the prescribed fraud.

**Figure 1: The basic carousel fraud scheme**  
European Court of Auditors



The basic scheme of the Missing Trader rests on the fact that the company in Member State B sells the goods to another company (within the Member State) including VAT, however, the Company B acquired the goods from another Member State A under ‘zero tariff’ (intra-Community transaction). The company in Member State B was supposed to pay VAT it disappears but as Missing Trader sold the goods including VAT which he put into his own pocket or into that of his principals or accomplices. According to the Europe review 2015, the Missing Traders can operate only few months before disappearing in order not to be detected by the authorities. But new companies are ready to take the MT place.

**Figure 2.**  
**Missing trader scheme - Acquisition fraud, source: Europol**



In order to prove the commitment of a tax fraud offence (in the Slovak Republic offence according to Section 277a of the Slovak Penal Code Act 300/2005 Coll.) law enforcement agencies have to examine the whole chain of transactions and they have to prove that the company knew that it formed a part of fraudulent chain and that entitlement to VAT deduction was not legitimate. According to the case *Optigen Ltd., Fulcrum Electronics Ltd., Bond House Systems Ltd.* from 12 January 2006, the Court of Justice of the European Union held that if companies adopt all reasonable measures in order to secure that their business transactions are not part of the fraudulent chain consisting of VAT frauds, these businesses have to have a right to trust the legality of the transactions without risking that the companies taking part in the chain will be jointly liable for tax payment,

which shall be paid by another tax payer. Each transaction has to be considered independently, even in the case that some transactions within the chain are fraudulent. In the judgement of the Court of Justice of the EU from 2006 in the joined cases C-354/03, C-355/03 and C-484/03 the Court ruled:

“The right to deduct input value added tax of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by value added tax fraud, without that taxable person knowing or having any means of knowing.” Otherwise, legal certainty would be hampered.

In the above-mentioned European jurisprudence, the CJEU has clearly shown that in the situation of a conflict between the economic interests of the EU and the legal certainty, it chooses the latter. This gives much needed protection to suspects who may have been unknowingly involved in a tax fraud scheme. It also creates a pathway for tax authorities, which respects fundamental rights of the suspects, but also does not obstruct investigation of tax fraud.

## **Selected sections of the Penal Code Act of the Slovak Republic concerning VAT frauds**

In this section, we shall explain how VAT fraud takes place within the Slovak Republic We shall also examine various specific types of tax fraud and their definition within the Slovak legal system.

### **a. General**

VAT frauds may fall within the definition of the following Sections of the Slovak Penal Code Act No. 300/2005 Coll.:

§259 Distortion of Data in Financial and Commercial Records

§276 Tax and Insurance Evasion

§277a Tax Fraud

§278 Failure to Pay Tax

§278a Obstruction of Tax Administration

The main offences concerning VAT frauds are described in Section 276 tax evasion and Section 277a tax fraud. Section 278a and Section 259 define offences which usually form a part of the preparation process to commit criminal acts under sections 276 and 277a. According to the offence described under the Section 276 of the Slovak Penal Code Act 300/2005 Coll. the tax payer is obliged to pay tax to the tax authority of the Slovak Republic, Section 278 refers to situations when the tax payer did not pay the tax due, however the value of unpaid tax has to exceed the amount of € 2.660 to constitute the criminal offence.

According to Šamko (2015) in regard to the Section 277a the offender falsely pretends that he is entitled to a VAT deduction to which he is either not entitled or for which he over claims.

In an offence under § 276, the benefit rests in the fact that the decrease in the value of the perpetrator's assets does not match the decrease that would be adequate to the tax the perpetrator is liable to pay. In the offence under § 277a the benefit represents the increment of the assets of the perpetrator, while he asks tax authority to return VAT to which he is not entitled. In both above-mentioned offences the fraud is committed against the Slovak Republic harming the public fund. Even if consequently the VAT fraud harms State's citizens and indirectly the EU's citizens too. In case that the harmed subject would be primarily another subject, not the Slovak Republic represented by the tax authority, then the respective fraudulent behaviour would fall within the definition of Fraud as described in § 221 of the Slovak Penal Code Act.

## **b. Tax and Insurance Evasion**

In terms of Tax and Insurance Evasion, this offence may be committed by failing to register as a taxpayer according to the § 4 of the Slovak VAT Act No. 222/2004 Coll. or by non-submitting the tax returns. The businessman may be registered as a VAT payer, however, may commit an offence, when he does not submit the tax return to the respective tax authority. The perpetrator is hiding his business activities. For example, by charging VAT to end consumers that is not paid to the tax authorities. He may even submit the VAT return, however, he does not include all relevant documents of accountancy into the tax return which results in lowering his tax burden. In case the businessman does not pay the VAT which is due, the criminal

offence under Section 278 Failure to Pay Tax may be committed in case the VAT due exceeds the amount of € 2.660.

The case when the tax payer does submit the tax return, but does not include all transactions into the respective tax return was decided by the Supreme Court of the Slovak Republic in case no. 2 To 7/2010 in which the businessman did not include all transactions made into submitted tax return, however, charged the VAT (which he was supposed to pay to the Treasury) to his customers. As a consequence, the businessman obtained an unlawful advantage in VAT of €620.590, 62.

The Tax Evasion of VAT may be also committed by fictitiously lowering the tax burden, by pretending increment of VAT which was paid for certain goods or services provided by another trader (supplier) who is also a VAT payer, so called input VAT. But in this case, the goods or services provided are only fictional and the supply of goods or services never took place. The perpetrator deducts this fictionally paid input VAT from VAT which is he supposed to pay at the output resulting in lowering his tax liability. The invoices used in this type of criminal behaviour are either fictional, may be even issued by non-existent companies or in some cases invoices are bought from other companies which are doing real business, but they are also selling their invoices to other companies to 'help' them with documents about purchases to increase the VAT at the input stage. The case no. 5 To 4/2009 of the Supreme Court of the Slovak Republic refers to this type of criminal behaviour, where the businessman in the company's tax return included also fictional invoices on purchase of iron plates issued by a fictional company and therefore evaded VAT in amount of €8.487, 64.

With respect to crimes connected to value added tax, it is important to differentiate between the behaviour resulting in lowering the VAT to be paid to the Treasury, the VAT is actually paid but in a lower amount and behaviour resulting in State returning VAT to the businessman. If the perpetrator unlawfully lowers existing tax liability, this kind of behaviour falls within the Tax and Insurance Evasion offence. In the case where the businessman lowers his tax liability to the extent that (part of) unlawfully money is given back from the Treasury then this behaviour falls within the Section 277a of Tax Fraud.

In the respective section, the intra-Community fraud will be elaborated in a view of commitment of Tax and Insurance Evasion criminal offence,

*i.e.* which segment of behaviour in the intra-Community fraud falls within the scope of Tax and Insurance Evasion offence. This type of VAT tax fraud mostly concerns import of goods into the Slovak Republic from another intra-Community state. In case of Intra-Community fraud, the respective behaviour of a businessman may be qualified as Tax and Insurance Evasion in the following course of action. The businessman is registered as a VAT payer importing goods to the Slovak Republic from other Member States of the European Union. The import of goods, for example cars, was part of intra-Community transaction; therefore, the imported cars were exempted from VAT in EU Member States, but the Slovak businessman was supposed to pay VAT in the Slovak Republic pursuant to VAT rates applicable in the Slovak Republic. If the businessman fails to pay the VAT to the Slovak tax authority and consequently sold the goods further in the Slovak Republic including VAT, he 'earned' the VAT which was not paid to the Treasury. However, the businessman submitted the tax return, in which he did not include transactions concerning buying and selling of cars, which resulted in lowering company's tax liability. The businessman did not ask the Slovak Republic tax authority for excessive tax deduction, he 'only' lowered his tax liability, therefore it was an offence committed under § 276 Tax and Insurance Evasion. Tax and Insurance Evasion can be also committed when the business is conducted with illegal goods. The goods are imported into the Slovak Republic illegally and consequently the goods are sold in domestic market without VAT being paid to the Treasury.

### **c. Tax Fraud**

Because Tax Fraud is an offence with intent, it is important to look closely at the gravity of the particular offence described in Section 277a paragraph 1 (minor offence), because if the gravity of a minor offence is of a lesser degree of seriousness in view of the mode of its commission, consequences and circumstances of commission, then the particular behaviour does not constitute a criminal offence.

The object of the offence of Tax Fraud is the protection of financial interests of the Slovak Republic against fraudulent behaviours gaining advantage through mis-declared VAT deduction.

According to the definition of Tax Fraud as stated in Section 277a, in order for this offence to be completed it is sufficient that the offender unlawfully exercises entitlement to excessive VAT deduction in a tax return with the aim to earn an illegitimate benefit. Therefore, for accomplishment of Tax Fraud offence it is sufficient that the offender exercises a false entitlement to VAT deduction, while it is not necessary for VAT deduction to be actually granted to the offender by the respective tax authority. From the above-mentioned facts it is clear that the attempt of Tax Fraud according to § 14 paragraph 1 of the Slovak Penal Code Act is not possible. According to Šamko (2015) if the tax authority actually pays the offender back then we can speak of a completed offence.

The tax return can have the difference between input VAT and output VAT: if the difference is positive the tax payer has an obligation to pay tax to the respective tax authority; if the difference is negative the tax payer is entitled to VAT deduction. Tax fraud is committed when the tax payer aims at an illicit negative difference between the output VAT and input VAT.

The offender may obtain an excessive VAT deduction by pretending fictitious purchases of goods. However, the State does not collect any VAT because the transaction has not taken place (there is no real seller or purchase of goods). Consequently, the offender may obtain an excessive deduction. This is also known as fictitious increase of input VAT.

The right to deduct VAT is described under Section 51 of VAT Act No. 222/2004 Coll. The respective Section states that the tax payer has a right to deduct VAT when supported by invoices showing entitlement to VAT deduction. Section 79 paragraph 1 of the Slovak VAT Act states that if the tax payer is entitled to excessive tax deduction and cannot deduct this excessive deduction from his tax obligation in the next taxation period, he is entitled to payment of the excessive deduction. The tax authority shall return to the tax payer his non-deducted excessive deduction within 30 days pursuant to Section 79 of 222/2004 VAT Act of the Slovak Republic. The difference between these two definitions (right to deduct and excessive deduction) is crucial in the classifications of criminal offences. Tax and Insurance Evasion offence will occur when the businessman will illegitimately deduct VAT without excessive deduction being granted to him. On the other hand the Tax Fraud offence will be committed if the offender will be illegitimately be granted or will ask for excessive deduction from the tax authority.

In conclusion, enterprises are obliged to charge VAT to all their customers and have the duty to pay the collected VAT to the tax authority. They have the right to lower their tax liability by an amount of VAT already paid for goods and services bought from suppliers *i.e.* input VAT: the so-called tax deduction.

Defrauding the VAT system looks as follows. The end consumer A buys goods *e.g.* computers from the registered firm B and A pays for the goods including VAT. The end consumer A and seller B are conducting business in one Member State and the end consumer A does not sell the goods further. Sold goods were for example of € 2.000 value, the end consumer paid to seller B the value of the goods plus € 400 VAT if we presume a 20 % VAT rate. But seller B needed some components to construct the computers which were sold to the end consumer, therefore he bought these components from his suppliers for which seller B paid VAT. For the seller B the process is not finished by paying €400 to the Treasury as it was in case of end customer A. Let us presume that the seller B sold in this particular tax period only the computers for €2.000 (€400 VAT). In this scenario seller B may deduct €400 VAT from all value added taxes he paid to his suppliers for goods and services which were used or needed to create a product he was selling *e.g.* computers and by this action lower his tax liability. If the seller B paid more on VAT to his suppliers than is the value of VAT he received from purchases made by customers, he is entitled to excessive deduction. These facts have to be supported by invoices and submitted in a tax return.

## **Obstruction of Tax Administration and Distortion of Data in Financial and Commercial Records**

The offence described under Section 278a, Obstruction of Tax Administration, is an intentional criminal offence. In Section 278a paragraph 1 and paragraph 2 the offence is qualified as a minor offence. Therefore, it is important to look at the gravity of a particular offence because the principle of material corrective, enabling a conduct which would usually constitute a lesser offence to not be regarded as such, if the gravity of the offence is lower, enshrined in Section 10 paragraph 2 of the Slovak Penal Code Act may be invoked. The Section states that the act shall constitute a minor

offence if it is of a lesser seriousness in view of the mode of its commission and consequences, the circumstances of its commission, the degree of causation and the motivation of the offender. Moreover, punishability of this offence does not vanish even using effective regret under § 85 and § 86 of the Slovak Penal Code Act. The respective merits described under subparagraphs a) b) c) and d) of § 278a paragraph 1 have one fact in common and so that the offender has to be previously punished for analogical act in administration proceedings according to § 154 of the Slovak Tax Administration Act No. 563/2009 Coll. in previous 12 months. The period of 12 months is counted backwards from the moment of committing the offence and the important event is when the decision of administrative authority concerning previous offence became valid.

Merits of the criminal behaviour stated under subparagraph a) describe situations when the offender in documents submitted to tax authorities includes false data, grossly distorted data or conceals mandatory data b) describe actions of changing, devaluating or destroying documents necessary for correct tax payment, under subparagraph c) the tax payer does not fulfil his announcement obligations imposed by law and under subparagraph d) the tax payer does not fulfil his obligations imposed by law in terms of tax control. All of the above mentioned merits of § 278a aim at the same purpose and so to obstruct tax administration. Not all activities described in letters a) to d) will be considered as criminal offence of Obstruction of Tax Administration due to 12 month period condition mentioned above. The term tax administration is described in § 2 a) of the Act No. 563/2009 Coll.

In criminal behaviour described in § 278a under subparagraphs a) to d) the offender is intentionally trying to affect the tax administration process with the purpose to cover or to make it more difficult for the tax authorities to reveal that the particular businessman is a tax payer or what is the correct amount of VAT the tax payer is obligated to pay to the State's Treasury. It is not necessary for tax administration to be disabled, the offender's behaviour is aiming at the fact that tax authorities do not have the correct information needed or they may achieve the correct data however with bigger efforts.

The object of the criminal offence described in § 278a is to protect tax administration and consequently to secure correct detection of tax payers and their tax liabilities.

In terms of criminal act described in § 259 Distortion of Data in Financial and Commercial Records, the relevant paragraphs with regard to VAT frauds are § 259 paragraph 1 subparagraph c) and § 259 paragraph 2 subparagraph b). Section 259 paragraph 1 subparagraph c) is dedicated to submitting false data or grossly distorted data or concealment of mandatory data used for controlling accounting records and Section 259 paragraph 2 subparagraph b) concerns destruction, damage or rendering data unusable or failure to keep records referred to in paragraph 1. The main difference between the criminal offence of Obstruction of Tax Administration and Distortion of Data in Financial and Commercial Records rests in a fact that in terms of Distortion of Data in Financial and Commercial Records, there is no condition that the offender has to be previously punished for analogical act in administration proceedings. In case a businessman was found guilty of the offence under § 278a (he had to be previously punished for analogical act according to § 154 of Act No. 563/2009 Coll. in administration proceedings and 12 month period had to be kept) and he would commit the same act again, in this case the businessman cannot be found guilty of the offence of Obstruction of Tax Administration because he did not fulfil the criterion of the previous administrative punishment. However, the businessman may be suspected of Distortion of Data in Financial and Commercial Records, because this criminal offence does not have the condition of neither previous administration punishment nor previous criminal punishment. The same analogy would apply in cases when the businessman would behave in a way to obstruct tax administration process by for example destroying data or submitting false data and he was not punished in administrative proceedings in respective 12 month period, or when businessman was punished in administrative proceedings but in time period exceeding 12 months. The businessman could be suspected of Distortion of Data in Financial and Commercial Records offence. The description of the offence of Distortion of Data in Financial and Commercial Records is more universal because Obstruction of Tax Administration offence applies only to tax payers and behaviour concerning taxes. Moreover Distortion of Data in Financial and Commercial Records is not limited by previous criminal or administrative punishment.

## Conclusion

The patterns of carousel frauds have been explained and described using respective examples concluding the complexity and sophistication of VAT fraud schemes as well as pointing out different *modus operandi* concerning VAT frauds within the European Union. The different patterns of VAT frauds as well as criminal offences which may be committed by the respective behaviours of perpetrators were elaborated in order to give the complex view on the problems of tax frauds, mainly carousel frauds within the Community, reflecting the Slovak Penal Code Act. As it is clear from the facts stated in this chapter, the main goal of perpetrators of carousel frauds is to obtain profit, which perpetrators earn by exploiting loopholes in the European Union legislation (*i.e.* obtain a tax deduction from the State). Therefore more action from the European Union institutions is needed. The European Commission proposed solutions for the current situation, however it is complicated for Member States to agree on politics concerning VAT due to the fact that VAT forms one of the main states revenues. Since 2010 (Green paper on the future of VAT) European Union bodies are trying to create legal framework for single VAT system, however, the final solution was not found yet.

It is obvious that carousel frauds are committed by large number of companies involved in the chain of transactions to prevent the authorities to uncover the fraudulent schemes. In case the chain would consist of only three companies, the carousel *i.e.* fraudulent transactions would be suspected by the tax authorities of Members States quickly and would be easily detected. Therefore some Buffer Traders are added to the chain to make it more complicated to authorities to reveal the transactions. It was observed that fraudulent companies infiltrate into legitimate businesses, according to the case brought before the Court of Justice of the European Union. Legitimate businesses are part of the chain as well, whereas they may have no knowledge of the fraudulent transactions taking place. On the other hand, in order for the legitimate businesses to be protected against fraudulent companies, the case Optigen Ltd., Fulcrum Electronics Ltd., Bond House Systems Ltd. case is fundamental.

The authors are of the opinion that more action is needed in the Community level in order to prevent VAT frauds from happening. The various modes of operation of VAT tax frauds described above show the complex-

ity of the problem, however, the amount of wealth lost by this kind of criminal activity also clearly shows that there is a lot that could be done regarding the enforcement of current laws and regulations. The challenges of financial crime of today are mostly international in nature and, therefore, the enforcement mechanisms of tax regulation have to be more international and cooperative as well.

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# Italian strategies against the infiltration of the criminal organisation in the economy

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## Introduction

According to the limited available data, the main illicit markets in the European Union generate around 110 billion euros each year, approximately 1% of the EU GDP (Transcrime report, 2015; European Commission, 2016). These illicit proceeds are widely laundered in the legal economy of the European member states (Transcrime report, 2015).

Evidence of organised crime investments in the legal economy is found in almost all EU MS (Transcrime report, 2015; Lalam, 2004-2006, 382; Paoli, 2006, 284). There are different forms of involvement of criminals in legal companies: on the one hand legal businesses may be owned and directly managed by crime-entrepreneurs; on the other hand organised criminals may create a partnership with legal business men. Legal and illegal capital may coexist in financing the illicit activities (Berlusconi, 2016: 429; Savona and Berlusconi, 2015).

The Italian Supreme Court has stressed the urgent necessity to curb the laundering of accumulated criminal incomes which may flow into the legal sectors of the economy. And this infiltration of criminality into the legitimate economy can take place directly or indirectly, in the sense of entering into economic activities through individual companies, some of them already existing.<sup>2</sup>

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<sup>2</sup> Court of Appeal Palermo, decree 01/10/1996, Tre Noci s.r.l., (1997) Cass. pen. 2257.

Against this infiltration of illicit proceeds in the legal economy, according to the Transcrime report “from illegal markets to legitimate businesses: the portfolio of organised crime in Europe” (2015), the number of seizures and confiscations in relation to serious and organised crime assets has been increasing throughout Europe, and especially in certain countries (such as Italy, Ireland). This trend has been reinforced with the implementation of the Confiscation directive (Directive 2014/42/EU) and with stronger international cooperation among national Asset Recovery Offices (ARO), in the framework of EU ARO Platform or the Camden Assets Recovery Inter-agency Network (CARIN).

Notwithstanding these data about organised crime investments in the legal economy, most confiscated assets are movable goods (cash and vehicles) while there is almost no confiscation of companies. As a result, a gap exists between where the illicit proceeds are assumed to be invested (in the legitimate sector) and what is actually recovered from companies (Transcrime report, 2015).

It is more common, indeed, to make confiscation orders against individuals, because it is often difficult to prove that a company was used for criminal conduct, as these companies are often used as fronts for illicit activities (Laver, 2013) or, for example, due to the problems in tracing back the company to its beneficial owner. Moreover, prosecutors can also be reluctant to confiscate companies which are difficult to manage if they are still in operation (Centre for the Study of Democracy, 2014).

The Transcrime Report concluded that there is a need to increase the use of the confiscation of companies. EU policymakers could learn from Italy, where this approach has proven to be one of the most effective instruments in the fight against organised crime.

The scope of this chapter is not only to evaluate the conclusions noted above, but also to consider that the companies infiltrated by organised crime enjoy, at the very least, an unfair competitive advantage from the inflow of crime-money allowing criminals to obtain licit purchasing power (Masciandaro, 1994, p. 37; Zanchetti, 1997, p. 394). Therefore, targeting such companies serves the protection of the economic order and maintaining equal conditions of investing in a fair market economy.

Moreover, in the UNICRI (United Nations Interregional Crime and Justice Research) report about organised crime and legal economy (the Italian case) 2016 (UNICRI, 2016), it is confirmed that “reinvesting illicit profits

back into the legal economy” is “a practice which consequently weakens both the economic fabric of society and state institutions [. . .] as actions by organised crime groups can shape political decisions in the economic sphere, particularly through corruption and blackmail”.

As the Transcrime report stresses, of particular importance is the capacity of the Italian public authorities to target legitimate businesses: Italy is one of the few European countries seizing companies thanks to the powerful ‘arsenal’ of confiscation measures and to the wide experience of Italian law enforcement. At the same time, it is important to highlight that the Italian legislator has also introduced instruments alternative to seizure, *e.g.* judicial administration.

In the light of these considerations, a reflection is necessary at a European level on the strategies to face the infiltration of illegal proceeds in businesses and to achieve this aim, the analysis of various Italian tools can be very useful for legislators, national as well as the European.

The aim of this chapter is, firstly, to evaluate the different strategies adopted in the Italian system of law to tackle the infiltration of organised and economic crime in business and, secondly, to highlight the benefits and drawbacks of the different. In particular, the article focuses on the alternative instruments to confiscation, *e.g.* judicial administration (temporary suspensions), in order to identify improvements in the fight against criminal infiltration, whilst better ensuring the survival of the firms.

## **The importance of confiscation of companies in Italy**

The fight against organised crime infiltration in the Italian economy is important in order to ensure free and fair competition and to protect the legal economy, as considered above. It should also be acknowledged that, not only do mafia organisations seek contacts with businesses and the world of politics, but also that companies, on their own initiative, seek support and collusive agreements both with the mafia and with those who wield political power. This is in an attempt to gain commercial advantage, to have easier access to new markets and to obtain financial supplies. Moreover, companies do this to protect themselves from competition and to obtain

favours from public administrations whilst also eliminating or reducing various obstacles to their activity.

Furthermore, some studies confirm that in Italy the connection with the business world – in the form of control, conditioning or infiltration in pre-existing companies, or in the form of direct management of new business activities – serves ‘mafiose’ criminal organisations. This is not only to pursue enrichment in a strict sense but also to use the business as a tool to establish relationship networks, thereby reciprocating favours with protagonists from the world of politics, institutions and public administration. In this way, for the Mafia, the infiltration in companies or their management is a way to improve their ‘social capital’, *i.e.* the systemic network of relationships that the mafia organisations are using to developing with the various sectors of the so called ‘Legal society’, which historically is their strong point. For these reasons, an attack on the mafia-business means an attack on the heart of the mafia and thus an undermining of the foundations of their power and their territorial rooting (Sciarrone, 2012; Id., 2011; Visconti, 2014, p. 263; Paoli, 2006, p. 263). In conclusion, the confiscation of companies is a tool to face, on the one hand, this Mafia business and, on the other hand, these collusive relationships among companies, criminal organisations and political power.

As of 28 February 2017, according to the database of the A.N.B.S.C. (Italian), the “National Agency for the Management and Destination of the Properties”, seized and confiscated goods from organised crime comprise: 16.696 properties (buildings and land); 7.800 financial assets; 2.078 movable assets; 7.588 registered movable goods and 2.492 corporate assets (Dossier statistico, 2017).

The analysis of the types of recovered assets across the available databases in Italy shows that real estate is the macrotipe with the highest number of confiscations and seizures. However, we should also note the significant weight of companies (between 5% and 15% across all the databases), which confirms that Italy is one of the few European countries seizing businesses (Transcrime report, 2015).

This phenomenon of sequestered and confiscated businesses is steadily growing. The “report on the consistency, destination and use of the frozen and confiscated goods” by the Italian House of Representatives of February 2016, takes into account the data for the previous five years (2011-2015). The companies seized and confiscated totalled 912 in 2011, 1.054

in 2012; 1.549 in 2013; 1.874 in 2014 and 2.514 in 2015; the trend is growing.

The analysis of juridical forms has shown that, among the types of organised crime firms, Mafia organisations tend towards Companies and Partnerships. This would seem consistent with “the need for flexible forms of enterprises with limited personal liability and risk, allowing for greater possibilities to fragmentise capital and ownership” (UNICRI, 2016, 45).

Although southern Italy and capital provinces still collect most of the confiscated assets, the proportion of northern regions is growing. The upward trend of ‘non-traditional’ geographic areas (north and centre) is confirmed by the data of the Ministry of Justice (SIPPI) (Transcrime report, 2015, p. 272). There is, however, a notable variation in the types of confiscation. While real estate has a higher incidence in southern regions, companies and movable assets occur most often in northern regions (Transcrime report, 2015).

This evolution may be due, on the one hand, to the expansion of mafia investments in northern regions and on the other hand, to a wider adoption of confiscation measures in ‘non-traditional’ areas also because of confiscation measures against foreign criminal groups which are prevalent in central and northern regions (Transcrime report, 2015, p. 273).

The confiscation of assets in Italy, therefore, seems to reflect new trends of criminal investments, in both geographic terms (e.g. the expansion of mafia investments towards northern regions) and typological ones (e.g. more companies and movable assets) (Transcrime report, 2015, p. 273).

## **The confiscation against a legal person in supranational legislation**

The awareness of the European legislator of the seriousness of the criminal investment in the business (Albert, Cutajar and Fargier, 2014) transpires from the European Parliament Resolution on organised crime (0459/2011, l. b), where the substantial social and economic costs of organised crime are highlighted. The Resolution pointed at evidence of the infiltration of organised crime in some member states in “political circles, the public sec-

tor and legitimate economic activities; whereas it is conceivable that similar inroads have also been made, thereby strengthening the position of organised crime, in the rest of the European Union". The Resolution n. 0403/2016, "on the fight against corruption", stresses that "organised criminal groups have shown a tendency and a strong ability to diversify their activities, adapting to different geographical areas . . ." It pointed at the penetration into the legal economy and associated conduct which corrupts public officials". The Resolution n. 0444/2013 "on organised crime, corruption and money laundering", underlines that "organised crime is increasingly resembling an economic global player" with an estimated cost to business of more than € 670 billion annually".<sup>3</sup> In order to face this criminal infiltration in the economy various European legal instruments impose the introduction of forms of confiscation against the companies.

Art. 2 Directive n. 42/2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union provides for a broad concept of the object of the confiscation: 'property' means property of any description and legal documents or instruments evidencing title or interest in such property. Such a broad concept can also include actual businesses (Maugeri, 2015, p. 326).

Framework decision 212/2005 – on Confiscation of Crime-Related Proceeds, Instrumentalities and Property – imposed on Member States the adoption of the extended confiscation (art. 3; this rule has been replaced by art. 5 Directive n. 42/2014). The last paragraph of art. 3 establishes that each Member State may also consider adopting the necessary measures to enable it to confiscate property transferred to a legal person, in respect of which the person has a controlling influence or receives a significant part of the legal person's income. With this rule the Framework decision permits the confiscation of the company's property.

The framework decision 2006/783/JHA, has established in the art. 12, § 3, that "a confiscation order issued against a legal person shall be executed even if the executing State does not recognize the principle of criminal liability of legal persons". It admits the mutual recognition of confiscation orders against a legal person.

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<sup>3</sup> See, however, the critical approach about the official dates of Van Duyne *et al.*, 2014, p. 235; Van Duyne, 2000, p. 61.

In the “Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders” (December 2016 – last version 1 December 2017), the legal person is also considered as the affected person. Moreover, the confiscation order is defined in art. 2 as “a final penalty or measure [. . .] resulting in the final deprivation of property from a natural or legal person”. In addition, art. 26 establishes that “a freezing order or a confiscation order issued against a legal person shall be executed even if the executing State does not recognise the principle of criminal liability of legal persons”.

### **a. The strategies in Italy**

In order to fight the infiltration of organised and economic crime in business, the Italian system of law provides for four different approaches:

1. various forms of confiscation of the illegal proceeds or directly of the business itself;
2. measures designed to control or influence the management of the business (judicial administration of the firm, i.e. temporary suspension of the management, *ex art. 34* legislative decree 159/2011, so-called Antimafia Code; judicial control of the business *ex art. 34 bis* l.d. 159/’11);
3. administrative measures to limit the firms’ dealings with public administration (art. 83 ss. l.d. 159/’11);
4. the administrative liability “*ex crimine*” of enterprises.

While this article focuses mainly on the first two strategies, some consideration of the other two is also of value.

The third, “disqualification”, is a preventive measure, applied by administrative authorities: prohibition to conclude contracts, obtain authorisations and concessions and, in general, to have legal relations with public authorities, public bodies or companies that are supervised or otherwise controlled by the State or other public entities (art. 83 l.d. 159/’11).

It is possible to apply the disqualification, after the disqualifying disclosure/report (*informativa interdittiva*), of the existence of “any attempts at infiltration by the mafia, aimed at influencing the choices and directives of the concerned companies or firms” (art. 84, § 3 antimafia code). The disqualification paralyses all economic relations, in the broadest sense, between the subject and the Public Administration. This measure, which is

imposed with fewer safeguards, can have a significant impact on the firm, blocking all economic relations with public administration, on the basis of the mere suspicion of Mafia infiltration. It can be useful to prevent the infiltration of organised crime in the legal economy, but in a very problematic way in terms of respect of the safeguard of the rule of law.

The same function is also served by art. 32 of Decree Law 90/2014 which allows the Prefect, at the proposal of ANAC's Chairman (National Agency against Corruption), to appoint new corporate management or to impose judicial administration on enterprises, either because they are involved in criminal proceedings relating to, *lato sensu*, corruption or they are believed to be present in situations denoting unlawful conduct or criminal events. This applies only to enterprises which have been awarded contracts for public works, services or supplies.

The last of the four strategies, administrative liability "*ex crimine*" of legal entities, has been introduced by the legislative decree n. 231/2001, implementing the relevant international obligations.<sup>4</sup> This form of liability has been introduced, primarily, to punish the fundamentally legal enterprise which commits a crime (economic crime). It is provided also for the crime of participation in a criminal association (art. 416 c.p.) or in a *mafiose* association (art. 416 *bis* c.p.). The confiscation of the proceeds (or its value) or of the instruments of crime is a sanction against the enterprise *ex art. 19* of the leg. d. n. 231/2001; another interesting sanction is the definitive disqualification from the exercise of the activity, if the enterprise or one of its organisational units is permanently used for the sole or prevailing purpose of allowing or facilitating the commission of offenses (for example money laundering, forgery). This administrative liability "*ex crimine*" of legal entities is applied in a criminal proceeding and represent a useful tool against criminal infiltration in the economy.

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<sup>4</sup> For example, the Brussels Convention on the protection of the European Communities' financial interests 1995; the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, signed in Brussels on 1997; and the OECD Convention on Combating Bribery of Foreign Public Officials 1999).

## **b. Confiscation as a strategy against criminal infiltration in the economy**

The traditional strategy applied by the Italian legislator to tackle the infiltration of (organised and economic) crime into the legal economy, and in particular into companies, is based, first of all, on different forms of confiscation (especially extended confiscation), in order to forfeit the criminal proceeds laundered through a business, or to directly seize the business of the criminal organisation (see next section). Generally, in Italian judicial experience, confiscation has served as the main instrument, not only to deprive the mafia of illicitly acquired assets, but also to affect their capacity to influence businesses.

Art. 416 bis, § 7 criminal code (c.p.) provides for the conviction-based confiscation of the proceeds (fruits and reinvestment) and the instruments of mafiosa association; it is considered a security measure (Barazzetta, 2012, 4310).

Art. 240 bis c.p. (criminal code)<sup>5</sup> provided for seizure and confiscation in case of conviction or plea agreement for serious crimes, such as those regulated under article 416 bis of the criminal code, criminal mafia-type organisations, and connected crimes. This is a form of extended confiscation used when assets have a value disproportionate to the declared income or economic activity of the convicted person<sup>6</sup> and the owner is not able to give a clear explanation of their licit origin<sup>7</sup> (Maugeri, 2016, p. 68).

A form of extended confiscation, albeit non-conviction based, is the preventive measures *ex art. 24* legislative decree n. 159/2011 (anti-mafia code)<sup>8</sup>: confiscation of assets which a subject has at his disposal, being

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<sup>5</sup> Introduced by legislative decree n. 21/2018, before art. 12 sexies of Law Decree June 8th, 1992, n. 306 - converted by Law August 7th, 1992, n. 356.

<sup>6</sup> Supr. Court, 17/12/2003, Montella, (2004) Cass. pen. 1182; see McIntosh v Lord Advocate, n. 251, which affirm that Court could make the assumption of the illegal origin of the proceeds to confiscate only when there is a significant discrepancy between the accused property and expenditure and the accused's known sources of income. L Campbell, *Organised crime and the law* (Hart Publishing, 2013) p. 189.

<sup>7</sup> Const. Court, 29/01/1996, n. 18, Basco, (1996) Cass. pen. 1385; Supr. Court, 15/04/1996, Berti, *ivi*, 3649; Supr. Court, 17/12/2003 (19/01/2004), Montella, (2004) Cass. pen. 1182; Supr. Court, 13/05/2008, n. 21357, E., in [www.dejuriuffrè.it](http://www.dejuriuffrè.it).

<sup>8</sup> Before art. 2 ter law 575/'65, introduced with the law 646/1982.

disproportionate to declared income or economic activity, or when *it results* that they are derived from illicit activity or used for reinvestment, and, at any rate, are assets for which the defendant has not demonstrated a legitimate origin.<sup>9</sup>

This confiscation is applied to specific categories of persons who have not been attributed a criminal responsibility through sentencing, but who are considered a danger to society because – according to art. 16 Anti-mafia Code – they are suspected, based on objectively verifiable facts, of specific crimes<sup>10</sup> or, on the basis of factual evidence, may be regarded as habitual offenders. Alternatively, on account of their behaviour and lifestyle and on the basis of factual evidence, they may be regarded as habitually living, even in part, on the proceeds of crime. For this reason such ablative measures are defined as *ante* or *praeter probationem delicti* (about confiscation without conviction, see Faraldo Cabana, 2017; Rui, 2015; Smith, Owen and Bodnar, 2015; Simser, 2009; Kennedy, 2006, 132).

Following the recent reforms it is possible to apply preventive confiscation without inflicting personal preventive measures that demand the demonstration of the “current social dangerousness” (not only in the past), and even when the owner died during the proceeding or has died in the five years before the beginning of the procedure (art. 18 Ant. Code). So it is truly an *actio in rem*.

A lower standard of proof is required (when compared to conviction-based confiscations) regarding the evidence necessary for the application of preventive measures on both a personal and a patrimonial level. However, after the recent reform, preventive confiscation ex art. 24 anti-mafia code can be applied only when *it transpires* that the proceeds are derived from illicit activity or used for reinvestment, and no longer merely when *there is reason to believe*. This means, in the opinion of the doctrine, that the prosecutor has to *prove* the illicit origin of the proceeds on the basis of the criminal standard of the proof – at least by circumstantial evidence

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<sup>9</sup> Art. 2 *ter*, l. 575/1965, introduced by art. 14 l. 646/1982, and now art. 24 of the Anti-mafia Code.

<sup>10</sup> First of all the crime of participation in Mafia, Camorra or other criminal groups, or suspected of the crimes provided in art. 51, § 3 *bis* Criminal Procedure Code (crimes connected to criminal organisations, kidnapping for profit, racketeering); or for those who committed preparatory acts to terrorism acts and so on.

(“serious, precise and concordant”, art. 192 of the Italian criminal procedure code). Yet the Supreme Court does not demand this criminal standard of the proof as it accepts the use of assumptions.<sup>11</sup> These preventive measures can also be applied after an acquittal in a criminal trial.

Moreover, art. 34 antimafia code (before art. 3 *quinquies* l. 575/’65) has introduced the confiscation of assets used in the exercise of an economic activity that, based on sufficient grounds, is considered objectively useful for the activity of persons who are considered for preventive measures or are defendant in ongoing criminal proceedings for crimes linked to organised crime. The confiscation is applied where *there is motive to believe* that these assets are the fruit of illicit activity or constitute the reinvestment of such assets, and the owner has not demonstrated a legitimate origin<sup>12</sup>. Regardless of the fact that the property is at the disposal of the *socium sceleris*, the law does not require the existence of a fictitious interposition between the third party and the “proposed”, as occurs in the art. 24 antimafia code (for the confiscation), as it does not require a “proposed”, but only requires sufficient evidence to believe that the exercise of certain economic activities (such as laundering) can still help the activities of the affiliated persons. This has eliminated one of the major obstacles to the identification of assets of illicit origin and the ensuing application of confiscation, namely the difficulties linked to the demonstration of the actual relationship between the dummy and the person whose account the dummy holds. In the case of companies with a plurality of partners, considered for the application of preventive measures, it is not necessary to start as many processes as there are partners, rather it will suffice to simply bring a single case against the same company considered collectively.

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<sup>11</sup> Supr. Court, Unit. Sect., 26-6-2014, Spinelli, n. 4880.

<sup>12</sup> Art. 3 *quinquies*, l. 1423/1956, introduced by art. 24 d.l. 306/1992, now art. 34, § 7.

## The mafia enterprise

In the praxis, with some simplification, the distinction is possible among economic enterprises which are:

1. 'original' mafia businesses, characterised by a strong individualization around the dominant figure of the founder, who runs it directly with *mafiose* method;
2. enterprises owned by the 'Mafioso', who does not manage directly, but runs the business through a figurehead (dummy) with mafia methods;
3. enterprises with 'mafia participation', where the holder is not a figurehead but still represents his interests.

The latter case is more complex because different situations are possible: (a) the company, originally legal, has become a tool in the hands of the mafia through extortion, exploitation or money laundering; (b) the company is managed with only some relation to organised crime, *e.g.* simply the depositing of moneys to launder, without alteration of the business cycle. In the first case the company becomes a tool of the criminal organisation and it is close to the first two cases.

To respond to these situations in Italy, extended confiscation, art. 240 bis c.p. (after conviction) and art. 24 antimafia code (without conviction), and also the confiscation ex art. 416 bis, § 7 criminal code (in the form of the confiscation of the instrument) are used to forfeit the enterprise that is considered an investment or a tool of a mafia association.

Normally these forms of confiscation can impact only on the illegal proceeds of a crime or on the instrument of that crime, but in order to counter the criminal infiltration into the economy, the Italian Supreme Court consider the firm itself as an instrument or proceed of the crime.

In particular, in order to simplify the confiscation of businesses, the Italian Supreme Court uses the category of 'mafia enterprise' to justify the confiscation of an entire company or of compendiums of all company shares in cases where proceeds of illegal origin have become fused with lawful assets.<sup>13</sup> This category is applied whether the initial capital is of lawful origin and has been invested in an illegal activity (exercised with

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<sup>13</sup> Supr. Court, 30/01/2009, n. 17988, Ced. n. 244802; Supr. Court, 08/02/ 2007, n. 5640.

mafia method) or the unlawful initial capital has been invested in lawful activities.

When the illegal proceeds are merged with the company's legal funds, it becomes increasingly difficult to distinguish between lawful and unlawful and this could result in the confiscation of the whole enterprise. Although these forms of confiscation should affect only the illicit proceeds or the reinvestment of criminal assets, the Court forfeits, at least according to the interpretation of a certain case law, the entire contaminated activities, regardless of the illicit origin of the assets.

In the opinion of the Supreme Court, in a typically complex business enterprise, it was not possible to operate with a clear distinction between licit and unlawful goods, given the unique character of a company, which is the combined and synergistic result of capital, capital goods, labour force and other components, legally incorporated and united in the pursuit of the aim represented by the exercise of the company, as defined in civil law (art. 2555 cc). The overall unit constitutes an autonomous economic and social reality, because the various factors interact with the same aim and complement each other; the contribution of licit components (regarding entrepreneurial capacity and initiative) cannot be discerned from that attributed to illicit resources, especially the subject's companies have been supported by the mafia organisation, in a perverse circuit of common interests.<sup>14</sup>

Another way to forfeit an entire enterprise in the praxis of the jurisprudence is to consider the owner Mafioso and to apply the assumption that if the owner is 'Mafioso', the enterprise must be unlawful.

The problem here is that a similar assumption is used as a sort of 'experience rule', applicable without checking whether in the concrete case this rule is valid and is realised in practice, and without confirming the presence of an 'original' mafia business. Alternatively there is an enterprise owned by the "Mafioso" but managed by a straw man. Provided the assumptions are verified in the concrete case, these two hypotheses do not pose particular problems because the companies' funds are of illicit origin and managed with mafia method.

More problematic is the case of the enterprise with 'mafia participation', where the holder is not a figurehead but still represents his interests. In this latter case, the court must clearly verify whether the company is

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<sup>14</sup> Supr. Court, 23/01/2014, n. 16311.

managed with mafia methods and when this mafia contamination started, or whether the company has merely had some kind of relationship with organised crime, without alteration of the business cycle.

The latter case, the enterprise with mafia participation, is one that deserves more attention and requires a limiting of the seizure and confiscation only within the bounds of the unlawful proceeds or their reinvestment, rather than an indiscriminate confiscation of the whole enterprise. This is of fundamental importance, in particular, when the company has had only a limited connection with organised crime.

Otherwise such a wide interpretation of the concept of ‘mafia enterprise’ transforms the confiscation of profits and reinvestment into a form of general confiscation of property. This would constitute a disproportionate punishment in violation of the legality principle and of the constitutional protection of private property, as well as of the principle of proportionality (Maugeri, 2015, 337), because the law (art. 416 bis, § 7, art. 240 bis c.p. and art. 24 L. D. 159/2011) allows only the confiscation of the crime proceeds and reinvestment.

The same problems arise when the jurisprudence considers a company ‘totally illicit’ and ‘forfeitable’ because illegal proceeds have been invested such that they cannot be discerned.<sup>15</sup> This is a consequence of the extension of application of preventive measures not only against people suspected of being Mafiosi but also against those suspected of any habitual criminal activities, including corruption or tax evasion.

It is important to emphasise that the Directive n. 42/2014 in the recital n. 11 establishes, through the definition of the concept of ‘proceeds’, an important limit to the extension of these models of confiscation: “. . . proceeds can include any property . . . which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds”. This specification is a very important safeguard against the application of extended confiscation or a preventive measure to entire companies as it allows forfeiture of only those invested illegal proceeds.

In recitals 17 and 18 the Directive actually suggests the introduction of a clause to ensure compliance with the principle of proportionality in two cases. Firstly, “the relevant provisions could be applicable where [. . .] such

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<sup>15</sup> Supr. Court, 10/06/2013, n. 32032.

a measure is proportionate [. . .] to the value of the instrumentalities concerned”. Secondly, “confiscation should not be ordered” in exceptional circumstances, where confiscation would represent an undue hardship for the affected person.<sup>16</sup>

These clauses ensure respect for the proportionality principle in cases where illegal profits have been reinvested and their removal would result in jeopardising the viability of a business (Lackner and Köhl, 2011). In Italy, though, these clauses, already present in other legal systems, have not been introduced with the law n. 202/2016 which has enforced the directive; this represents a serious violation of the directive prescriptions and a lost opportunity to improve the safeguards in the Italian legal order.

Contrary to the praxis of the Italian jurisprudence which presumes the illicit origin of the business from the circumstantial evidence (or suspicions) of the mafia participation of the owner, it is useful to remember, moreover, the correct approach of the Supreme Court in the “Cinà” case.<sup>17</sup> The Court considers, according with the principle of legality, that the “availability”, the proximity or the “will to be at disposal” of the owner with the mafia association is not enough circumstantial evidence to infer the illicit origin of the entire business and the corporate shares. The Supreme Court criticises the Court of Appeal on this issue. The latter inferred the proof of illicit (mafiosa) nature of the assets from the desire, manifested by C., “to enter into full agreement of intent with an important member of the Mafia, which is GS, in order to enter into economic and trade relations with other persons - member of the association . . . so being able to take the privileges that derive for the enterprise from such mafia relation”. This last conclusion has been overturned by the Supreme Court, affirming: “This is clearly tautological reasoning because it infers the nature of the assets from the will of the owner to enter into business relationships with Mafia leaders. It is absolutely not sufficient to justify the confiscation of the enterprise”.

In the Court’s opinion in order to confiscate the company, it is necessary to demonstrate, according to the standard of the proof of the preventive proceeding (a facilitated standard of proof in comparison with the criminal

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<sup>16</sup> Para.18 specifies that this exceptional circumstance should only be permitted ‘in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive.’

<sup>17</sup> Supr. Court, 17/12/2013, n. 12493.

standard<sup>18</sup>), that the company is “the result of illegal activity” or that the company has actually taken advantage of the holder’s adhesion to mafia in carrying out its activities. More specifically, the demonstration is necessary, at least at the level of circumstantial evidence: (a) that the original asset acquisition was made possible by the buyer’s unlawful activity though without demanding proof of a direct link, in the form of causal link, between the illegal activity and the obtaining of assets; (b) that the growth and the accumulation of wealth by the company was actually facilitated by the illegal activity of the holder “belonging to the Mafia”. In the latter case the Supreme Court requires that the holder, “at least, used his mafia quality to create favourable conditions, putting in place the activities appropriate to impose, illicitly, the enterprise in the market because only in this case, can it be said – according to the provision of the law – that the capital increase is “*the result of illegal activities*”.

The Court states correctly that the illicit origin of the company assets or the corporate shares cannot be inferred from the fact that the owner is suspected (and is, therefore, considered a danger to society): “The preventive confiscation is not connected with the Mafioso status of the subject but [derives] from the activity exercised by him”.

The Supreme Court has repeatedly stated that, “The existence of adequate evidence of membership to a criminal association is not enough to believe that assets, although large and rapidly acquired, are of illegal origin. It is necessary, [. . .] indeed, to have evidence which suggests that the assets are the result of illegal activity or their reinvestment, due to the disproportion with the declared income or economic activity, or for other reasons”.

If the application of these forms of confiscation against enterprises does not respect the rule of law, the risk emerges that today the Court of Appeal of Palermo would try to confiscate the entire enterprise of individuals who wish to be at the disposal of the mafia. Tomorrow the jurisprudence can attempt to justify a company’s confiscation when the owner is a victim of extortion by a mafia organisation. The reason is that he is still economically supporting that organisation and is benefiting from a situation of calm to

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<sup>18</sup> See the previous paragraph.

work. Even these benefits, which are only a consequence of the mafia protection in relation to the victim of extortion, would already be sufficient to consider the company “mafiosa” and “confiscatable”.

### **The problems of the confiscation of companies.**

The confiscation of a business is a very effective weapon in weakening mafia power and impeding their infiltration into the legal economy. Indeed, in the opinion of the prosecutors such financial onslaught is more feared than a prison sentence by Mafiosi and other criminals.

Nevertheless, even setting aside the problems of respect for the rule of law connected with the application of forms of extended confiscation (King-Walker, 2014; Hendry-King, 2017, 733) – the consequences of confiscating a business are more complicated than those resulting from the seizure of properties: the risk to the very future of the company and to the jobs it provides, along with the negative social consequences attached to such job losses.

In order to address these issues in Italy, the legislator has introduced specific legislation to guarantee the management of the seized and confiscated businesses, to ensure that during the seizure the company can carry out its activities when the enterprise demands to be saved. Notwithstanding this, in Italy, data from the *A.N.B.S.C.* suggests that the majority of the forfeited companies are closed down and only a very small percentage will be sold, after the definitive confiscation, when they are survived during the seizure (Dossier statistico, 2017; Bivona, 2012, 321).

### **Judicial administration (art. 34 leg. decree n. 159/2011)**

The judicial administration (before art. 3 *quarter* l. 575/’65, introduced by law decree n. 306/1992; now art. 34 lgs.d. n. 159/2011), applies to assets used in the running of an economic activity which, based on sufficient grounds, is considered objectively useful for the activity of persons who

are considered for preventive measures or are defendant in ongoing criminal proceedings for crimes linked to organised crime (Mangione, 2000, 348; Licata, 2011, 1088)<sup>19</sup>.

The court orders the judicial administration of firms or assets which can be used, directly or indirectly, to carry out economic activities in two situations:

Firstly, if there are sufficient reasons to believe that these economic activities are directly or indirectly undertaken under the conditions of intimidation or submission provided for in Article 416-bis C.P. (mafiosa association), and therefore these businesses are victims of Mafia (*i.e.* the firm is forced to pay the bribe); or secondly may, however, facilitate the activities of the suspect or defendant.<sup>20</sup>

This tool is an interesting alternative to confiscation because it better facilitates the continued running of the business. It consists only of the removal of the company's managers for a period of time (12 months – renewable until 24 months). The court charges a judge (delegated) and a judicial administrator who has to manage the business. The judicial administrator has to present statements about the economic activity and reports *ex art.* 36 l.d. 156/2011 to the public prosecutor.

The purpose of the measure is to interrupt the facilitating activities, the use of the economic activity to support the activities of suspects or defendants. It aims also to prevent others by direct intervention on administration. This should not be confined to the mere management, but must also aim to remove the conditions that have caused the measure. This is a temporary measure, which can be concluded by the simple revocation of the measure, if the conditions of mafia infiltration have been removed. Likewise, there is the restoration of ordinary management alongside a “judicial control” for a maximum of three years, based on the obligation to communicate to the Questor and to the Tax Police a series of information on management acts; or, as mentioned earlier, the confiscation of properties when there is

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<sup>19</sup> See Trib. Milano, 27/01/2017 (2017) 4 ANPP 421; Supr. Court, 16/10/2013, n. 7449.

<sup>20</sup> Persons in respect of whom there is a preventive measure proposed or applied, or persons subject to criminal proceedings for any of the offenses provided for in articles 416-bis, 629 extortion – blackmail, 630 abduction, 644 usury, 648 bis money laundering and 648 ter, use of money goods or utilities of unlawful origin, of the criminal code).

reason to believe that they are the result of illicit activities or that they constitute re-use (Article 34, paragraph 7).

The object of the judicial administration (art. 34) is the entire business, not only the proceeds or the instruments of crime. It is an order in rem.

The owner must not be considered for preventive measures and, first of all, has not to be considered ‘dangerous’ because he/she is suspected of being involved in criminal activity, even if in the past. Otherwise, seizure and confiscation *ex art.* 20 – 24 leg. decree 159/2011 will be applied. The owner has to be ‘the third party’ in relation to the facilitated person and the business must genuinely be on his/her property and at his/her disposal. If the entrepreneur were merely a front or straw man of the facilitated person, his assets could be immediately subjected to the preventive seizure and preventive confiscation (art. 24 l.d. 159/2011), which may affect all the assets owned by the suspect or those which are, directly or indirectly (through straw man), at his disposal.

The activities both of parties subjected to preventive measure and of defendants must be facilitated. In the opinion of some authors these activities have to be criminal<sup>21</sup> (Mangione, 2000, 15), but the jurisprudence has affirmed that the application of this measure does *not* demand that *the facilitated activity is unlawful* and that *the economic activity, with facilitating nature, is being exercised in an unlawful manner*. It is sufficient that: (1) the supported person is also only proposed for a preventive measure or prosecution for one of the offenses mentioned above, and (2) that such activity, although exercised in a legitimate manner, offered *an aiding contribution to the persons referred to above*.<sup>22</sup>

The aim is to expel the criminal organisation from the company’s business, to reclaim the business, in particular when the company is only a victim of organised crime. The purpose is the ‘decontamination’ of fundamentally healthy economic activities affected by mafia infiltration. This measure should alleviate any danger of infiltration of organised crime whilst also eliminating potential distorting effects for the free market.

The judicial administration intends to intervene in that ‘grey zone’ of relations between the mafia (or other serious forms of crime) and enterprise, where the ‘classical’ preventive measures are not easy to apply, and

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<sup>21</sup> See Supr. Court, 16/10/2013, n. 7449.

<sup>22</sup> Trib. Milano, 24/06/2016, n. 6, [www.penalecontemporaneo.it/](http://www.penalecontemporaneo.it/)

where these measures are aimed at tackling the phenomenon of contamination of sound economic-entrepreneurial activities.

The more frequent use of judicial administration can be of great significance to the companies, in particular for more complex and big companies to remain outside criminal plots. Regarding this, the adoption of organisational-management models - as that imposed by the mentioned previously legislative decree 231/2001 - by the firms is considered worthy by the jurisprudence.

Judicial (compulsory) administration has been considered, in fact, in some judgements as a non-punitive deterrent to the infiltration by the mafia or organised crime.

In this regard, the TNT plc case is of great interest. The Dutch company, working in Lombardy, was placed under judicial administration by the Court of Milano due to the 'Ndrangheta infiltration'. TNT used small co-operatives connected with 'Ndrangheta in order to run its business in Italy. After only five months, the Court overruled the measure because the multinational company adopted a trustworthy compliance measures in order both to cut the connections with organised crime, which had motivated the initial judicial intervention, and to introduce adequate preventive tools for averting the risk of future 'relapses'<sup>23</sup> (Visconti, 2012).

For the 'parent company', TNT, it is not demonstrated that there was a clear self-interest in entertaining privileged relations with companies controlled by the criminal organisation. The Court correctly demands the ascertainment of an objective element, the nexus of instrumentality between a specific business and "mafiosi" interests, and a subjective element, the awareness by those who work for the enterprise of the "quality of the facilitated person and of his aims".

In the light of these stringent requirements, the measure has to work as a 'bistoury' (surgical knife) to operate selectively in the considered economic activities. The Court observes, in fact, that the measure of temporary suspension cannot indiscriminately extend to "all the assets attributable directly or indirectly to a particular person", but should concern only "those certain economic activities" that facilitate criminal interests. "A request for temporary suspension against a legal person cannot be accepted if it is founded only on the assumption that his legal representative has facilitated

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<sup>23</sup> Trib. Milano, April 2011.

the criminal group with other economic activities”. The law (art. 34), the Court highlights, demands that the “only objective requirement for the temporary suspension is the effective and conscious facilitation of such persons”.

Moreover, the Court of Milan has affirmed in a recent order that the judicial administration “is not repressive but preventive”. Its objective is not to punish the business person who is connected to criminal association, but to counter the mafia contamination<sup>24</sup> (Capecchi, 2017).

The Court affirms that the proximity to criminal interests detected in the business, can be grounds for censorship “exclusively in terms of its negligent relationship”.

In this case, the proceeding was against F M SPA and its 100% controlled N SPA, a semi-privatized public-sector entrepreneurial holding, notoriously responsible for planning, setting up and managing large-scale exhibition events. This group of institutions had been made subject to art. 34 of the Antimafia code, thanks to elements of criminal infiltration. In short, the Court considered the manager responsible for facilitating criminal infiltration into the business.

The originality of this order lies in the affirmation that judicial administration measures should be understood as “imposed also in favour of entrepreneurship and its transparency”. It presents new facets compared to previous case law and it limits itself to the appointment of a judicial administrator to implement or introduce anti-mafia requirements. The Court imposes on the managers an instruction to: a) subject a series of important negotiations to countersignatures of the judicial administrator, and b) to give immediate impetus to the study and adoption of an adequate organisation model.

In addition, the jurisprudence has recently specified that, in the case of illegal infiltration into a subsidiary company, through the creation of working relationships with persons involved in organised crime, the temporary

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<sup>24</sup> Trib. Milano, 24/06/2016, n. 6, cit.

suspension must be extended to the parent company. This extension is necessary when the subsidiary company hasn't real autonomy.<sup>25</sup>

## **Evolution of the praxis**

In the past, due to the criminal strength of the Mafia, this judicial administration wasn't applied. It was, indeed, more likely that the economic activities would fall, directly or indirectly, under the control of the criminal organisation and the holder was often considered a member of the criminal organisation or an aider (external complicity). Regardless, he was considered a danger to society and consequently subjected to confiscation.

The situation has changed in recent years as it has become increasingly common for the judges to assess the requirements of Article 34 in regard, for example, to multinational and large banks in economic relations with the 'Ndrangheta present in Lombardy. Moreover, there are large companies, holding either public or private wealth, with proven relationships with Cosa Nostra and 'Ndrangheta that help secure lucrative contracts for public works in Sicily and Calabria; or consortiums of cooperatives, of national importance, in connection with the Roman mafia organisation, "Mafia capitale" case (in which corruption has played a significant role).

In all these cases, as affirmed by Pignatone, the public prosecutor of Rome, the behaviour of one or more company managers, willing to enter into business relations with mafia associations – normally on the basis of a mutual benefit calculation – does not bring into question the origin and lawful formation of the company's assets. Without prejudice to any criminal responsibility of the individuals, these are forms of mafia influence that do not justify seizure and confiscation, but that can be 'cured' (treated), for example, through the removal of directors and/or colluding executives, or by switching suppliers and subcontractors, and so on (Pignatone, 2015, 262).

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<sup>25</sup> Trib. Milano, 28/09/2016, in [www.dejure.giuffre.it](http://www.dejure.giuffre.it)

## **Advantages and disadvantages of judicial administration (temporary suspension)**

The judicial administration has the advantage, in terms of efficiency, of allowing the court to affect the whole business even if only some partners are involved in criminal activities.

In terms of respect of the safeguards of the rule of law, as well as from an economic point of view, judicial administration is not definitive and serves to ensure the continuity and productivity of the enterprise.

The more serious disadvantage is the risk of affecting the actual victim of the mafia or organised crime. This risk is increased with the reform, introduced by the recent law n. 61/2017, which does not demand the double *verification*, necessary in the former version of the law: first of all, of the apparent evidence that the company is a victim; and secondly, as a result of further investigations and on the basis of factual elements, of the fact that the enterprise victim supports the activities of the party subjected to preventive measure or the defendant. The demonstration of the fact that the firm is a victim is deemed sufficient.<sup>26</sup> The law appears to admit that paying the bribe is a way to help the mafia, to give a contribution to the criminal association; it expresses the culture of suspicion.

This crosses, in particular, the line of acceptability when the measure is applied, in cases of aiding somebody under investigation as the judicial administration could impact upon the business of a third party, who is not defendant in a criminal trial, simply because it (the business) could facilitate the person under investigation, presumed innocent according to art. 27, § 2 Constitution (Castaldo, 2016).

There are many doubts about the respect of the principle of guilt as the owner is not considered a danger (suspected) or guilty: he is a third party. Constitutional Court n. 487/1995 rejects the question of constitutionality by noting that the holders of those economic activities which aid the “mafia phenomenon, cannot be considered third parties with respect to the realisation of those interests”, because the free management of their assets helps to strengthen the economic presence of organised crime in the area. Therefore, the choice to carry out an activity with these connotations entails, by

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<sup>26</sup> Trib. Milano, 27/01/2017, cit.; Trib. Milano, 24/06/2016, n. 6, cit.

definition, the awareness of the consequences that may arise, thus allowing the exclusion of the subjective situation of ‘substantial guiltlessness’. In the opinion of the Constitutional Court, the owners of the business, subjected to judicial administration, are in some way collaborators of the mafia; there is ‘contiguity to mafia’.

For the Court of Milan, moreover, negligent facilitation is considered enough; the Court downgrades the ‘aware conduct of facilitation’, demanded by the Constitutional Court, to “negligent conduct”, a concept which, indeed, is not entirely clear.<sup>27</sup>

Moreover, an appeal against this measure is not provided for by the law; it is possible only against the confiscation, connected to this measure (when the court has reason to believe that the property has an illegal origin and the owner is not able to justify the origin), or against the renewal of the order.

## **The judicial control of enterprise (new art. 34 bis)**

One fascinating new instrument is the judicial control of an enterprise (art. 34 bis) provided by the law n. 61/2017 (reform of the Anti-Mafia code) and introduced by the legislator in order to tackle the criminal infiltration in the economy without adopting the more invasive tools, which remain available.

Where there is only occasional activity of supporting (‘facilitation’) the business of suspects (persons in respect of whom a preventive measure is proposed or applied) or a defendant, described in paragraph 1 of Article 34 (analysed above) the court orders the judicial control of a company if there is a real danger of mafia infiltrations. It is applied for a period of not less than one year and not more than three years.

The content of the judicial control is less invasive than that of a temporary suspension because the Court doesn’t replace the management but rather, while allowing the owners of the company to run the activities, appoints a judicial commissioner with specific control tasks relating to the management of the business. He can impose stringent requirements or prescriptions. This measure includes the obligation for those who own, use or

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<sup>27</sup> Trib. Milano, 28/09/2016, cit.

manage the goods and companies, to communicate to the judicial commissioner and the tax police each economic act. Under the supervision of a delegated judge, the judicial commissioner has to report periodically on the outcomes of the monitored activity to the delegated judge and the public prosecutor. Managers must take any appropriate initiative aimed at specifically preventing the risk of attempts of Mafia infiltration or influence. A procedure is provided for verifying the proper fulfilment of the obligations and, in the case of a violation of one or more of the requirements, the court may impose legal administration (art. 34 Antimafia code).

This measure is a monitoring tool for the firm which, after the failure to issue anti-mafia certification, wants to undergo verification of its path of emancipation from the risks arising from “criminal contiguity” and thereby to recover legality.

This judicial control might be seen as representing an expression of public leadership in the economy, but it is true that, if adopted intelligently, it could be a way out for those companies who want to try to fully comply with legality against the risk of being wholly absorbed into the chains of criminal organisations.

## Conclusions

The fight against the infiltration by organised and economic crime in the legal economy is extremely important in order to protect the economy, the free competition and the *par condicio* of investors, preventing, above all, the infiltrated companies from enjoying an unfair competitive advantage (Sciarrone, 2011; UNICRI report, 2016). Attacking the mafia or criminal-business is, moreover, fundamental in undermining the basis of their power and expansion, in part by dismantling their ‘social capital’, *i.e.* the systemic network of relationships, based on reciprocity of favours, with the world of politics, institutions and public administration.

In order to fight this polluting of the legal economy, the confiscation of companies is an important instrument, largely used in the Italian system of law through forms of extended and non-conviction based confiscation, as examined. In addition, the use of confiscation against companies is also encouraged in the supranational legislative instruments.

The Transcrime report, quoted previously, emphasised that in order to improve the confiscation of enterprises there is the need to intervene at three levels.

First, the tracing/tracking of criminal assets should be improved by strengthening the financial investigation skills of European LEAs and FIUs. This can be achieved, for example, through courses and workshops, but there is also the need to equip Eurojust and Europol, with better access to registries and more effective IT tools. The report of the “Stati generali della lotta alla mafia”, emphasises this necessity to ease access to the registries of Eurojust and Europol (Report ‘Mafie e Europa’, 2018).

Secondly, the regulations should be enhanced, e.g. by widening the use of *extended confiscation* or *third-party confiscation* which in some countries (e.g. Italy) has greatly facilitated the confiscation of enterprises.

Finally, the management of confiscated companies should be improved in order to guarantee the continuity of the economic activity: in some European countries, prosecutors may avoid the seizure of companies because they prove difficult to manage once confiscated. This calls for the effective development of management policies which, when possible, keep companies and jobs alive.

In relation to the proposal to improve the use of *extended confiscation* or *third-party* confiscation, however, it is important to stress that, according to the principle of proportionality, the analysed instruments, and in particular confiscation, must be applied with almost surgical precision, in consideration of the dramatic consequence that they can have. These measures can have an impact, first of all, on the owner involved in criminal activities (affecting his reputation, his economic freedom and his property rights) but also on third party innocents, such as the creditors and, above all, the workers. Additionally, the economy and society in general may well be affected, while the risk to the long-term survival of businesses once they are subjected to a confiscation application is clearly demonstrated in the Italian statistics regarding company closures following the imposition of such measures.

Another important aspect that should be highlighted is the need to improve the safeguards of the rule of law in this legislation on extended confiscation in order to guarantee first of all the respect of the principles of the rule of law (and the connected citizens’ freedoms) and to encourage the cooperation and mutual recognition in this sector. Mutual recognition must

be built on the harmonisation of confiscation laws but also, most importantly, on mutual trust, which demands respect for the rule of law (Mitsilegas, 2006, 1277-1311). On 21 December 2016, a “Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders” (Proposal for a Regulation, 2016) was presented (and amended in 2017), in order to impose the mutual recognition of all types of orders covered by Directive 2014/42/EU, as well as other types of orders issued without final conviction within the framework of criminal proceedings in criminal matters (in the first version the proposal demanded orders issued in “criminal proceedings”). This Regulation should not apply to freezing and confiscation orders issued within the framework of *civil* or *administrative* proceedings (Maugeri, 2017, 231). ‘Proceedings in criminal matters’ is an autonomous concept of Union law, where “the safeguards under the Charter [of Fundamental Rights of European Union] should apply. In particular, the essential safeguards of criminal proceedings set out in the Charter should apply to proceedings in criminal matters covered by this Regulation, which are not criminal proceedings” (recital n. 18).

In this context, the discovery of new types of intervention is gradually getting well-accepted following an approach entailing a ‘therapeutic’ management of enterprises that are temporarily afflicted by criminal viruses/elements. The analysed judicial (compulsory) administration could be an interesting alternative (art. 34 leg. decree n. 159/2011) to confiscation, as could the new instrument of judicial control of enterprise (art. 34 bis leg. decree n. 159/11). They are less invasive instruments that can sever a company’s ties with crime while, at the same time, maximising the chances of that business’s continued survival.

The mechanism of judicial administration (art. 34 leg. decree n. 159/11) provides an alternative to traditional ablating measures against enterprises, as a method of intervention against forms of mafia penetration within fundamentally sound and legal. It can be applied for purposes of combating illegality that has not yet reached a level of risk requiring the use of the seizure aimed at confiscation, but that nonetheless satisfies the appetites of organised crime. In the praxis, the adoption of an organisational, management and control model (compliance program) by the company subjected to judicial administration, is particularly interesting and increases the value of this measure as a robust safeguard against the reiteration of unlawful

conduct that need to be reined in.

The new mechanism of Judicial control (art. 34 bis d.lgs. N. 159/2011) is inspired by an approach that enhances a company's prospects through an intervention from outside the enterprise aimed at facilitating its reinstatement into economic legality, inspired in turn by flexible decision-making models that honour the principle of proportionality and impose the least possible invasion. The judicial intervention pursuant to art. 34, does not give rise to the 'freezing' of the entire governance, but it guarantees the continuity of the management.

In a wider European perspective, the proposal of these alternative instruments to confiscation should be considered as a tool to combat the traditional mafias, which are increasingly 'looking outside' their physical borders. Also, in general, they tackle the infiltration of organised and economic crime in the legal economy. This proposal is inspired, on the one hand, by the principle of proportionality, with a view to ensuring balance between sanctioning response against the weight of the individual action. On the other hand, there is the need to ensure that the entire sanctioning system is rational and flexible, in that it provides a range of measures with appropriate degrees of severity. Ultimately, these instruments are designed to strike the fine balance between the need to repress illegality and the need to safeguard the 'social value' of the enterprise.

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